Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration

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This article provides an overall analysis of the law and practice of interim protection in international investment arbitration, covering the most commonly used arbitral frameworks (International Center for Settlement of Investment Disputes (ICSID) Convention, and the Arbitration Rules of the ICSID Additional Facility, United Nations Commission on International Trade Law (UNCITRAL), Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA)). It analyzes the legal status of interim protective measures and more specifically their legal basis, their binding force, and the procedural aspects of their adoption, highlighting significant dissimilarities between ICSID Convention and other arbitral mechanisms when it comes to the role of domestic courts in this process. The article also looks into the substantive aspects of interim protection, a field where the differences between these frameworks tend to become less pronounced. Despite wording differences in arbitration rules, we are witnessing an important convergence of the practice of tribunals and a common reliance by arbitrators on the jurisprudence of international courts and tribunals.

I. Introduction

Where it concerns a dispute before a domestic, an international, or an arbitral tribunal, the protection of the parties’ rights cannot always await the final resolution of a case. This is undoubtedly why the possibility of granting interim measures, as a device to remedy the slowness of justice, is a common feature of these very distinct adjudicative bodies. The interim protection of rights has even been considered as one of “those general principles of law common to all legal systems,”1 and even more, “an inherent art of the judicial function of all courts.”2 Beyond highlighting the fundamental role of interim measures for every dispute settlement mechanism, it is noteworthy that interim relief turns down the temporal process of adjudication which consists in a retrospective review of a case.3 This perspective reverses while considering interim relief because, as indicated by the International Court of Justice (I.C.J.) in Application of the Convention on the Prevention and Punishment of the Crime of Genocide, “the Court, in deciding whether to indicate provisional

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1 Lawrence Collins, Provisional and Protective Measures in International Litigation, 234 Recueil des Cours 9, 23 (1993).
3 Guillaume Le Floch, L’Urgence devant les juridictions internationales 422 (2008) (pointing out that the executive function corresponds to the present, and the legislative function to the future).
measures is concerned, not so much with the past as with the present and with the future.” The judge expresses therefore a part of police powers, highlighting the *mixtum* of *imperium* and *jurisdiction* included in any decision granting interim protection measures.5

This question becomes particularly more complex in the case of international arbitration, where the authority of the arbitral tribunal to grant interim measures is restricted by its lack of coercive powers and potentially interacts with the parallel intervention of domestic courts and their usual assistance to the arbitral process.6 The complexity increases even more in the case of international investment arbitration, as this transnational process may not only imply the neutralization of domestic courts’ powers in certain contexts, but also involve a state or state entity against which the scope of interim relief available may vary considerably given their sovereign nature.

Within this framework, this article will conduct an analysis of the law and practice of interim protective measures before arbitral tribunals adjudicating international investment disputes. For the purpose of this research, the analysis will be limited to arbitrations conducted under the International Center for Settlement of Investment Disputes (ICSID) Convention and its Arbitration Rules;7 the ICSID Additional Facility Rules;8 the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);9 the Stockholm Chamber of Commerce (SCC);10 the International Chamber of Commerce (ICC);11 and the London Court of International Arbitration (LCIA),12 all of them considered as the most “prominent arbitration rules”13 in investment disputes. However, two caveats must be highlighted regarding the scope of this study. First, considering the lesser publicity of non-ICSID Convention arbitration, most of the

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5 Le Floch, supra note 3, at 422. The scope of the arbitrator’s *imperium* is to be distinguished from that of the domestic judge. See Charle Jarrosson, *Réflexions sur l’imperium, in Études offertes à Pierre Billel* 245, 260 et seq. (1991) (according to whom the *imperium* is comprised of the *imperium merum*, reflecting the coercive powers of public authorities, and the *imperium mixtum*, corresponding to the powers permitting the fulfillment of the *jurisdiction* function, including, e.g., the measures of judicial administration such as ordering the production of evidence. The arbitrator is endowed with the *imperium mixtum* but lacks the *imperium merum* of the domestic judge.)

6 For a recent and comprehensive study, see Ali Yüşilmaz, *Provisional Measures in International Commercial Arbitration* (2005).


decisions cited in this study emanate from tribunals constituted under the auspices of the ICSID Convention. Secondly, considering that decisions on interim protective measures are usually rendered as procedural orders, they do not benefit from the publicity rules for final awards under the ICSID Arbitration Rules14 and, consequently, are not all disclosed to the public. Therefore, a few ICSID decisions were not consulted for the purpose of this research.

Before dealing with the aforementioned issue, it is necessary to clarify the terminology used in this article. Authors and arbitration rules refer to provisional, interim, conservatory, protective, preliminary, or urgent measures.15 Within this lax terminology,16 two elements must be taken into consideration: the nature of these measures and their purpose.17 They have the specificity to be adopted by the tribunal before its final decision. The term “provisional” suggests that the validity of the measure is temporally limited, which is, for instance, not the case of an order to withdraw from proceedings in domestic courts. This is why the use of the neutral term “interim,” qualifying the lapse between the initiation of the dispute and its final adjudication, is preferable. But the adjective “interim” is not sufficient itself as such measures need to be distinguished from other procedural incidents, such as ancillary claims on jurisdiction, that might also be decided between the initiation of the proceedings and the final award. They are fundamentally different, as ancillary claims consist in a jurisdictional decision of the tribunal, whereas interim measures will be decided within the exercise of the tribunal’s administrative powers.18 However, this subtlety has not been captured in practice and the purpose of these measures allows the clarifying of this distinction. The measures at issue are often characterized as “conservatory,” but this adjective suffers from the same lacuna as the adjective “provisional” to the extent that it suggests a temporal limitation of the protection of rights. A direction to withdraw from domestic proceedings or an order to avoid the aggravation of the dispute are not best encapsulated in the adjective “conservatory” and the unequivocal term “protective” should be preferred. For these reasons, this article will use the expression of “interim protective measures” or “interim measures of protection,” the latter expression being used in Article 26 of the UNCITRAL Arbitration Rules.

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14 ICSID Arbitration Rules, art. 48(4), provides that “[t]he Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.”
15 See, e.g., YILIRMAZ, supra note 6, at 9. For instance, in an ICSID case, the arbitral tribunal noted the difference of terminology between the ICSID Convention and the Central America Free Trade Agreement (CAFTA) and stated that “[t]he ICSID Convention uses the term ‘provisional measures,’ CAFTA uses ‘interim measures.’ Both terms are used in this decision without any attempt to distinguish between them.” See also Railroad Development Corp. v. Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Provisional Measures, October 15, 2008, para. 1 n.1, available at <http://ita.law.uvic.ca/documents/RDC-ProvisionalMeasures.pdf>.
16 EMMANUEL GAillard, LA JURISPRUDENCE DU CIRDI 226–27 (2004). This author underlines the necessary distinction between the conservatory measures prior to the enforcement of the award, such as attachments, and other provisional measures such as the preservation of evidence, the latter being the exclusive province of the arbitral tribunal, whereas the former could potentially be granted by domestic courts. See also infra notes 217–246 and accompanying text.
17 YILIRMAZ, supra note 6, at 9.
18 CARLO SANTULLI, DROIT DU CONTENTIEUX INTERNATIONAL 456 (2005).
This article is comprised of two parts reflecting two conceptual aspects of interim protective measures in the context of international investment arbitration that must be distinguished. The first relates to their legal status. While the bulk of this issue relates to the power of arbitral tribunals to grant such measures, the residual or auxiliary role of domestic courts and its relationship with arbitral tribunals will also be examined. The second Part, from a more substantive perspective, deals with the scope of arbitral tribunals’ interim powers and the conditions under which they may grant such measures, showing a great convergence in the practice of international investment arbitral tribunals despite different textual bases. The overall analysis demonstrates that, although the procedures of international investment arbitration were considered as linked to the mechanisms of international commercial arbitration, tribunals have interpreted the lex arbitralis (i.e., the procedural law to be applied by the arbitral tribunal) in light of international tribunals, and notably the I.C.J., revealing therefore the imperium of an international investment arbitrator considering and establishing himself as an international judge.

II. LEGAL STATUS OF INTERIM PROTECTIVE MEASURES

An analysis of the legal status of interim protection in international investment arbitration requires, first, an examination of the legal basis recognizing the power (chiefly of arbitral tribunals) to grant such measures. This legal status also includes the controversial question of their binding force.

A. POWER TO GRANT INTERIM PROTECTIVE MEASURES

Although interim protective measures in investment disputes are more likely to be sought before arbitral tribunals, it is important to stress the double function of domestic courts, enforcing arbitral tribunals’ decisions on interim measures as well as offering a forum to seek interim relief.

1. Arbitral Tribunals’ Power to Grant Interim Protective Measures

a. Legal basis for granting interim protection

Except for the odd cases where there are no legal bases for such granting (under which the arbitral tribunals’ ability to adopt such measures depends on the so-called “inherent powers”), the various international investment arbitration frameworks explicitly empower arbitral tribunals to grant interim protection. However, a distinction must be made between the ICSID and other arbitration mechanisms.

19 Yüşülmək, supra note 6, at 56–58. See also infra notes 166–180 and accompanying text.
**Legal basis in ICSID Convention arbitration.** ICSID’s special feature lies in its “self-contained” dimension, neutralizing the effect of the lex arbitri, enshrined in Article 44 of the ICSID Convention. It does not mean that the courts of the seat of arbitration are prevented from dealing with such requests (“provided that [the parties] have so stipulated in the agreement recording their consent”), but that the domestic law of the seat of arbitration does not interfere with or impose mandatory rules on the ICSID arbitration process. It must be stressed that this solution is not applicable in the case of an arbitration under the ICSID Additional Facility Rules which are not “insulated from national law” given the inapplicability of the Convention in this situation. In this respect, the ICSID Additional Facility mechanism is to be treated as any non-ICSID arbitration system. Therefore, the legal basis for granting interim protection within the framework of an ICSID Convention arbitration is usually comprised of the ICSID Convention and Arbitration Rules representing the lex arbitralis generalis, and the specific provisions on interim measures that may be included in the instrument(s) establishing the consent for the jurisdiction of the tribunal. This is generally via a bilateral or a multilateral investment treaty and/or a specific agreement between the investor and the host state, representing the lex arbitralis specialis. The lex arbitralis specialis can be superseded by the mandatory provisions of the ICSID Convention and Arbitration Rules.

**Lex arbitralis** in ICSID Convention Arbitration includes:

1. mandatory provisions of the ICSID Convention and Arbitration Rules;
2. lex arbitralis specialis (instrument containing the consent to ICSID arbitration: investment treaty, state investor agreement, state legislation, etc.);
3. lex arbitralis generalis (ICSID Convention and Arbitration Rules).

This structure should be highlighted in the decisions of arbitral tribunals that have tended to indifferently consider these distinct layers of arbitration rules, or to disregard...
their hierarchy. For instance, in *Tanesco v. IPTL*, the parties made the unusual choice in their agreement to refer disputes to arbitration under the ICSID Convention and Arbitration Rules, and decided at the same time that "[t]he Law governing the procedure and administration of [t]he arbitration … shall be the English law." This choice would not have put this arbitration under the auspices of the English *lex arbitri* and the review of English courts given the mandatory neutralization of the *lex arbitri*, but it should had led the arbitrators to apply only the provisions of the English Arbitration Act 1996 related to the procedural conduct of the arbitration (as the *lex arbitralis specialis*) while disregarding the provisions on the role of domestic courts in the arbitral process. The arbitral tribunal seemed, however, uncomfortable with this choice and attempted to avoid the issue of the applicability of the provisions of the English Arbitration Act on the arbitral tribunal’s power to grant interim protection. Instead, the tribunal balanced the arbitral tribunal’s power under both mechanisms (English law and ICSID). The tribunal implied that the ICSID Arbitration Rules superseded the *lex arbitralis generalis*, and concluded:

that we have jurisdiction to make the recommendations sought, provided that they satisfy the requirements of Rule 39, which is all the power the Tribunal would have even if section 39 of the English Arbitration Act applied (as to which it is unnecessary for us to reach or express any conclusion).

In the author’s opinion, this is the wrong approach. The general authority for the granting of interim protection in an ICSID arbitration is to be found in Article 47 of the ICSID Convention providing that "[c]hannel law to the contrariety to the Tribunal, 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," and is complemented by Article 39 of the ICSID Arbitration Rules, the content of which will be examined below. The *lex arbitralis specialis* may modify this general authority. Specific provisions on interim measures are, for instance, included in North American Free Trade Agreement (NAFTA) or the 2004 U.S. Model Bilateral Investment Treaty (BIT).

The existence of specific provisions on interim measures in the *lex arbitralis specialis* does not necessarily mean that it covers broader issues than the ICSID Convention and Arbitration Rules, but only that the former shall prevail in case of a conflict between the two, on the condition that they remain within the limits of party autonomy permitted by the Convention and the Arbitration Rules and within the jurisdictional boundaries of Article 25 of the ICSID Convention. For instance, the ICSID Convention refers to measures “to preserve the respective rights of either party,” whereas the wording of NAFTA,

\[\text{\textsuperscript{28}}\text{Art. 18(c) of the agreement mentioned in the arbitral tribunal’s decision, see infra note 29, para. 7.}\]

\[\text{\textsuperscript{29}}\text{Tanzania Electricity Supply Co Ltd. v Independent Power Tanzania Ltd., ICSID Case No ARB/98/8, Decision on Request for Provisional Measures, December 20, 1999, 8 ICSID Rep. 239, para. 11.}\]


\[\text{\textsuperscript{32}}\text{NAFTA, supra note 30, except for the situation where the provisions of the ICSID Convention and Arbitration Rules are mandatory.}\]
Article 1134 includes measures “to preserve the rights of a disputing party, or to ensure that the Tribunal’s jurisdiction is made fully effective.” Thus, in the case of a NAFTA arbitration under the ICSID Convention, the tribunal’s authority to grant interim measures will be determined under the broader scope of NAFTA, Article 1134. In a similar fashion, the ICSID Convention indicates that the tribunal may “recommend” such measures, whereas NAFTA provides that the tribunal may “order” them. However, these distinctions are of little importance in practice.

**Legal basis in non-ICSID Convention arbitration.** In the case of a non-ICSID Convention arbitration, the legal basis for the granting of interim measures by the arbitral tribunal is primarily to be found in the arbitration rules chosen by the parties, representing the lex arbitralis generalis. Should the arbitration rules be silent on this point, which is not the case for the rules considered in this article, the general interim power of the arbitral tribunal lies in a potential empowerment by the lex arbitri, such as what is provided in the UNCITRAL Model Law. This general power is supplemented by the possible provisions on interim measures included in the instrument(s) establishing the consent to the jurisdiction of the arbitral tribunal (for instance, an investment treaty or a state contract where parties have crafted their own arbitration rules provisions), representing the lex arbitralis specialis. These two layers of rules are superseded by the mandatory provisions of the lex arbitri of the seat of the arbitration and of the arbitration rules chosen by the parties.

*Lex arbitralis* in non-ICSID Convention arbitration includes:

1. mandatory provisions of the *lex arbitri* of the seat of arbitration;
2. mandatory rules of the *lex arbitralis generalis*;
3. *lex arbitralis specialis* (in the instrument containing the consent to the arbitration: investment treaty, state investor agreement, state legislation, etc.);
4. *lex arbitralis generalis* (institutional or ad hoc arbitration rules chosen by the parties: Arbitration Rules of ICSID Additional Facility mechanism, UNCITRAL, ICC, SCC, LCIA, etc.);
5. *lex arbitri* (seat of arbitration).

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35 Yeğilirmak, *supra* note 6, at 60.
36 The fact that the consent for arbitration lies in a public international law instrument such as a bilateral investment treaty does not preclude the application of the mandatory rules included in the *lex arbitri* if the seat of arbitration is neither located in the country of citizenship of the investor nor the host state of the investment. In the latter case, the *lex arbitri* is superseded by an international agreement binding on the two states, but this is unlikely to happen considering that the seat of arbitration is rarely chosen outside one of these two states. Otherwise the *lex arbitri* of a third state is not superseded by the investment treaty, considering that “a treaty does not create either obligations or rights for a third State without its consent,” according to the *res inter alios acta* principle embedded in art. 34 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1165 U.N.T.S. 331.
This structure was highlighted in an interim award rendered in *Encana v. Ecuador*, where the arbitral tribunal, although not mentioning the mandatory aspects, stated:

Two different provisions are potentially relevant to an order for interim measures of protection in the present case, Article 26 of the UNCITRAL Rules and Article XIII(8) of the BIT. As a specific provision applicable to investments by Canadian corporations in Ecuador, Article XIII(8) must prevail over the general power in Article 26 of the UNCITRAL Rules.37

The most frequent set of rules used in non-ICSID Convention arbitration empower arbitral tribunals to grant interim measures.38 These interim measure provisions may be supplemented and amended by the *lex arbitralis specialis* in a similar fashion to the aforementioned situations in ICSID arbitration. The mandatory rules included in the *lex arbitri* can affect the ability of arbitral tribunals to grant interim measures, but such provisions are rare, and the main role of the *lex arbitri* in this respect relates to the ability given to domestic courts to adopt interim measures in aid of the arbitration.39 In the rest of the article, the unlikely situations of provisions prohibiting40 arbitral tribunals or substantially abridging41 their authority to grant interim measures in the *lex arbitralis specialis* in the case of an ICSID arbitration and in the *lex arbitralis specialis* and/or the *lex arbitri* in the case of a non-ICSID arbitration will not be examined.

The legal basis for the granting of interim measures in international investment arbitration is therefore well established and shows a distinction of legal regimes between the ICSID Convention system and other arbitration mechanisms. Within these disparate frameworks, the procedural aspects of interim protection need to be highlighted.

b. Procedural aspects of arbitral tribunals’ powers to grant interim protection

*Ratione temporis* aspects (acceleration of the procedure). A few preliminary remarks on parties’ possibility of requesting interim measures are important. International arbitration is highly praised for its overall speed, but this comparative advantage is reduced in relation to interim measures given that the requesting party might wait for the constitution of an arbitral tribunal, whereas domestic courts are immediately available in international litigation. Although international arbitration frameworks do not usually prevent parties

37 *Encana Corp. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Interim Award: Request for Interim Measures of Protection, January 31, 2004, para. 10, available at <http://ita.law.uvic.ca/documents/Encana-InterimAward.pdf>; See also *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Procedural Order No. 1, October 27, 1997, para. 7, available at <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladProceduralOrder1.pdf> (noting that the request “does not invoke article 47 of the Additional Facility Rules which deals with provisional measures of protection. Even so, the reference to article 1134 of NAFTA is sufficient to oblige the Tribunal to consider whether the situation is one requiring an order for provisional measures of protection.”).

38 ICSID Additional Facility Rules, art. 46; UNCITRAL Rules, art. 26; SCC Rules, art. 31; ICC Rules, art. 23; LCIA Rules, art. 25.

39 The *lex arbitri* can also empower the arbitral tribunal itself to adopt interim measures. See Guy Robin, *Conservatory and Provisional Measures in International Arbitration: The Role of State Courts*, Int’l Bus. L. J. 319, 320 et seq. (2008).

40 For some examples of *leges arbitri* empowering exclusively domestic courts to grant provisional measures, see Yeşilirmak, supra note 6, at 64.

from requesting interim protection from domestic courts during this critical lapse, some efforts have been made to empower arbitration mechanisms to administer interim measures requests before the formation of the arbitral tribunal.

Indeed, recent amendments to the ICSID Arbitration Rules in 2006 provide the possibility for a party of filing a request for interim measures as soon as a dispute is registered with the Centre. Article 39(5) of ICSID Arbitration Rules empowers the ICSID Secretary General to administer the request by “fix[ing] time limits for the parties to present observations … so that the request and observations may be considered by the Tribunal promptly upon its constitution.” A truly innovative solution would have been to establish a mechanism empowering a permanent authority to administer and adjudicate interim measures until the constitution of the arbitral tribunal, therefore neutralizing the potential difficulties in its formation, but such a solution would have required an amendment to the ICSID Convention and therefore the approval of all contracting states.

This possibility has been set up by some arbitral institutions. The ICC established in 1990 a “pre-arbitral referee procedure” but its opt-in basis, meaning that parties wishing to have recourse to such procedures must make specific reference in their arbitration agreements, has rendered this mechanism almost unused. A recent amendment to the American Arbitration Association-International Center for Dispute Resolution (AA-ICDR) Arbitration Rules in 2006 has established a genuine interim relief procedure before the formation of the tribunal by permitting the appointment of an emergency arbitrator. Contrary to the ICC pre-arbitral referee procedure, this mechanism is integrated in the standard arbitration rules and is applicable unless the parties agree otherwise.

However, given that the AAA-ICDR Rules are not commonly used in investment disputes, the only way to obtain interim measures before the formation of the ICSID Tribunal still lies in the purview of domestic courts.

Beyond this modest corrective intended to accelerate the process, it is usually recognized that, depending upon urgency, interim measures requests may be filed by parties. Such measures may be adopted, modified, or lifted by the arbitral tribunal.
at any time between the appointment of the tribunal and the final award, regardless of whether the plain jurisdiction of the tribunal is established.\textsuperscript{50} As pointed out by the ICSID arbitral tribunal in \textit{Casado v. Chile}:

\begin{quote}
It is in the very nature of the institution of provisional measures that they are … above all urgent, that is to say that they must be or be able to be decided quickly … These measures must therefore be capable of being taken, recommended, indicated or commanded … at any stage of the proceedings and in consequence also before the Tribunal has been able to rule on all of the objections to its jurisdiction or on the admissibility of the claim on the merits.\textsuperscript{51}
\end{quote}

Likewise, in \textit{Railroad v. Guatemala}, it was underlined that “the power of the Tribunal to grant provisional measures is not limited to any particular phase of a proceeding.”\textsuperscript{52}

The ICSID Arbitration Rules underline that the “Tribunal shall give priority to the consideration of a request” for such measures. This feature highlights the specific accelerated procedure of interim measures of protection that are dissociated from the usual temporal framework of adjudication.\textsuperscript{53}

\begin{quote}
Initiative of the request and \textit{proprio motu} powers of arbitral tribunals. In ICSID arbitration, both parties have the right to request interim measures but the arbitral tribunal may also grant them on its own initiative. The situation is different under UNCITRAL, SCC, ICC, and LCIA Arbitration Rules, all requiring a special request of the party.\textsuperscript{54} It must be noted that such requests may be filed by the claimant, the respondent, or both parties.\textsuperscript{55}

The specific power of ICSID tribunals to order interim measures \textit{proprio motu} does not play a great role at the triggering level.\textsuperscript{56} Besides, international tribunals have rarely and only in exceptional situations used this power.\textsuperscript{57} It may, however, have an impact on the range of measures that may be decided \textit{ultra petita} by the arbitral tribunal.\textsuperscript{58} Indeed,
\end{quote}

\textsuperscript{50} The possibility for an arbitral tribunal to adopt interim measures will, however, depend on certain conditions, such as the requirement of a prima facie jurisdiction. See infra notes 263–276 and accompanying text. Moreover, we should note that the waiting period before initiating arbitration “need not have lapsed … if negotiation attempts were clearly futile.” See Sergei Pauzhok, CJSC Golden East Co. and CJSC Vostoknetfetegz Co. v. Mongolia, UNCITRAL, Order on Interim Measures, September 2, 2008, para. 52, available at <http://ita.law.uvic.ca/documents/Pauzhok-Interim.pdf>

\textsuperscript{51} Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No ARB/98/2, Decision on the Request for Provisional Measures, September 25, 2001, 6 ICSID Rep. 375, 378, para. 5.

\textsuperscript{52} Railroad Development Corp. v. Republic of Guatemala, supra note 15, para. 31.

\textsuperscript{53} \textit{Santulli}, supra note 18, at 440–41.

\textsuperscript{54} UNCITRAL Rules, art. 26(1) (“at the request of either party”); SCC Rules, art. 26(1) (“at the request of a party”); LCIA Rules, art. 25(1) (“on the application of any party”). Albeit art. 26(1) of the UNCITRAL Rules clearly indicates that the arbitral tribunal may take any interim measures “at the request of the party,” the Iran-United States Claims Tribunal has already considered that its power to order interim relief \textit{proprio motu} “is in no way restricted by the language in Article 26 of the Tribunal Rules.” See also Rockwell Int’l Systems, Inc. v. Islamic Republic of Iran, Ministry of Defence, Award No. ITM 20–430-1, June 6, 1983, 2 Iran-U.S. C.T.R. 369, 371.

\textsuperscript{55} \textit{Schreuer}, supra note 20, at 749.

\textsuperscript{56} \textit{Schreuer}, supra note 20, at 749.

\textsuperscript{57} The I.C.J. indicated interim measures \textit{proprio motu} only once in its history; Karin Oellers-Frahm, \textit{Article 41}, in \textit{The Statute of the International Court of Justice: A Commentary} 923, 945 (A. Zimmermann, C. Tousschat, & K. Oellers-Frahm eds., 2008).

although the ICSID Arbitration Rules underline that the tribunal “give priority to the consideration of a request made [by a party],” it “may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request.” For instance, in the first dispute under the ICSID Convention, *Holiday Inns v. Morocco*, the tribunal granted other interim measures than those requested by the claimant. This authority is notable in enabling the tribunal to grant less restrictive measures than those requested but pursuing “the same objective.” Non-ICSID arbitral tribunals do not enjoy this ability to decide interim measures *ultra petita* but the *lex arbitralis specialis* may potentially serve as an extension of arbitral tribunal powers in this matter. For instance, the specific sections on interim measures of NAFTA and the 2004 U.S. Model BIT both provide that “[a] tribunal may order an interim measure of protection,” but a party’s request is not a prerequisite.

**Due process rights.** Both ICSID arbitration mechanisms impose on the arbitral tribunal the obligation to respect the due process right of the respondent. Indeed, the Arbitration Rules and the Additional Facility Rules provide that the tribunal may adopt, modify, or revoke interim measures only “after giving each party an opportunity of presenting its observations.”

Such provisions are curiously absent from non-ICSID arbitration frameworks and, more broadly, from arbitration rules and *lex arbitri*. It may be argued that interim measures’ specific procedures are covered by general due process rights of the arbitration framework. The UNCITRAL Rules provide, for instance, that arbitration is conducted to ensure that “each party is given a full opportunity of presenting his...

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56 ICSID Arbitration Rules, art. 39(2); ICSID Additional Facility Rules, art. 46(1).
57 ICSID Arbitration Rules, art. 39(3); ICSID Additional Facility Rules, art. 46(2).
59 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003, para. 14; the tribunal held that “in the circumstances of the case and at that stage of proceedings, it was not in a position to recommend the specific measure requested or to proposes others with the same objective.” Available at <http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>.
60 See also infra notes 320–327 and accompanying text.
61 NAFTA, art. 1134; 2004 U.S. Model BIT, art. 28(8). NAFTA’s commentators, doubting the obviousness of this solution, pointed out that “Article 1134 is silent on whether a tribunal can issue an order for interim measures *sua sponte*. It will be interesting to see how a tribunal addresses this difference in applicable arbitration rules if it arises in Chapter 11 Context.” KINNEAR ET AL., supra note 33, at 1134–211.
62 ICSID Arbitration Rules, art. 39(4); ICSID Additional Facility Rules, art. 46(3). In City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador), ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, para. 70, the tribunal considered that this provision “does not require that each party has actually submitted its observations, but that it has been afforded an opportunity to do so—where, provided that such opportunity has been afforded, a party has failed to do so or has partially done so, the tribunal will have met the regulatory requirement and there is no obstacle to the ordering of provisional measures.” Available at <http://ita.law.uvic.ca/documents/CityOrient-ProvisionalMeasures-EN.pdf>.
63 KINNEAR ET AL., supra note 33, at 1134–44.
64 KINNEAR ET AL., supra note 33, at 1134–44.
Some authors have nevertheless wondered if the absence of explicit due process rights in the provisions on interim measures leaves room for *ex parte* motions, which are frequent in the situation of requests before domestic courts, and sometimes necessary considering the risk of fleeing assets if the respondent is given the opportunity to present his case. Besides, it could be possible to reach the same result in ICSID arbitration if the *lex arbitralis specialis* is silent on this issue and ICSID Arbitration Rules are deemed voluntary. This highly controversial question has been considered cautiously, and even negatively, although it is argued that, due to a tribunal’s ability to lift such measures at any time of the proceedings, *ex parte* motions are possible in exceptional cases and under specific conditions regarding their duration. A similar position has been taken by the I.C.J. Such a stance may, however, be undesirable or risky since a “[f]ailure to give the other party an opportunity to be heard will amount to a serious departure from a fundamental rule of procedure” and such violations of the principle of adversarial proceedings may expose an arbitral award to annulment in the case of an ICSID Convention arbitration. Or, under other mechanisms, it may prevent its recognition and enforcement for other arbitration frameworks under the New York Convention.

Importantly, the impossibility of obtaining interim relief before the appointment of the arbitral tribunal is coupled with the general adversarial framework of interim measures in investment arbitration, thereby sometimes diminishing their efficiency. This has made it necessary to have recourse to domestic courts, though their role and the interplay with arbitral tribunals need to be clarified.

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67 UNCITRAL Rules, art. 15(1).
68 SCC Rules, art. 20(3); ICC Rules, art. 15(2); LCIA Rules, art. 14(1).
69 According to the arbitral tribunal in that case, “[t]he powers of the tribunal relating to interim (or provisional) measures are set in Articles 15(1), 26(1) and 26(2) of [UNCITRAL] rules,” see Sergei Paushok, CJSC Golden East Co and CJSC Vostokneftegaz Co v. Mongolia, supra note 50, para. 34 (art. 15(1) relates to the general due process rights of the parties).
70 Lew, Mistelis, & Kröll, supra note 58, at 606–07.
71 Kinnear et al., supra note 33, at 1134–213 et seq.
72 Yıldırımak, supra note 6, at 223–24; Lew, Mistelis, & Kröll, supra note 58, at 607–08.
74 Pieter H.F. Bekker, Provisioinal Measures in the Recent Practice of the International Court of Justice, 7 Int’l L. Forum 24, 31 (2005) (citing LaGrand (Germany v. United States of America), infra note 138, and pointing out that “in case of extreme urgency” such as “the possibility of a death sentence being carried out by the Respondent in the days following the submission of the request,” the I.C.J. is “likely to dispense with hearings”).
75 Schreuer, supra note 20, at 750.
76 According to art. V(1)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (hereinafter “New York Convention”), the recognition or enforcement of a foreign arbitral award may be refused if “the party against whom the award is invoked was … unable to present his case.”
2. Double Function of Domestic Courts

Domestic courts sometimes constitute a more convenient forum where a party might, under certain limitations, directly seek interim relief. They are also the forum where a party will seek to enforce arbitral interim protective measures.

a. Potential recourse to domestic courts to seek interim measures

In ICSID Convention arbitration, seeking interim relief before domestic courts within the framework of an arbitration conducted under the ICSID Convention was a problematic issue until 1984. The Convention and initial Arbitration Rules were silent on this point, the emphasis of ICSID Article 26 on the “[c]onsent of the parties to arbitration under this Convention … to the exclusion of any other remedy” provided arguments to opponents as well as proponents of the power of domestic courts to grant interim protection, and the solutions adopted by domestic courts and arbitral tribunal on this issue were inconsistent. In *Atlantic Triton Co. v. People's Revolutionary Republic of Guinea*, the arbitral tribunal suggested that its jurisdiction to recommend interim measures should not be regarded as “exclusive and prohibit any recourse to national courts” but underlined at the same time that the “question as to whether the Washington Convention and the ICSID Rules stand apart as compared with all other arbitral regimes is a very delicate one.” In order to dispel doubts, an amendment to the Arbitration Rules was adopted in 1984. It is now located in Article 39(6) of the Arbitration Rules and provides:

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.

The power of domestic courts to adopt interim measures under the ICSID Convention is therefore subject to the explicit consent of the parties in the *lex arbitralis specialis*. This system tends to reconcile the self-contained nature of investment arbitration under the Convention with the consent-based approach of international arbitration. However,
the power of domestic courts is strictly limited given that states “will generally refuse to submit expressly to the jurisdiction of the courts of third countries for interim relief.”

For instance, NAFTA and the 2004 U.S. Model BIT specify the possibility for an investor initiating arbitration proceedings to seek interim relief but it is limited to certain measures and to domestic courts and tribunals of the defending party, and it is unlikely that an agreement between the state and the investor might make a provision for interim protection. In addition, this limited power, where present, does raise some problematic procedural issues.

First of all, in the unlikely case where such power has been provided for in the lex arbitralis specialis, a request for interim relief before domestic courts prior to the start of ICSID proceedings cannot be considered as a choice of dispute settlement mechanism. Under the electa una via, non datur recursus ad alteram principle, included in some investment treaties and known as the “fork in the road” mechanism, the first choice of a dispute settlement mechanism by the investor is considered as irrevocable. Interim measure requests before national courts are possible at any time of the proceedings if the parties agree, therefore a request filed before the engagement of ICSID arbitration which amounts to a choice of domestic courts over the arbitration is an inaccurate solution. Such a position would do violence to the explicit consent of parties and would lead, at the same time, to asymmetrical situations where the same request is considered irrevocable before the arbitration and as an admissible protection during the arbitration. It does not mean, however, that domestic courts may adopt any measures at this stage, since their decisions must not overlap with the exclusive jurisdiction and authority of the tribunal. Indeed, a domestic interim order in its form equivalent to a decision on the merits in substance could possibly be considered as a “fork in the road” choice.

A second, less theoretical procedural issue raises the question of the legal effect of a request for interim relief filed in domestic courts prior to the initiation of arbitral proceedings under the ICSID Convention when parties did not previously consent to the availability of such measures. It could legitimately be argued in this situation that the party claiming interim relief in domestic courts has made a choice incompatible with a future ICSID arbitration. Two arguments can be discerned. First, on the issue of the availability of the ICSID mechanism, a party’s request for interim relief in a domestic forum that would have been inaccessible during the arbitration affects, in our view,
the jurisdiction of the arbitral tribunal. Secondly, the presence of a “fork in the road”
provision in the lex arbitralis specialis could constitute an implicit choice for a specific dis-
pute settlement mechanism that allows interim measures at the pre-arbitral stage, such as
the UNCITRAL Arbitration Rules. Investors should therefore pro-actively assess the
opportunity to request interim measures in domestic courts. If they are considered as
effective devices to put the host state under pressure and force it to settle the dispute, they
may limit, in the future, dispute settlement options available and direct the claimant
towards a non-ICSID Convention arbitration system that would be under the control of
the lex arbitri and the review of the 1958 New York Convention.

In non-ICSID Convention arbitration. Under other investment arbitration systems,
the availability of interim relief before domestic courts is not limited or subject to the
restriction encountered in the ICSID Convention mechanism. ICSID Additional Facility
Rules provide indeed that “[t]he parties may apply to any competent judicial authority
for interim or conservatory measures.” Arbitration Rules of UNCITRAL, SCC, ICC,
and LCIA also allow for interim protection before all domestic courts, and not
only those of the seat of arbitration. Although these rules converge on this possibility,
they differ on their respective application.

UNCITRAL, SCC, and ICSID Additional Facility Rules do not impose natione tempori conditions under which seeking interim relief in domestic courts is possible. This
indicates that parties may have recourse to national courts at any time during the
proceedings. The situation is different under the ICC Rules, which provide that interim
protection in domestic courts is available “before the file is transmitted to the Arbitral
Tribunal and in appropriate circumstances even thereafter,” and under LCIA Rules
under which the same relief may be requested “before the formation of the Arbitral
Tribunal and, in exceptional cases, thereafter.” These provisions establish a “principle of

86 Contra Katia Yannaca-Small, Parallel Proceedings, in The Oxford Handbook of International Investment
1008, 1027 (Peter Muchlinski, Federico Ortino, & Christoph H. Schreuer eds., 2008) (author sees in art. 47 of
the ICSID Convention or art. 1134 of NAFTA an “exception to the ‘fork-in-the-road’ rule [that] would allow the
investor to seek interim or injunctive relief under domestic procedures without foreclosing his rights to initiate
international arbitration”). In our view, this opinion misinterprets those two articles referring to the “tribunal” as the
arbitral tribunal and not any domestic court.

87 Some guidance may be found in Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID
Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, para. 98, where the tribunal held that a strictly
defensive measure may not trigger the “fork in the road” mechanism, available at <http://ita.law.uvic.ca/documents/
Enron-Jurisdiction.pdf>.

88 The existence of the arbitration agreement, as well as the possibility of state court intervention, embedded in
the arbitration rules will be considered as a waiver of immunity from jurisdiction, thereby empowering domestic
courts for the taking of interim protective measures. However, their implementation may be restricted in practice by the
rules of sovereign immunity regarding the assets that are available in the case of a pre-award security. For some examples,
see infra notes 232-246 and accompanying text.

89 Arbitration Rules of UNCITRAL, SCC, ICC, and LCIA also allow for interim protection before all domestic courts, and not
only those of the seat of arbitration. Although these rules converge on this possibility, they differ on their respective application.

90 UNCITRAL Rules, art. 26(3).
91 SCC Rules, art. 31(2).
92 ICC Rules, art. 23(2).
93 LCIA Rules, art. 25(3).
94 ICC Rules, art. 23(2).
95 LCIA Rules, art. 25(3).
priority of arbitral tribunals over domestic courts as soon as the arbitral process is launched. It is difficult to interpret accurately the expressions “in appropriate circumstances” and “in exceptional cases,” both indicating that the availability of domestic courts is to be determined on a case-by-case basis. Authors have, however, attempted to draw guidelines from practice, which indicate that domestic courts are appropriate forums: in situations of urgency, when the arbitral tribunal has no power to grant the measure sought, or in situations of paralysis or inability of the arbitral tribunal. Actually, the latter conditions suggest more a _ratione materiae_ than a _ratione temporis_ allocation of power to grant interim relief between domestic courts and arbitral tribunals. These _ratione materiae_ aspects will be analyzed below with the conditions for the granting of interim measures.

Although the interplay between courts and arbitral tribunals might be conflicting, it should not overshadow the fact that the action of domestic courts is usually taken to assist the arbitration and that domestic courts are also a forum where interim relief granted by an arbitral tribunal will be enforced.

b. **Enforcement of arbitral interim measures in domestic courts**

Interim protective measures granted by arbitral tribunals are not self-executing, unlike those adopted by national courts. Given this circumstance and the _ratione materiae_ allocation of interim measures between domestic courts and arbitral tribunals, arbitrators “generally refrain from ordering measures that intrinsically require the use of coercive powers.” Moreover, considering an arbitrator’s ability to draw negative inferences from non-compliance, parties toward whom those measures are directed generally spontaneously comply with them, and thus their enforcement before domestic courts is not the most common problem. The fundamental mechanisms of enforcement, however, deserve to be analyzed. Again, a significant difference exists between ICSID Convention arbitration and other frameworks.

**Unenforceability of ICSID Convention arbitral interim protective measures.** Article 47 of the ICSID Convention provides that the arbitral tribunal may “recommend any provisional measures.” The term “recommend” is also laid down in Article 39 of the ICSID Arbitration Rules. Given this terminology, the question of their enforceability should
be posed. Rather, as discussed below, ICSID tribunals have often interpreted this terminology very broadly so as to consider that measures granted under Article 47 may not just be a “recommendation,” but also an “order.” However, regardless of the debate on their legal nature, it appears that interim protective measures cannot benefit from the advantageous legal regime of enforcement of ICSID awards.

The only mechanism for the enforcement of ICSID decisions before domestic courts lies in Article 54 of the ICSID Convention providing that “[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.” If no definition of the term “award” is provided by the Convention, it is possible to infer from other provisions of the Convention that only final awards are covered by Article 54. Other decisions made by the arbitral tribunal during the proceedings, such as decisions on jurisdiction, recommending or ordering interim measures, or other procedural orders, are consequently outside the scope of the automatic recognition and enforcement mechanism of the Convention. It must also be stressed that the lex arbitralis specialis cannot, in our opinion, transform an arbitral decision on provisional measures into an award benefiting from the enforcement mechanism of the ICSID Convention. The only way for interim measures granted by an ICSID tribunal to be enforced before domestic courts lies, therefore, in their incorporation in the final award, as for instance in Tanesco v IPTL. However, without being in the realm of enforcement, it is certain that arbitral interim measures in the form of anti suit injunctions recommending or ordering parties to abstain from domestic legal proceedings may have a significant persuasive role over domestic courts decisions.

Controversial enforceability of non-ICSID Convention arbitral interim measures. There are two ways of envisaging the enforcement of arbitral interim measures in domestic courts.

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102 To our knowledge, the only reference suggesting that a recommendation of an ICSID tribunal may be enforced by a domestic court is the decision of the Cour d’appel of Rennes related to Atlantic Triton, see supra note 79, where the French court pointed out that “[t]he necessity for the parties to have recourse to national courts for the implementation of conservatory measures recommended by the arbitral tribunal cannot constitute a valid argument for depriving the arbitrators of all jurisdiction in the matter” (3 ICSID Rep. 9).
104 See ICSID Convention, art. 48.
105 Id. art. 53(2) provides that “for the purpose of this Section, ‘award’ shall include any decision interpreting, revising or annulling such award pursuant to Article 50, 51 or 52.”
106 Schreuer, supra note 20, at 1110 et seq.
107 For instance, provisions of NAFTA, art. 1136, related to the “finality and enforcement of the award” have been considered by certain authors as potentially covering decisions on interim measures. Kinnear et al., supra note 33, at 1134–215.
108 Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., supra note 29, para. 32 (“The conclusions of the Tribunal in relation to the Request for Provisional Measures ... were published in the form of ‘Decisions’ to be incorporated into our Final Award by reference in due course”).
109 For instance, in Mine v. Guinea, a Swiss court relied heavily on the decision of the ICSID arbitral tribunal recommending the cessation of proceedings in domestic courts and lifted the attachment that was previously granted (see 4 ICSID Rep. 45–53). In CSOB v. Slovakia, however, the Slovak Supreme Court did not follow the recommendations of the ICSID tribunal to suspend domestic bankruptcy proceedings; see Schreuer, supra note 20, at 760–61.
They can be enforced abroad or before the courts of the seat of arbitration. Given that there is commonly little connection between the state of the seat of arbitration, which is deemed to be neutral for parties in international investment arbitration, the matter of the enforcement of interim measures before the courts of the seat of arbitration (therefore under the *lex arbitri*) will not be considered. The analysis will focus on the enforcement abroad through the 1958 New York Convention.

Assessing the enforceability of arbitral interim measures under the New York Convention requires a prior determination of their legal nature. Non-ICSID Convention arbitration rules commonly used in investment arbitration do not all define precisely the nature of arbitral decisions granting interim measures. The aforementioned ICSID Additional Facility, SCC, and LCIA Rules simply indicate that the arbitral tribunal may or shall have the power to "order" interim measures. ICC Rules are more precise and provide that "[a]ny such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate." Lastly, the UNCITRAL Rules leave no doubt by specifying that "[s]uch interim measures may be established in the form of an interim award." This diversity has implied a diverse terminology, where interim measures have been issued as "interim award," "partial award," "decision," or "procedural order." The distinction between "award" and "order" or "decision" is, however, significant within the framework of international arbitration. In contrast to an "order" or a "decision," an "award" must be motivated and its content must follow certain rules, it has *res judicata* effect and it cannot be issued *ex parte.*

The recognition and enforcement mechanism established by the New York Convention is applicable to "arbitral awards," but no precise definition of this expression is given by this convention. On a strictly formal plan, orders, procedural orders, or decisions adopted by arbitral tribunals are not "awards" and cannot intuitively benefit from the New York Convention. The situation in practice is, however, more complicated, and domestic courts, in the few cases involving this issue, have tended to assess the "finality of the decision" for which enforcement is sought more than the terminology used by the

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110 As pointed out by an UNCITRAL working group, "arbitrations are often conducted in a State that has little or nothing to do with the subject-matter in dispute," see U.N. Doc. A/CN.9/WG.II/108, para. 76, and the courts of the place of arbitration may not have effective jurisdiction over the parties or the assets," see U.N. Doc. A/CN.9/460, para. 119.
111 For some useful insights, see Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional*, 18 J. Int’l Arb. 513, 513–20 (2001); Yеşilirmak, supra note 6, at 247–54.
112 Yеşilirmak, supra note 6, at 258–59; "neither will be considered the rare situations where domestic laws provide a special regime for the recognition and enforcement of foreign arbitral interim measures," and the specific situations of transposition of arbitral interim measures into court orders, therefore "portable" as domestic court orders (at 255–57).
113 ICSID Additional Facility Rules, art. 46(3); SCC Rules, art. 31(1); LCIA Rules, art. 25(1).
114 ICC Rules, art. 23(1). It is worth mentioning that art. 23(2) refers to "[t]he application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal."
115 UNCITRAL Rules, art. 26(2).
116 Notably that the award must state the reasons on which it is based; see UNCITRAL Rules, art. 32; ICC Rules, art. 25; SCC Rules, art. 32; LCIA Rules, art. 26; ICSID Additional Facility Rules, art. 52.
117 Tweedale & Tweedale, supra note 73, at 328–32; Yеşilirmak, supra note 6, at 192–93.
118 New York Convention, art. 1(1).
119 Tweedale & Tweedale, supra note 73, at 328.
arbitrators. French, U.S., and English courts have, for instance, considered the form of the decision as an irrelevant element in deciding on its enforceability. In this “substance over form” analysis, some domestic courts have enforced arbitral decisions granting interim protective measures to the extent that the measures in question were both final and severable from the rest of the dispute. This highlights the terminological laxity mentioned above. It is, indeed, necessary to draw a distinction within the category of interim measures between those that are final on an issue and those of a provisional character, reversible in nature, that may be lifted at any time by the arbitral tribunal.

These trends do not, of course, overshadow the disparities between domestic courts. Besides, this issue was on the agenda of UNCITRAL which included in its recent amendment of the Model Law specific provisions for the enforcement of arbitral interim measures. This possibility offered by some domestic courts to assist the arbitral process highlights, however, a significant difference with investment arbitrations carried out under the regime of the ICSID Convention, where arbitral interim measures cannot be enforced and are locked up until the final award in the self-contained regime established by the Convention. For this reason, the scope and legal implications of the duty to comply with provisional measures is of great importance in the ICSID system.

### B. Compliance with interim protective measures within the arbitral framework

While arbitral tribunals have the power to grant interim protective measures that might be enforced in domestic courts in certain situations, the core issue of compliance

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120 Derains & Schwartz, supra note 44, at 275 (“Albeit it has a psychological dimension for arbitrators.”). As underlined by authors, under the ICC Rules, arbitrators have the power to tag their interim measures as an award with “the hope that it will enhance the possible enforcement of the arbitrator’s decision.”

121 Tweedale & Tweedale, supra note 73, at 331–32. See also Marc J. Goldstein, Are Interlocutory Orders Arbitral Awards? Interpreting the New York Convention: When Should an Interlocutory Arbitral “Order” be Treated as an “Award”? in AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 178 (Thomas E. Carboneau ed., 2006) (discussing the decision in Publicis Communication v. True North Communications Inc., 206 F.3d 725 (7th Cir. 2000). The U.S. Court of Appeals for the Seventh Circuit rejected the argument according to which an arbitral decision not labeled as “award” but “order” cannot be enforceable, as “extreme and untenable formalism” and that the “consistent use of the label ‘award’ when discussing final arbitral decisions does not bestow transcendental significance on the term. Their treatment of ‘award’ as interchangeable with final does not necessarily mean that synonyms such as decision, opinion, order, or ruling could not also be final. The content of a decision— not its nomenclature—determines finality” (at 728)). Contra, for example, the different position of the Australian courts in Resort Condominiums Inc. v. Ray Bowell and Resort Condominiums Pty Ltd., October 29, 1993 (Sup. Ct. Queensland) 20 Y.B. COMM. ARB. 628 considering that “the reference to ‘arbitral award’ in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties.” Id. at 640.

122 Tweedale & Tweedale, supra note 73, at 332.

123 For an overview of the case law on this issue, see Kojovic, supra note 111, at 522–27; Yeşilirmak, supra note 6, at 261–62. However, it must be stressed that such a position is not shared by all domestic courts, nor commentators. Id. at 262–63.

124 Supra note 121.

125 Art. 17(h)(1) of the UNCITRAL Model Law, supra note 34, provides that “[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.” On the work of UNCITRAL on this issue, see Kojovic, supra note 111, at 529–31; Yeşilirmak, supra note 6, at 265–69.
goes beyond the question of their enforceability and lies mainly in the power to ensure compliance within the arbitral framework. It is therefore necessary to determine exactly the binding force of arbitral interim measures, before highlighting the legal consequences of non-compliance.

1. **Binding Force of Interim Protective Measures**

A peculiar distinction is to be mentioned between ICSID Convention arbitration and the other arbitration mechanisms. Whereas Article 47 of the ICSID Convention provides that the tribunal may only “recommend” interim relief, other arbitration rules recognize the power of tribunals to “order,”126 “order or recommend,”127 or “take”128 interim measures. While it seems intuitively that such measures adopted under the ICSID Convention are not binding, the practice of arbitral tribunals has weakened this textual distinction and admitted their binding force. Some insights into the underlying theoretical debate on the justification of their binding force provide a useful avenue to understand the nature of arbitral interim protective measures.

a. **Source of the binding force**

**Textual source for non-ICSID Convention arbitration.** As mentioned above, non-ICSID Convention frameworks empower arbitral tribunals to “order” or “take” interim measures. The wording of Article 26 of the UNCITRAL Rules referring to the term “take” should be clarified. This rule specifies that the tribunal has, among others, the power to take “measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit.”129 There is consequently no doubt that a tribunal conducting an arbitration under the UNCITRAL Rules has the power to “order” interim relief.

Considering the consensual nature of international arbitration, there is no doubt that interim measures granted as “orders” by tribunals in non-ICSID Convention arbitrations are binding on parties.

**Praetorian source for ICSID Convention Arbitration.** Putting aside the specific cases empowering an arbitral tribunal to “order” interim measures through the lex arbitralis specialis, or the possibility for arbitral tribunals to seek the binding agreement of parties to implement them,130 the ICSID Convention and Arbitration Rules both refer to the

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126 ICC Rules, art. 23(1); SCC Rules, art. 31(1); LCIA Rules, art. 25(1), (2).
127 ICSID Additional Facility Rules, art. 46(3).
128 UNCITRAL Rules, art. 26(1).
129 Emphasis added.
130 See, e.g., Vacuum Salt Products Ltd. v. Government of the Republic of Ghana, ICSID Case No. ARB/92/1, Decision No. 1 on Request for Recommendation of Provisional Measures, December 3, 1992 (cited in Award, February 16, 1994, 9 ICSID Rev. 72, 79, para. 16 (1994), where Ghana assured the tribunal “that it will not deny Vacuum Salt Products Limited … access to its records, including any which are required for its compensation claim in this proceeding.” The arbitral tribunal also took note “of the fact that Vacuum Salt Products Limited acknowledged and accepted these undertakings as satisfying the concerns expressed in its Request for Provisional Measures.”
authority of the arbitral tribunal to "recommend" interim measures. The French and the Spanish versions use the verbs "recommander" and "recomendar" and the terms "recommandation" and "recomendación." A simple textual analysis indicates clearly that ICSID tribunals lack the power to order interim measures binding on parties. This is also corroborated by the Convention's travaux préparatoires showing "a conscious decision … not to grant the Tribunal the power to order binding provisional measures." Despite clear wording which leaves little room for even a far-fetched and extensive interpretation, some arbitral tribunals have understood these provisions to establish the compulsory nature of such measures. ICSID tribunals dealing with Article 47 of the Convention have always used the term "recommend" and never mention the potential mandatory dimension of interim measures. Besides, in Atlantic Triton v. Guinea, the arbitral tribunal opposed its "jurisdiction to recommend conservatory measures" with the one of national courts "traditionally and virtually universally recognized as having sole jurisdiction to order such measures."

The positions of the arbitral tribunals in Maffezini v. Spain and in Casado v. Chile overturned this well-established interpretation and determined that such measures should not be viewed as recommendations but as binding arbitral decisions. The tribunals' legal arguments in both cases were, however, highly questionable.

In Maffezini v. Spain, the tribunal considered the "semantic difference between the word 'recommend' as used in Rule 39 and the word 'order' as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action [as] more apparent than real" and deemed "the word 'recommend' to be of equivalent value to the word 'order,'" concluding that "the Tribunal’s authority to rule on provisional measures is no less binding than that of a final award." The tribunal justified its interpretation by a reference to the Spanish version of the Arbitration Rules using the word "dictación."

The tribunal does not specify where this term is located in the Arbitration Rules. The closest word to be found in Article 39 is part of the expression referring to "las circunstancias que hacen necesario el dictado de tales medidas," understood in the English version as "the circumstances that require such measures." In our view, this tribunal

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131 Schreuer, supra note 20, at 757–58 (showing evidence that the term “recommend” was preferred to “prescribe” and that the availability of interim awards on provisional measures was not held established). See also Brower & Goodman, supra note 81, at 440.


133 Atlantic Triton Co. v. People's Revolutionary Republic of Guinea, supra note 79, at 35 (original emphasis).

134 Emilio Agustín Maffezini v. Kingdom of Spain, supra note 103, para. 9. This argument was also used in City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, supra note 64, para. 52, where the tribunal referred specifically to rule 39(1).
mixed up two distinct aspects. The term “recommend” is used to define the tribunal’s procedural power and therefore the legal nature and value of its decision adopting interim measures. The term “require” (of course more directive than “recommend”) relates to the substantive conditions under which the measures may be adopted. The latter expression should therefore be read as “the circumstances that require such measures to be recommended.”

The arbitral tribunal’s reasoning in Casado v. Chile is far more elaborate and is based on different grounds. Although mentioning the Maffezini decision in passing, the tribunal deemed that “this question can today be considered closed, in the light of the general jurisprudence and a recent decision of the International Court of Justice.” Indeed, relying on the then recent judgment of the I.C.J. in LaGrand, where the Court “reached the conclusion that orders on provisional measures under Article 41 [of the I.C.J. Statute] have binding effect,” the arbitrators upheld the binding legal value of interim measures. This holding stems from the conclusion of the tribunal that:

It is clear from the preceding that provisional measures are principally aimed at preserving or protecting the efficiency of the decision that is given on the merits; they are intended to avoid prejudicing the execution of judgment, or prevent a party, by unilateral act or omission infringing the rights of the opposing party.

The pertinence of some arbitrators’ arguments justifying this binding nature can be called into question. To begin to justify its position the tribunal relied on Article 41 of the I.C.J. Statute and its interpretation in LaGrand. Such “analogies” (a terminology used twice by the tribunal to comprehend the interplay between the ICSID and I.C.J. systems) are highly questionable considering the principle of party autonomy in international arbitration. Differences exist indeed between the terms “recommend” of the ICSID Convention and Arbitration Rules, and the term “indicate” embedded in the I.C.J. Statute. The same comments apply to the references made to the jurisprudence of the Iran–United States Claims Tribunal where proceedings were conducted under the UNCITRAL Arbitration Rules.

On another note, the tribunal seems to consider with variable intensity the relevance of the legislative history of these distinct procedural rules. The fact that the I.C.J. took the travaux préparatoires of its Statute into account seemed to be a relevant element for the tribunal. Likewise, the tribunal mentioned the first draft of the former rules of ICSID, stating in an explanatory note that Article 47 of the Convention is “based on the principle

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136 Interpreting art. 47 of the ICSID Convention, in Tokios Tokélés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 1, Claimant’s Request for Provisional Measures, July 1, 2003, para. 3, the tribunal mentioned “the circumstances require that provisional measures be taken to preserve the respective rights of either party;” available at <http://ita.law.uvic.ca/documents/tokios-order1.pdf>. It must be stressed, however, that the tribunal upheld the binding force of provisional measures; see infra note 154.

137 Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 17.

138 LaGrand (Germany v. United States of America), 2001 I.C.J. 466 (Judgment of June 27).

139 Id. para. 109.

140 Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 26.

141 Id. paras. 18–20.

142 Id. paras. 22–23.

143 Id. para. 20.
that … the parties should not take steps that might aggravate or extend their dispute.”

However, when considering the opinions expressed by various commentators, the tribunal mentioned “the questionable method of interpretation which consists of referring to the travaux préparatoires where the term ‘prescribes’ was eventually replaced by ‘recommend’.”

Regardless of its solution, the arbitrators’ interpretation should have stressed the public international law nature of the ICSID Convention from which the Arbitration Rules stem. According to the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” The ordinary meaning of the terms “recommend” (understood as “to praise or commend to another as being desirable or worthy”) leaves little room for any binding dimension of provisional measures within the ICSID Convention framework. The term “indicate” laid down in the I.C.J. Statute (and defined as “to show or to point out”) is more directive than “recommend.” The parallel between the two terms attempted by the arbitrators in Casado not only violated the principle of party autonomy in international commercial arbitration, but was also not in conformity with the basic rules of interpretation of treaties in international law, expressing the junction between the two legal spheres in which ICSID Convention arbitration occurs.

There are no reasonable (strictly legal) bases to support the tribunal’s interpretation of the ICSID Convention and Arbitration Rules in Casado. We might consider that the presence of the I.C.J. judge Momahed Bedjaoui, who sat on the I.C.J. in LaGrand only three months before this arbitral decision, greatly influenced the arbitral tribunal’s position. Besides this speculative argument, the justification of the appropriation of the power to order interim measures by ICSID tribunals, if any, is to be found elsewhere.

b. Justification of the binding force

Although Casado should have constituted a very persuasive ruling for future tribunals for ICSID Convention disputes, subsequent arbitral tribunals have not systematically emphasized the binding nature of the interim measures granted. In SGS v. Pakistan, Zhinvali v. Georgia, Plama v. Bulgaria, Biwater v. Tanzania and

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144 Id. para. 25.
145 Id. para. 18.
146 Vienna Convention on the Law of Treaties, art. 31(1).
148 Id. at 564.
150 Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Order, January 24, 2002, cited in Award, January 24, 2003, 10 ICSID Rep. 6, 18, para. 44.
Saipem v. Bangladesh, the arbitral tribunals only mentioned the terminology related to “recommendation” and avoided the issue of their binding nature. It is, of course, delicate to determine whether these tribunals comprehended the interim measures they granted as mandatory or not, and it is certainly unlikely that arbitrators would stress the non-binding nature of such measures in their decisions. In Tokios Tokelés, the arbitral tribunal followed the Casado ruling and suggested that even labeled as “recommendations,” such measures would be deemed binding on the parties:

It is to be 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.

This position, adopted again more recently in OPC v. Ecuador, was more specifically reaffirmed in City Oriente v. Ecuador, where the tribunal underlined that the question of the binding nature of interim measures is less an issue of textual interpretation (i.e., the meaning of the term “recommendation”), than a functional dimension. The tribunal stated that:

Even disregarding such semantic discussion, a teleological interpretation of both provisions leads to the conclusion that the provisional measures recommended are necessarily binding. The Tribunal may only order such measures if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfill its purpose of providing effective judicial protection. Such goals may only be reached if the measures are binding, and they share the exact same binding nature as the final arbitral award. Therefore, it is the Tribunal’s conclusion that the word ‘recommend’ is equal in value to the word ‘order’.

It is necessary to replace the tribunal’s functional argumentation in City Oriente in the more global discussion on the power of international tribunals and courts to adopt binding interim measures. Indeed, these ICSID decisions were given in the wake of the I.C.J.’s LaGrand ruling, which is considered as the starting point of a “new judicial customary rule.” Although the I.C.J. in LaGrand has drawn its conclusion from, inter alia, an interpretation of Article 41 of its Statute, this decision has served as a global authoritative precedent not only for ICSID tribunals but also for other international courts such as the

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154 Tokios Tokelés v. Ukraine (No. 1), supra note 136, para. 4.


156 City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, supra note 64, paras. 66-77 (relying on the case law of the I.C.J., of the European Court of Human Rights, and of the Iran-United States Claims Tribunal, and stating that “[i]t is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed”).

European Court of Human Rights.\(^{158}\) Several arguments have been put forward to justify the existence of this power regardless of its textual basis.\(^{159}\) Indeed, the existence of an overarching rule or principle of public international law must be determined in order to give a rationale for the circumvention of a treaty provision such as that carried out by ICSID arbitral tribunals.

It is first possible to comprehend this power under the notion of “the general principles of law recognized by civilized nations” as a source of international law by Article 38(1)(c) of the Statute of the I.C.J. In the *LaGrand* case, the I.C.J. relied on the ruling of the former Permanent Court of International Justice (PCIJ) in *Electricity Company of Sofia and Bulgaria*, recognizing the provisions related to interim measures in its Statute, which:

> [A]pplies the principle universally accepted by international tribunals … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.\(^{160}\)

Considering the widespread embedding of this principle in domestic legal orders\(^{161}\) and its recognition by international courts, the binding nature of interim measures in public international law may be viewed as stemming from this general principle, or as a subcategory of the principle of good faith.\(^{162}\) Although the PCIJ decision was mentioned in *Casado*\(^{163}\) and in *City Oriente*,\(^{164}\) both arbitral tribunals did so only to determine the circumstances under which interim measures may be granted, but not to justify their binding nature. In *Casado*, the tribunal, citing excerpts of explanatory notes of the first draft of former ICSID Rules, noted that “Article 47 of the ICSID 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,’ a principle which has a certain ‘generality,’”\(^ {165}\) but used those notes as a persuasive argument and did not specify how this principle overarches the ICSID Convention.

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\(^{159}\) **Le Floc’h**, supra note 3, at 401–14.


\(^{161}\) **Elkind**, supra note 2, at 23 et seq.

\(^{162}\) **Koll**, supra note 157, at 612.

\(^{163}\) *Víctor Pey Casado and President Allende Foundation v. Republic of Cháile*, supra note 51, para. 69.

\(^{164}\) *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, supra note 64, para. 88 (while mentioning this decision, the arbitral tribunal surprisingly referred to an “early decision of the International Court of Justice”).

\(^{165}\) *Víctor Pey Casado and President Allende Foundation v. Republic of Cháile*, supra note 51, para. 65.
Another argument put forward lies in the so-called theory of the “inherent powers” of courts and tribunals stemming from the essence of the judicial function itself. This theory was explicitly referred to by the I.C.J. in the Nuclear Tests cases, where it emphasized that:

[The Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character” … Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.]

The theory of “inherent powers” of courts and tribunals is a very powerful device, as such powers are deemed to exist regardless of their textual basis, and therefore it is to be distinguished from the theory of “implied powers,” while relying on the same functional approach. Considering their inherent nature, these powers are frequently expressly stated in the constitutive charter of the tribunal or court, which is also a method for controlling their application in practice. However, the main advantage of this theory lies in its potential neutralization of the rules under which the tribunal or court proceeds. Although “inherent powers” may not contradict the powers expressed in the constitutive instruments, it has been argued that they may not only complete the legal instruments governing the procedure of the tribunal or court, but also extensively interpret them in order for the tribunal to enjoy the maximum of latitude while exercising its functions.

An illustration of this interplay between “inherent powers” and procedural instruments may be found in the practice of the Iran–United States Claims Tribunal, which functions under the UNCITRAL Rules. Indeed, several of its decisions underline the “inherent power” of the tribunal to order interim measures regardless of the explicit provisions of Article 26. This had no impact on the binding nature of such measures, but permitted the expansion ratiocina materiæ of the scope of the tribunal’s interim measure powers

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168 The theory of “implied powers” had been used in the context of international organizations but it had only tentatively been mentioned in relation to the justification of the binding nature of interim measures; Le Floch, supra note 3, at 410–11. See also Gaeta, supra note 166, at 362–64.

169 Id. at 410–11.


171 Rockwell International Systems, Inc. v. Islamic Republic of Iran, supra note 54, at 369.
beyond those in Article 26, textually limited to the subject matter of the dispute, in order to protect the effectiveness of the tribunal’s jurisdiction and its authority.173

It is difficult, however, to determine to what extent a court or tribunal may implement the “inherent powers” theory so as to act contra legem and blatantly contradict its constituent instruments. For some scholars, one of the limits of the theory lies in the explicit limitations included in the constituent instruments of the court or tribunal, the so-called “clause contraire.”174 For another minority view, some of these judicial powers “are intrinsic in the nature of the tribunal and may not be denied … even through an express provision.”175 While it is seems excessive to follow the latter view, a distinction must be drawn, in our opinion, between an explicit restrictive limitation to the tribunal’s power and a simple provision stating how the tribunal or court is deemed to proceed while dealing with a certain issue.

To illustrate the first category, it is possible to mention Article 1134 of NAFTA providing that “[a] Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.” The arbitral tribunal in Pope & Talbot stated that Article 1134 “does not confer jurisdiction on the Tribunal to enjoin the application of a measure … the Tribunal takes the view that it lacks power to grant such relief.”176

It is our view that the legal framework for the granting of interim measures in the ICSID Convention system falls within the second category. Article 47 of the Convention provides that “[e]xcept 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.” Three arguments can be advanced to demonstrate that Article 47 cannot constitute a clause contraire. First, the presence of the expression “[e]xcept as the parties otherwise agree” leaves room for binding provisional measures through the lex arbitralis specialis, thereby meaning that Article 47 does not impose a mandatory limitation regarding the binding character of provisional measures. Secondly, and relying also on the latter statement, Article 47 does not prohibit explicitly the tribunal’s power to “order” interim measures. Thirdly, and completing these two arguments, the legislative history of the Convention shows that if there is strong evidence that the term “recommend” was chosen over “prescribe,” the travaux préparatoires also highlight that negotiating states made this choice for practical reasons in order to avoid the question of the enforceability of interim measures before domestic courts, and therefore did not prevent consideration of the binding nature of such measures within the sole sphere of arbitral proceedings.

174 Brown, supra note 166, at 239–42.
175 Caron, supra note 166, at 476. The author defines the stance of this minority view but does not share its views.
177 Schreuer, supra note 20, at 759.
There are therefore strong arguments that the theory of “inherent powers” of courts and tribunals can potentially justify the binding nature of interim protective measures adopted by ICSID arbitral tribunals. The same conclusion applies for the principle not to “aggravate or extend the dispute.” An explicit reference to this principle or theory in ICSID decisions, and an explanation as to how they may overarch the provisions of Article 47, would have been a preferable argument and legal basis compared with the conclusions referred to above underlying the similarities between the I.C.J. Statute and the ICSID Convention and concluding that “recommend” means “order.” Besides, and considering that the legal basis for the recognition of the binding nature is to be found outside the scope of the Convention, ICSID tribunals have to expressly specify the mandatory nature of such measures. In our view, the recent decisions only “recommending” interim measures on the basis of Article 47 cannot be interpreted de plano as “orders.”

2. Consequences of Non-Compliance with Interim Measures

Carrying out a judicial function, arbitrators have therefore the authority to adopt binding interim measures. Although, most of the time, parties spontaneously comply with them, the question of the consequences of non-compliance are not of a purely theoretical nature. Considering that arbitrators lack coercive powers, the issue of their implementation stays mainly within the sole framework of the arbitration and it is therefore necessary to highlight the procedural and substantive consequences of non-compliance with binding interim measures.

a. Procedural consequence: Drawing adverse inferences

The drafting history of the ICSID Convention suggests that, although there was a lack of consensus as to mentioning the effect or the possibility of damages or penalties for non-compliance, negotiating parties considered that “naturally the Tribunal would normally have to take account of this fact [non-compliance] when it came to make its award.”

\[178\] Contra Brown, supra note 166, at 236 (commenting on the decisions in Casado and Maffezini, this author states that “these decisions should be regarded as incorrect. Whilst international courts arguably possess an inherent power to grant provisional measures that have binding force, this can be displaced by the clear terms of clause contraire, such as that found in Article 47 of the ICSID Convention.


\[180\] Art. 1134 of NAFTA provides that “[a] Tribunal may order an interim measure of protection” but also adds that “[f]or the purposes of this paragraph, an order includes a recommendation.” This suggests the possibility for arbitral tribunal to choose between binding and non-binding interim measures. See also Oellers-Frahm, supra note 57, at 958.

[181] See supra note 101; Yeşilirmak, supra note 6, at 241.

[182] See, e.g., the aforementioned ruling of the arbitral tribunal in Pope & Talbot, Inc. v. Canada, supra note 176.

[Cited in Schreuer, supra note 20, at 761. This element was recalled by the arbitral tribunal in Victor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 24. The first draft of the article of the ICSID Convention on interim measures provided that “[i]f the Tribunal may fix a penalty for failure to comply with provisional measures” but this provision was withdrawn by “nearly unanimous vote” of negotiating parties (cited in Caron, supra note 166, at 511).}
Therefore, and absent “the power to penalize parties,” arbitrals tribunals nevertheless have the possibility to draw adverse inferences from non-compliance, notably on the issues involving the production of evidence.

In *Agip v. Congo*, the arbitral tribunal explicitly indicated that it drew such inferences from the uncooperative behavior of the Government of Congo. While examining the “grievances invok[ed] by Agip and … the assessment of, and provision of reparation for the damage caused to it,” the tribunal noted that it did not “lose sight of the facts … (c) that the Government did not comply with the decision of the Tribunal … as to the measures of preservation and as a consequence Agip was unable to have access to a certain number of documents which could have assisted it in presenting its case.”

The possibility to draw adverse inferences from non-production of evidence is not limited to decisions of arbitral tribunals in the form of interim measures, but exists more explicitly as part of the arbitral tribunal’s decisions based on its general power to summon evidence. Also, Article 34(3) of the ICSID Arbitration Rules provides that “[t]he parties shall cooperate with the Tribunal in the production of the evidence” and adds that the tribunal “shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.” As a power not specifically provided for non-compliance with interim measures, the drawing of adverse inferences can be considered one of the tribunal’s “inherent powers” in relation to its judicial functions of the administration of evidence and determination of the truth. Such a power exists, therefore, in the context of arbitrations other than those conducted under the ICSID Convention.

It is worth mentioning that arbitral practice has defined some criteria and procedural principles circumscribing the ability of tribunals to draw adverse inferences in the context of the production of evidentiary documents: the party requesting adverse inferences must establish that the evidence sought is accessible for the requested party; it must produce all evidence in its possession permitting the corroboration of the inference sought and, at least, prima facie evidence of its claim or defense; there should be a reasonable and consistent link between the evidence sought and the facts in dispute; and the arbitral tribunal should afford the requested party sufficient due process considerations.

The ability of arbitral tribunals to draw adverse inferences constitutes a powerful device for arbitral tribunals to ensure a high level of compliance with their interim protective measures. Arbitrators also have the possibility to indicate to parties what inferences they may draw from a failure to comply, thereby implementing a sort of psychological

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185 Law, Mistele, & Kaöll, supra note 58, at 788.


187 Yeşilirmak, supra note 6, at 242–43.


189 Yeşilirmak, supra note 6, at 242, n. 20.
penalty. Drawing adverse inferences is, however, mainly restricted to matters related to production and preservation of evidence.

b. **Substantive consequence: Compensation for the aggravation of harm**

There are a few examples of non-compliance with interim measures in investment arbitration having substantive consequences. Some theoretical, although essential, considerations must be pointed out.

It has been suggested in the context of international commercial arbitration that arbitrators have the authority to grant damages for non-compliance with interim measures implied from their power to order them. Likewise, some commentators found in the jurisprudence of the I.C.J., notably in the *Fisheries Jurisdiction* case, that "a violation of an interim measure would carry with it the responsibility of reparation." Although international tribunals such as the I.C.J. usually make a note of non-compliance with interim measures in decisions on the merits, and even suggest that a non-compliance amounts per se to the violation of the international obligation, binding interim measures do not create, in our view, new and specific subjective rights to their beneficiary that are distinct from those resulting from its cause of action. The only power of tribunals in this respect is therefore to grant compensation for the aggravation of the harm suffered, if any, resulting from non-compliance with these measures. For instance, in the practice of the Iran–United States Claims Tribunal, non-compliance with an interim measure granted by the arbitral tribunal to stay parallel litigation in domestic courts resulted in the tribunal’s final award declaring “without legal effect” the final decision adopted by domestic courts. No additional responsibility was recognized above the legal neutralization of negative consequences resulting from non-compliance.

Of course, considering the restrictive and exceptional substantive conditions under which arbitral tribunals are entitled to adopt interim protective measures, non-compliance

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190 This was suggested in *Mine v. Guinea*, Decisions of December 4, 1985 (unreported), where the arbitral tribunal noted in its decision on provisional measures that it “will take into account in its award the effects of non-compliance by Mine with its recommendations,” cited in the decision of the Tribunal de Première Instance of Geneva, March 13, 1986, 4 ICSID Rep. 41. See also Schreuer, *supra* note 20, at 41.

191 *Yeşşilirmak*, *supra* note 6, at 243–44.


194 For instance, in *LaGrand* (Germany v. United States of America), *supra* note 138, para. 111, while considering the question “whether the United States has complied with the obligation incumbent upon it as a result of the Order of March 3, 1999,” the Court found “that the United States did not discharge this obligation” (para. 115) and “violated its international legal obligation to comply with the Order” (para. 116). See also para. 5 of the *dispositif* of the same judgment. In the case concerning Armed Activities on the Territory of Congo, the I.C.J. found in the *dispositif* that “the Republic of Uganda did not comply with the Order of the Court on provisional measures of July 1, 2000,” but no mention of the violation of an international obligation was made; Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), *dispositif* para. 7 (Judgment of December 19, 2005), available at <www.icj-cij.org/docket/files/116/10455.pdf>.

195 Santulli, *supra* note 18, at 443.

with such measures is likely to result in the aggravation of the harm suffered by the requesting party. However, non-compliance does not imply *ipso jure* the responsibility of the recalcitrant party. Given the cautious but anticipatory and prospective assessment of one of the parties' behavior in which the granting of provisional measures lies, as well as the potential doubts on the jurisdiction of the tribunal, arbitrators’ determinations are based on hypotheses and it would seem excessive to attach a responsibility to non-compliance regardless of whether or not it has resulted in an additional prejudice.

Having established the extent to which arbitral tribunals adjudicating investment disputes have the power to grant interim measures, it is now necessary to determine the substantive aspects of their implementation.

III. Substantive Aspects of Interim Protective Measures

In practice, a large range of different interim measures have so far been granted by arbitral tribunals. They are related to procedural issues such as the production of evidence; the confidentiality of proceedings; the interruption of parallel proceedings in domestic courts or in another arbitral tribunal; to specific performance such as a suspension of payments, a ban on the transfer of funds outside the host state or on...
the termination of contracts;205 to an interdiction of the seizing or the obtaining of a lien on assets;206 the maintenance of ordinary business operations;207 or, more broadly, a direction not to aggravate the dispute;208 financial guarantees regarding the costs of arbitration; or to the satisfaction of the award.209 This diversity calls, however, for a more precise analysis of the scope of arbitral tribunals’ interim powers and the distinct types of interim measures which should be available under this label, before dealing with the very restrictive substantive conditions under which interim measures may be granted.

A. Scope of arbitral tribunals’ interim protection power

As highlighted above, the power to grant interim measures is, in certain cases, shared between arbitral tribunals and domestic courts. While procedural considerations have shown a *ratione temporis* dimension,210 it should not obscure the potential *ratione materiae* allocation of measures between the two, particularly in ICSID Convention arbitration. This is a necessary preliminary step to distinguish the place of interim protective power among the range of measures arbitral tribunals have the authority to adopt.

1. *Ratione MATERIAE Allocation of Interim Protective Measures between Arbitral Tribunals and Domestic Courts*

a. De facto *ratione materiae* allocation in non-ICSID Convention arbitration

As mentioned above, the main institutional and ad hoc arbitration rules used in international investment arbitration empower both arbitrators and domestic courts to adopt interim measures. Considering the still modest mechanisms for the early granting of interim relief before the appointment of the tribunal,211 domestic courts play a greater role at the pre-arbitral stage, while arbitral tribunals regain the upper hand at the beginning of their proceedings.212

205 Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, supra note 64, para. 79 (provisional measures restraining the Respondent from “unilaterally amending, rescinding, terminating, or repudiating the Participation Contracts or engaging in any other conduct which may directly or indirectly affect or alter the legal situation under the Participation Contracts, as agreed upon by the parties”).

206 Id. para. 2.

207 Id. para. 2.

208 City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, supra note 64, para. 92 (deciding that Ecuador and Petroecuador should refrain from “engaging in, starting or persisting in any other conduct that may directly affect or alter the legal situation”); Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co v. Mongolia, supra note 50, dispositif para. 11 (deciding that “the parties shall refrain … from any action which could lead to further injury and aggravation of the dispute between the parties”).

209 Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co v. Mongolia, supra note 50, dispositif para. 4 (possibility for the claimant and the respondent to use either an escrow account “in an internationally recognized financial or other institution” or the “provision of a bank guarantee”).

210 Supra notes 88–98 and accompanying text.

211 Yeşilirmak, supra note 6, at 118 et seq.

212 This principle of priority is inserted in the ICC Rules according to which “the parties may apply to any competent judicial authority” for interim measures “[b]efore the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter” (art. 23(2)). See also LCIA Rules, art. 25(3).
Besides this _ratione temporis_ distribution, there is no explicit _ratione materiae_ allocation of interim measures in arbitration rules between arbitral tribunals and domestic courts. One may point to the distinction in the UNCITRAL Rules between the power of an arbitral tribunal to take "any interim measures … in respect of the subject-matter of the dispute"\(^{213}\) and the broader reference to "[a] request for interim measures … to a judicial authority,"\(^{214}\) but these textual differences are too minor to infer a _de jure_ allocation. Such allocation, if any, lies therefore in the practical application of interim measures in arbitration, and may be highlighted by interim measures seeking guarantee in the expectation of the future enforcement of the award.

Apart from the specific situation that "arbitrators do not have power … [to] grant attachments or freezing orders that intrinsically require the use of the court’s coercive powers,"\(^{215}\) the granting of a pre-award security is not prohibited by any of the arbitration rules mentioned, and it is sometimes explicitly permitted.\(^{216}\) The relevant question is as to the overall efficiency of requesting such security before the arbitral tribunal. It is obvious that such measures, which are expected to be granted spontaneously in order to prevent the dispersion of assets, are not likely to fulfill this objective if they are granted by an arbitrator, because their enforcement before domestic courts will still be needed if a party is reluctant to provide security. This is, of course, with all the uncertainty weighing on the enforceability of interim protective measures already mentioned.

This suggests a form of natural allocation between arbitral tribunal and domestic courts, the former being entitled to order interim measures in relation to the dispute, the latter being the more efficient forum to provide a guarantee of the enforcement of the future award. This _de facto_ "subsidiarity" governing in practice the relationship between these two forums highlights a distinction, which inherently exists in ICSID Convention arbitration, between interim measures in relation to the dispute, and protecting the "rights" of parties and those in relation to the execution of the award, and protecting the "interests" of parties.

b. **Inherent _ratione materiae_ allocation in ICSID Convention arbitration**

As a "self-contained" regime, ICSID arbitration is disconnected from domestic courts and, unless provided in the _lex arbitralis specialis_, ICSID tribunals have a monopoly in the adoption of interim measures. In addition, instruments governing the arbitration do not impose _ratione materiae_ limitations on a tribunal’s interim relief powers. Indeed, according to Article 47 of ICSID Convention, the tribunal may adopt "any provisional measures." In _Casado_, the tribunal pointed out that "the drafters … decided not to delimit

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\(^{211}\) UNCITRAL Rules, art. 26(1).

\(^{212}\) Id., art. 26(3).

\(^{213}\) Yeşilirmak, supra note 6, at 96. ICC Final Award 7589 of 1994, cited in Yeşilirmak, supra note 6, at 97 ("the opinion of the author relies on an ICC award decided under the former 1988 ICC Arbitration Rules where the tribunal stated that an attachment ‘is one [measure] that the Arbitral Tribunal does not have the power to grant.’ ").

\(^{214}\) See, e.g., LCIA Rules, art. 25(1), (2).
the range of possible measures, given the infinite variety of situations in which such measures can justifiably be invoked."^{217}

This wide power can, however, be restricted by the *lex arbitralis specialis*. Article 39(6) of the ICSID Arbitration Rules allows the parties to request "judicial or other authority to order provisional measures, prior to or after the institution of the proceeding," provided such a possibility is included within their agreement. This is notably the case of NAFTA when, applied in connection with the ICSID Convention, breaches arbitral tribunals' monopoly to adopt interim measures^{218} and, more importantly, removes their authority to "order attachment or enjoin the application of the measure alleged to constitute a breach."^{219} Notably, this restriction was taken into account in *Pope & Talbot* where the arbitral tribunal stated that "it lacks power to grant such relief."^{220}

It is unclear whether or not ICSID tribunals and domestic courts enjoy exactly the same interim powers when recourse to courts has been planned by parties. Whereas Article 39(1) of the ICSID Arbitration Rules refers to "provisional measures for the preservation of its rights," Article 39(6) delimiting domestic courts' authority speaks of "provisional measures … for the preservation of their respective rights and interests." This additional reference to "interests" seems to indicate a distinction between measures related to the dispute and deemed to preserve the "rights" of parties, and measures related to the execution of the award and deemed to preserve the "interests" of parties. Does it mean that, in any case, with or without specific agreement of parties, ICSID tribunals lack the authority to order interim measures for the protection of parties' "interests"?

Some commentators have indeed suggested that a fundamental distinction exists within the category of interim measures between conservatory measures directly in relation to the execution of the award, and other interim measures, such as orders of production or preservation of evidence, or for specific performance.^{221} It has been argued that "in the spirit of the Convention," the latter are the exclusive realm of arbitral tribunals whereas the former should be the province of domestic courts.^{222} In the wake of this discussion, an arguably appealing, but somehow questionable, argument could be made.

First, while Article 39(1) of the ICSID Arbitration Rules recognizes the possibility to request interim measures before arbitral tribunals for the protection of "rights," and Article 39(6) allows the request of interim measures for the protection of "rights and interests" provided there is an agreement, these provisions could be interpreted as implicitly recognizing the power of domestic courts to permanently protect "interests" regardless of an agreement of the parties to do so. In addition, if domestic courts have under the

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217 Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 15.
218 NAFTA, art. 1121(1)(b) and (2)(b), see supra note 83.
219 NAFTA, art. 1134. The 2004 U.S. Model BIT also provides that an arbitral tribunal “may not order attachment” (art. 28(8)).
220 *Pope & Talbot, Inc.* v. Canada, supra note 176. See also *Brown*, supra note 166, at 239 (considering this provision of NAFTA, art. 1134 as a *clause contraire*).
222 Id. at 226–27 ("dans la logique de la Convention, le principe d'exclusivité qui vaut pour les mesures d'administration de la prevue par exemple, qui relevent de la seule compétence du tribunal arbitral, ne s'étend pas aux mesures d'assistance à l'exécution qui demeurent le monopole des juridictions étatiques.").
ICSID Convention the obligation, and therefore the power, to enforce ICSID awards, they should consequently have the parallel power to secure the enforcement of a future award. Such an interpretation\textsuperscript{223} would reflect a kind of inherent and natural allocation of interim measures between the arbitral tribunal and domestic courts, distinguishing two distinct legal spheres: the dispute and the award.

In practice, ICSID tribunals have always abstained from granting pre-award security, such as, for instance, \textit{cautio judicatum solvi}.\textsuperscript{224} The justification of arbitral tribunals on this issue seems, however, inconsistent. In \textit{Atlantic Triton v. Guinea}, the arbitral tribunal refused the parties' request but admitted that "such measures would clearly be within its mandate under Article 47 of the ICSID Convention."\textsuperscript{225} On the contrary, while recognizing "the very broad and varied nature of the possible provisional measures available within the ICSID regime,"\textsuperscript{226} the tribunal in \textit{Casado v. Chile} pointed out that "the absence of any text on the guaranteeing of the payment of costs . . . seems to entail a certain presumption that such a measure is not authorized or included."\textsuperscript{227} If the \textit{Casado} tribunal attempted to reconcile this position with the \textit{Atlantic Triton} ruling considering this measure admissible "in certain circumstances,"\textsuperscript{228} but not as "an ordinary and general measure,"\textsuperscript{229} this case demonstrated how uncomfortable ICSID tribunals are in dealing with such requests, preferring to leave the unrewarding work to domestic courts. In \textit{Tanesco v. IPTL}, the tribunal considered in a much more clear-cut opinion that "there is some precedent for the view that conservatory or provisional measures under Rule 39 should not be recommended in order, in effect, to give security for the claim."\textsuperscript{230} The de facto unavailability of pre-award security tends to confirm the unstated aforementioned allocation of interim powers between arbitral tribunals and domestic courts.\textsuperscript{231}

\textsuperscript{223} Which would necessarily constitute a qualification in the view of our previous discussion on the effect of a combination of a "fork-in-the-road" clause with a request for interim measures before domestic courts, see supra notes 84–87 and accompanying text; to the extent, of course, that the request deals only with the protection of the parties' "interests" and does not infringe the arbitral tribunal's exclusivity as to the protection of parties' "rights."

\textsuperscript{224} Similar measures are, however, possible at the post-award stage when an ad hoc committee considers a stay of enforcement of the award in case of an annulment procedure. The legal grounds are different from those on interim measures. A recent example may be found in the recent decision in Sempra Energy Int'l v. Argentine Republic, ICSID Case No ARB/02/16, Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, March 5, 2009, para. 117, where the ad hoc committee granted Argentina the continuation of the stay of enforcement of the award if it placed in escrow an amount of U.S.$75 million; available at <http://ita.law.uvic.ca/documents/Sempra-Stay.pdf>.

\textsuperscript{225} Quoted in Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 88.

\textsuperscript{226} Id. para. 86.

\textsuperscript{227} Id. para. 88.

\textsuperscript{228} Id. para. 86.

\textsuperscript{229} Id. para. 86.

\textsuperscript{230} Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., supra note 29, para. 14.

\textsuperscript{231} Paul D. Friedland, \textit{Provisional Measures and ICSID Arbitration}, 2 Arb. Int'l 335, 348 (1986) (commenting on the decision in \textit{Atlantic Triton} where the tribunal refused to grant pre-award security, the author considers that "[t]his result is undoubtedly appropriate; indeed, it is difficult to imagine a standard for the award of pre-judgment security that would be workable in ICSID arbitration. Attachments to secure ultimate recovery are typically ordered by municipal courts only when the moving party demonstrates (i) a true risk that the award may prove unenforceable, and (ii) a likelihood of success on the merits of the dispute. In the ICSID context, the first consideration would rarely be applicable where a government was the respondent, and the second requirement would be impracticable regardless of which party was the respondent because the international character and complexity of ICSID arbitrations usually prevent any reasonable snap judgment as to which party will prevail").
The question as to whether such allocation is deeply rooted in the ICSID Convention and therefore permits pre-award security before domestic courts, absent explicit choice of parties in accordance with Article 39(6), is somehow much more debatable. This, of course, would depend on the attitude of domestic courts regarding such requests and arbitral tribunals’ inclination potentially to request parties to stay domestic proceedings. The latter parameter is, however, theoretical as pre-award securities are typically sought before the appointment of the arbitral tribunal. The former may be illustrated in the recent and still pending ICSID case, ETI v. Bolivia.232

ETI, a Dutch corporation holding shares in Entel since the privatization of this Bolivian telecommunications company in 1995, initiated arbitral proceedings against Bolivia following the renationalization of this entity by filing a request with the ICSID Secretary General in October 2007. The arbitral tribunal was then constituted in October 2008. Just after the Bolivian police took control of Entel’s offices on May 1, 2008, ETI obtained an ex parte order on May 5, 2008 in a New York federal district court denying its motion to attach Bolivia’s property. However, its application with respect to Entel’s property located in New York resulted eventually in a U.S.$36 million attachment.233 On July 30, 2008, ETI’s motion to confirm the attachment was denied and the former ex parte order was vacated.234 At the same time, ETI, on May 7, 2008, brought a similar action before the English courts in order to prevent the risk of dissipation of Bolivia’s and Entel’s assets located in London. Likewise, freezing orders that were sought by ETI were eventually set aside by the Court of Appeal on July 28, 2008.235

If the New York proceedings are not very instructive as to the aforementioned issue,236 the British decision contains several developments on the impact of Article 39(6) of the ICSID Arbitration Rules in domestic courts.237 Although “[p]rovisional relief by a national court pending any decision by the tribunal once constituted … supports rather than undermines an ICSID arbitration,”238 the Court of Appeal underlined “the effect of Rule 39(6) … that provisional measures may be sought only from the ICSID tribunal itself, and not from national courts, unless the parties agree otherwise.”239 The Court circumvented the argument that the ICSID Convention is not incorporated in U.K. law and

233 The facts are in the decision referred to infra note 234.
236 The district court indeed stated that “it is not necessary to address parties’ arguments as to whether the ICSID Convention prevents the Court from ordering the prejudgment attachment of Entel’s New York bank accounts,” supra note 234.
237 All the more precious in that it was authored by Lawrence Collins, L.J., an authoritative scholar in the field of interim measures in international litigation, see supra note 1.
239 Id., para. 108.
relied on the consent of parties to the arbitration under the ICSID Convention and Arbitration Rules, concluding that:

Although there may be exceptional circumstances which might justify a national court in disregarding the agreement of the parties, in my judgment that agreement pursuant to the Convention and the Rules would of itself normally make an interim order … inexpedient, and also make it unnecessary to consider all the other circumstances.240

English courts have therefore, admittedly indirectly, implemented the provisions of Article 39(6) and recognized their unavailability for pre-award security absent agreement of the parties. In addition, it would be an interesting question for the ICSID arbitral tribunal to consider if such a request for interim measures limits its jurisdiction in the future. This decision has also highlighted how interim measures sought in domestic courts can be exploited to force the most advantageous settlement of the case. As such, the English Court of Appeal introduced its decision by pointing out that "[i]t concerns an attempt by ETI to use national courts to secure its position in an international arbitration arising out of the nationalisation of its interests in Bolivia."241

Such exploitation has also been underlined in the case involving Exxon Mobil against Petróleos de Venezuela, a Venezuelan state-owned oil company. Within the framework of the initiation of an ICC arbitration, Mobil sought and obtained from the English courts a "freezing injunction" with an unprecedented value up to U.S.$12 billion in support of a potential arbitral award.242 The order was eventually lifted more than one month later.243 Such requests may have harmful effects for those under the injunctions. Indeed, these corporations lose the free disposal of their assets, thereby significantly disturbing their economic activity. Admittedly, those interim measures are in practice less requested to secure the execution of the award than to increase the bargaining power of the claimant seeking the most favorable settlement of its case. It has been argued that what may constitute "the nuclear weapon in the litigation armoury … had fallen into the wrong hands."244 Such excessive requests enhance the risk of escalation of the dispute and undermine, more than assist, the arbitration. Venezuelan officials described Mobil’s initiatives as a form of “judicial” and “legal terrorism.”245

Such measures are all the more difficult to control when they originate from domestic courts that may have different standards in dealing with interim measures in aid of arbitration. They may not only undermine the dispute itself, they can also more broadly compromise or even endanger the sustainability of, and the confidence in, international investment dispute resolution mechanisms. It is not a coincidence that we have witnessed

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240 Id. para. 109.
241 Id. para. 1.
244 Fordham, supra note 242, at 1.
in recent years a growing mistrust, manifesting itself in the withdrawal of some countries from international investment arbitration mechanisms, notably from ICSID.\footnote{For instance, Bolivia’s withdrawal from the ICSID Convention in 2007.} Ironically, it appears that the ICSID system is certainly more protective of sovereign interests, since domestic courts’ interim measures such as pre-award guarantees may only be ordered if the state expressly consented, whereas judicial interim power is the default rule in other arbitration mechanisms.

Beyond these risks weighing on arbitration mechanisms, it has been shown that, when granting interim relief, arbitral tribunals focus mainly on the preservation of parties’ rights and either tend to evade the issue of the award’s future enforcement, or are not considered as a natural forum to seek such relief. This leads us to try to determine if, among all measures taken by arbitral tribunals and regardless of their label, there is a genuine category of arbitral interim protective measures.

2. Allocation of Interim Protective Measures within Arbitral Tribunals’ Powers

Before considering whether a category of genuine interim protective measures exists, it seems necessary to minimize the differences in the wording of arbitration rules. For instance, both the ICSID Arbitration Rules and Additional Facility Rules refer to the “measures for the preservation of its [a party’s] rights,”\footnote{ICSID Rules, art. 39(1); ICSID Additional Facility Rules, art. 46(1). The ICSID Convention, from which the ICSID Arbitration Rules derive, mentions the “measures which should be taken to preserve the respective rights of either party” (art. 47).} whereas the UNCITRAL Rules mention “measures … in respect of the subject-matter of the dispute.”\footnote{UNCITRAL Rules, art. 26(1). ICC Rules are even broader and refer to “interim or conservatory measures it [the tribunal] deems appropriate” (art. 23(1)). SCC Rules simply refer to “a specific performance by the opposing party for the purpose of securing the claim” (art. 31(1)).} In \textit{Sergei Paushok v. Mongolia}, the tribunal considered that the UNCITRAL Rules applicable in this arbitration left “wider discretion to the Tribunal in the awarding of provisional measures.”\footnote{“The Tribunal notes that the wording of Article 26(1) of the UNCITRAL Rules is not the same as under the ICSID Convention; it leaves wider discretion to the Tribunal in the awarding of provisional measures (‘any interim measures it deems necessary in respect of the subject-matter of the dispute’) than under Article 47 of the ICSID Rules (‘provisional measures for the preservation of its rights’).” Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, supra note 50, para. 36.} In our view, these dissimilarities are ultimately insignificant.

Indeed, none of these arbitration rules contains an explicit \textit{clause contraire} suggesting that certain arbitral interim measures are expressly prohibited. Taking into account the inherent powers of every tribunal, arbitrators enjoy a great discretion in practice. In \textit{Casado v. Chile}, taking into account the fact that “[t]he drafters of the ICSID Convention in effect decided not to delimit the range of possible measures, given the infinite variety of situations in which such measures can justifiably be invoked”\footnote{Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 15.} and that the provisions of Article 47 of the Convention and 39 of the Arbitration Rules “contain no indication or exact statement,” the arbitral tribunal
recognized that interim measures “can be extremely diverse and are left to the appreciation of each Arbitral Tribunal.”

Considering this broad discretion, arbitral tribunals usually granted, or stated they had the power to grant, the same kinds of interim measures (subject to the conditions mentioned below and to the extent they have a connection with the dispute), such as the preservation of evidence, order of specific performance or a stay of proceedings in domestic courts. Within this framework, a specific issue as to the scope of arbitral interim powers deserves to be mentioned.

It is noteworthy that arbitral tribunals have clearly mentioned that the scope of interim measures is distinct from the general scope of the tribunals’ administrative powers. This has been highlighted in Biwater v. Tanzania, where the claimant’s request for production of documents was labeled as “interim” under Article 47 although it fell within the scope of Article 43 of the ICSID Convention which provides that “the Tribunal may, if it deems it necessary at any stage of the proceedings, call upon the parties to produce documents or other evidence.” The arbitral tribunal refused this request based on Article 47 since “production is not usually considered within the ambit of such interim relief,” and made it clear that “Article 47 is designed to ensure that the Arbitral Tribunal can properly discharge its mandate, whilst Article 43 is one element in a range of provisions that structures how the mandate is to be discharged.”

Interim protective measures therefore belong to a category that cannot overlap other general administrative powers of the tribunal to conduct the proceedings. Their main specificity lies in the very restrictive conditions under which they are granted.

B. CONDITIONS FOR THE GRANTING OF INTERIM PROTECTIVE MEASURES

Arbitration rules are usually very broadly drafted and do not provide strong guidance to the arbitrators as to when interim measures may be granted. For instance, the ICSID Rules refer both to the “preservation” of a party’s rights and the “circumstances” that

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252 Id. See also id. para. 83, where the tribunal underlined the “very broad and varied nature of the possible provisional measures available within the ICSID regime and … the willingness of the framers of the applicable texts to forswear a precise list of the measures available to the Tribunal.”

253 For an overview of these measures, see Yeşilkırma, supra note 6, at 204–319.

254 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (No. 1), supra note 152, para. 84 (“It is uncontroversial that the Arbitral Tribunal’s powers under Article 47 include the power to recommend the preservation of evidence, including documents. This is one of the most common forms of interim relief.”).

255 Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., supra note 29, para. 16 (“We do not go so far as to conclude that ‘provisional measures’ under Rule 39 can never include recommending the performance of a contract in whole or in part.”).

256 Zhinvali Development Ltd. v. Republic of Georgia, supra note 150, at 18, para. 45, where the arbitral tribunal recommended “that the Georgia court stay and suspend its proceedings insofar as any issues pending before the Tribunal were concerned.”

257 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (No. 1), supra note 152, para. 100.

require such measures, whereas the UNCITRAL Rules simply mention measures that the arbitral tribunal “deems necessary in respect of the subject-matter of the dispute.” In practice, arbitral tribunals relying on the jurisprudence of other tribunals have construed and developed a common set of requirements that need to be met in order to grant an interim protective measure. This is true regardless of their textual bases in arbitration rules. In Sergei Paushok v. Mongolia, the arbitral tribunal deciding on the interim measures (substantially relying on the previous work of an author) pointed out that:

It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures . . . (1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality.

These sometimes overlapping conditions may, however, be considered separately as two layers of conditions distinct in nature. First, because the fundamental function of interim measures is to protect the rights of parties pending arbitration, the tribunal needs to assess the “protectability” of these rights, that is to say it needs to carry out an overall assessment of the claim, inevitably conducted prima facie considering the necessity to decide promptly. Secondly, tribunals must assess how the circumstances may affect a party’s right and determine whether or not such circumstances require an appropriate interim protection pending the arbitration.

1. **Prima Facie Assessment of the Claim: The “Protectability” of Rights**

Requests for interim measures can be filed at any stage of the proceedings, therefore “before the Tribunal has been able to rule on all the objections to its jurisdiction or on the admissibility of the claim on the merits.” In this situation, arbitrators need to find a right balance between two opposite risks: imposing a measure on a party and eventually finding that they lack the jurisdiction to do so, or waiting for a preliminary ruling on jurisdiction but taking the risk of jeopardizing the final decision. Tribunals have therefore construed a two-prong test assessing the prima facie jurisdiction of the tribunal to hear the claim and the prima facie admissibility of the case.

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259 ICSID Rules, art. 39(1): “a party may request . . . provisional measures for the preservation of its rights . . . The request shall specify . . . the circumstances that require such measures.” See also ICSID Convention, art. 4, referring to both “rights” and “circumstances.” The ICSID Additional Facility Rules refer only to the “preservation of rights” (art. 46(1)).

260 UNCITRAL Rules, art. 26(1). In identical terms, the ICC Rules only mention measures that the tribunal “deems appropriate” (art. 23(1)).

261 Yeşilirmak, supra note 6, at 175 (“the collective requirements to grant provisional measures are: (1) prima facie establishment of jurisdiction; (2) prima facie establishment of case; (3) urgency; (4) imminent danger, serious or substantial prejudice if the measure requested is not granted; and (5) proportionality.”). The tribunal in Sergei Paushok v. Mongolia did not quote this previous work.

262 Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, supra note 50, para. 45.

263 Victor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 5 (original emphasis).

264 Oellers-Frahm, supra note 57, at 953. See also Victor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 6.
a. **Prima facie jurisdiction**

The necessity of prima facie jurisdiction to order interim measures has been firmly established by the I.C.J. since the *Icelandic Fisheries* cases, where it found sufficient a “provision in an instrument emanating from both Parties to the dispute [appearing], prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.” 265 This requirement, reaffirmed by the I.C.J. in *Military and Paramilitary Activities in and Against Nicaragua*, 266 has since been adopted by the Iran–United States Claims Tribunal, 267 ICSID, 268 and UNCITRAL 269 tribunals, and more broadly in the context of international commercial arbitration. 270

This prima facie requirement is not difficult to meet in investment arbitrations, as a clear basis for jurisdiction is likely to be found in investment treaties or arbitration agreements. 271 The sole presence of one of these instruments apparently applicable between the claimant and the respondent, and referring to the arbitration mechanism in question, constitutes a sufficient prima facie basis. The arbitral tribunal disregards at this stage more complex issues, such as the requirement of a prior negotiation period, 272 that will be considered exhaustively at the jurisdictional phase of the proceedings. It must be stressed that the recognition of prima facie jurisdiction by the arbitral tribunal will not prejudge the final determination of the tribunal on its jurisdiction. 273

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266 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1984 I.C.J. 169, 179, para. 24 (Order of May 10) (Request for the Indication of Provisional Measures) (“Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to 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 founded.”).

267 See *Brower & Brueschke*, supra note 173, at 218–22; *Caron*, note 166, at 535–36.

268 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, supra note 51, paras. 8–10 (relying on the *Fisheries* case); *Occidental Petroleum Corp. and Occidental Exploration & Production Co. v. Ecuador*, supra note 155, para. 55; *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleo del Ecuador*, supra note 64, para. 50. See also *Yaung Chi Oo Trading Ltd. v. Government of the Union of Myanmar*, supra note 46, paras. 47–54 (relying on the *Nicaragua* case).

269 *Sergei Paoshok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia*, supra note 50, paras. 175–76.

270 *Wycliffe*, supra note 6, at 175–76.

271 *David D. Caron et al., The UNCITRAL Arbitration Rules: A Commentary* 536 (2006) (pointing out about UNCITRAL arbitration that, “with respect to interim measures, the jurisdictional issue is not likely to be as important for ad hoc arbitration, which typically deals with tailor-made arbitration clauses or agreements, as for the World Court or for a large treaty-based settlement process.”).

272 *Sergei Paoshok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia*, supra note 50, para. 52.

273 In the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 1951 I.C.J. 89, 93 (Order of July 5) (Request for the Indication of Interim Measures of Protection), the I.C.J. recognized that “the indication of such measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction.” See also *Tokios Tokelés v. Ukraine* (No. 1), supra note 136, para. 6 (“the ‘recommendation’ of provisional measures does not in any way prejudge 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.”).
In the ICSID system, the establishment of this *prima facie* jurisdiction can be facilitated by the Secretary-General’s screening test at the registration of the request. Indeed, the ICSID Convention provides that the Secretary-General may refuse to register the request if “he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.”274 This purely administrative Secretary-General’s decision cannot bind *ipso jure* the future determination of the tribunal on its *prima facie* jurisdiction275 but, in practice, “it provides a useful basis for its power to recommend provisional measures.”276

b. *Prima facie case (fumus boni juris)*

According to one author, the “basic requirement” of a *prima facie* establishment of the case “is to satisfy the tribunal that the moving party has, with reasonable probability a case or, alternatively, to determine that the claim is not frivolous or vexatious.”277 This criterion, also known as *fumus boni juris*, is one of the few where international arbitral tribunals have departed from the case law of the I.C.J., which does not take this condition into consideration.278

Arbitral decisions do not contain much guidance on this principle.279 The recent decision in *Sergei Paushok v. Mongolia* seems to establish no more than an obviousness test by considering that “[a]t this stage, 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 favor of Claimants.”280 Therefore, and contrary to domestic courts, the tribunal does not have to assess the possibility of success on the underlying merits when it grants interim measures.281 Besides, it underlines that implementing a stricter test “would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.”282

Actually, this type of judicial review is of the same slight intensity as the one required to pass the filter of preliminary objections in the ICSID arbitration mechanism. Indeed,
according to Article 41(6) of the ICSID Arbitration Rules, the arbitral tribunal may render an award even if it considers “claims are manifestly without legal merit.” At this specific stage, the tribunal must indeed decide the issue of jurisdiction but has only to consider prima facie the mere acceptability of the claim (albeit the intensity of conclusiveness required may vary in practice depending on common law and civil law approaches so as to refer to fumus boni juris as well as fumus non mali juris. Consequently, because this prima facie test is implemented at the preliminary objections or interim measures stages the tribunal should not prejudge the decision on the merits.

Having found a potential basis for jurisdiction and a reasonable substantive claim, the arbitral tribunal finishes this prima facie assessment of the claim conducted regardless of the contents of the request for interim measures, and switches its focus to the substantive conditions under which such measures may be granted.

2. Substantive Conditions as to Interim Protection

Several ICSID and UNCITRAL tribunals pointed out that interim measures are “extraordinary” and should not be granted “lightly.” Despite a certain convergence regarding the functions these measures pursue, the tribunals’ arguments sometimes lack clarity and consistency as to the substantive conditions under which interim protection may be granted. A distinction is to be made between the exceptional conditions determining the necessity for the arbitral tribunal to protect the parties’ rights pending arbitration and the conditions that the measures sought must satisfy in relation to the necessity of protection.

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283 A similar test has been inserted in the 2004 U.S. Model BIT, see art. 28(4)(c).
284 See discussions in Veijo Heiskanen, Frivolous’ Claims, 2 Transnat’l Disp. Mgmt 1, 1–10 (No. 5, 2005).
285 This variable intensity has also been highlighted in the separate opinion of Judge Abraham to the I.C.J. order in the Pulp Mills on the River Uruguay case, where Judge Abraham underlined that: “[I]l en peut exiger du demandeur qu’il établige prima facie le bien-fondé de ses prétentions sur le fond du différend … C’est une approche plutôt exigeante … On peut aussi se satisfaire du constat que le droit revendiqué n’est pas manifestement inexistant, et qu’il n’est pas manifestement exclu … Le critère du fumus boni juris cède alors la place à celui du fumus non mali juris. Mais ce sont là, à vrai dire, des nuances, et il existe toute une variété de degrés intermédiaires … L’essentiel, à mes yeux, est que le juge soit convaincu d’être en présence d’une argumentation qui, sur le fond, présente un caractère suffisamment sérieux” (Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Order of July 13, 2006) (Requests for the Indication of Provisional Measures), para. 10 (Separate Opinion of Judge Abraham), available at <www.icj-cij.org/docket/files/135/11240.pdf>).
286 Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, supra note 50, para. 56 (“[T]he Tribunal wishes to stress that in no way does that ruling imply that the Tribunal would reach a similar conclusion on the merits of the case.”); Brewster Gauff (No. 3), supra note 152, para. 165 (“The Arbitral Tribunal is obviously not yet in a position to form any views whatsoever on the merits of the parties’ cases, and it has been careful not to prejudge any issues of fact or law in the formulation of this procedural order.”); Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., supra note 29, para. 6 (“[W]e observe that both Parties concentrated a great deal of attention in their written and oral submissions on the ‘merits’ of the dispute … we think it neither appropriate nor indeed possible for us at this stage to form or express any concluded view on the merits.”).
287 Maffezini v. Spain, supra note 103, para. 10; Plama Consortium Ltd. v Republic of Bulgaria, supra note 151, para. 38; OPC v. Ecuador, supra note 155, para. 59; Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co v. Mongolia, supra note 50, para. 39; Phoenix v. Czech Republic, supra note 258, para. 33.
a. Necessity to protect the parties’ rights pending arbitration

Arbitration rules do not provide much guidance as to the assessment of the necessity to protect parties’ rights during the course of arbitration. In our view, such assessment should follow three logical steps: (i) it is first necessary to underline the characteristics of the rights to be protected, then (ii) to determine the circumstances endangering the protection of these rights, and, finally, (iii) to identify the circumstances justifying an early protection. These three conditions are, of course, cumulative.

(i) Conditions as to the rights to be protected (rights entitled to protection). As pointed out by one author, the ICSID Convention and Arbitration Rules “do not specify which of the parties’ rights might deserve protection by way of provisional measures.” Other arbitration rules are equally silent on this issue. A study of arbitral precedents and commentaries suggest that two conditions must be fulfilled: first, rights to be protected must reasonably exist and, secondly, they must be connected to the main claim.

It is not clear if the test related to the parties’ rights to be protected overlaps the condition of the prima facie establishment of the case. In Maffezini v. Spain, the tribunal laconically stated “that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.” This position has been moderated by subsequent decisions, and notably in Casado v. Chile which considered that the aforementioned Maffezini decision “contains … some statements that may be susceptible to misunderstanding.” Underlining that “[i]t is clearly not a question for the Tribunal of prejudging in any way … its eventual decision on the substance,” the decision pointed out that:

It [the tribunal] must therefore reason, at this preliminary stage of the arbitration process, on the basis not of “assumptions” but of “hypotheses,” in particular that by which it may come to recognize its own jurisdiction on the substance of the case, and in such a case, the hypothesis whereby the rights that the decision may recognize for one or the other of the parties in question could be placed in danger or compromised by the absence of provisional measures.

This view has been confirmed and clarified in OPC v. Ecuador, where the arbitral tribunal stressed that “the right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact” and that the claimant “need only...
show that they allege the kind of claims that—if ultimately proven—would entitle claimants to substantial relief.\textsuperscript{296} The prima facie test seems therefore to be sufficient in order to recognize the possibility to protect rights that are included in the claim, a situation that is involved in most of the requests for interim measures.

It is nonetheless necessary to consider the protection of rights other than those raised by the claimant in its substantive claim. The standard adopted by the I.C.J. lies in the existence of a strict relationship between the rights to be protected and the main claim.\textsuperscript{297} Arbitral tribunals have relied on this standard, such as in \textit{Plama v. Bulgaria}, where arbitrators considered that “the rights to be preserved by provisional measures are circumscribed by the requesting party’s claims and requests for relief … [and] must be related to the specific disputes in arbitration.”\textsuperscript{298} This standard enables tribunals to extend their interim power and thereby take into consideration substantive as well procedural rights having a connection with the rights at stake, such as, for the latter category, the preservation of evidence,\textsuperscript{299} but interim protection cannot be granted so as to protect the rights of third parties such as subsidiaries.\textsuperscript{300} To corroborate the previous analysis on the allocation of interim power between arbitral tribunals and domestic courts, the lack of relationship between the frustration of the award and the main claim could be viewed as one of the reasons why arbitral tribunals have been reluctant to grant pre-award security. This is particularly so considering that the protection request focuses mainly on the outcome of the merits rather than the rights eventually to be recognized by the tribunal.\textsuperscript{301}

(ii) \textit{Circumstances justifying protection (causality and necessity)}.

The tribunal must not only recognize that a certain party’s right included in or related to the main claim is at stake, but must also demonstrate that circumstances are likely to cause a violation or an aggravation of the violation of rights entitled to protection. The tribunal must therefore carry out a prospective analysis, requiring “a degree of speculation,”\textsuperscript{302} in order to determine if certain circumstances are, first, likely to occur in the future and, secondly, likely to affect the rights deserving protection. If the first part of the test is purely factual, the second is subject to debate.

International courts and arbitral tribunals have often underlined the necessity to demonstrate an “irreparable harm” or “irreparable prejudice.”\textsuperscript{303} However, as pointed out by one author, “the terms of ‘grave’ or ‘substantive’ might be more appropriate than ‘irreparable.’”\textsuperscript{304} Indeed, the idea underlying the term “irreparable” suggests that the rights deserving protection would not even be compensable in case of violation. It is certain that some kinds of reparations are more adequate than others, but all harm could

\begin{itemize}
  \item \textsuperscript{296} \textit{Id.} para. 63.
  \item \textsuperscript{297} For an overview of the I.C.J. case law on this issue, see Oellers-Frahm, supra note 57, at 938–39; Merrills, supra note 266, at 100.
  \item \textsuperscript{298} Plama Consortium Ltd. v. Republic of Bulgaria, supra note 151, para. 40.
  \item \textsuperscript{299} Biwater Gauff v. Tanzania, Procedural Order No. 1, supra note 152, paras. 84–88.
  \item \textsuperscript{300} EnCana Corp. v. Republic of Ecuador, supra note 37, para. 17.
  \item \textsuperscript{301} Schreuer, supra note 20, at 776–77.
  \item \textsuperscript{302} Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., supra note 29, para. 14.
  \item \textsuperscript{303} For the I.C.J., see Oellers-Frahm, supra note 57, at 939–40.
  \item \textsuperscript{304} Caron et al., supra note 271, at 537.
\end{itemize}
be considered as compensable eventually. Additionally, the tribunal pointed out in Sergei Paushok v. Mongolia that "[t]he possibility of monetary compensation does not necessarily eliminate the possible need for interim measures."\(^{305}\) Therefore, as underlined in Biwater v. Tanzania, the standard is met when there "exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some form of control."\(^{306}\)

Some tribunals have applied a stricter test when the claimants’ posture consisted essentially in monetary damages. In Plama v. Bulgaria, the tribunal pointed out that "harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy claimant seeks."\(^{307}\) Likewise, in OPC v. Ecuador, the arbitral tribunal considered that interim relief was not available, as the claimant’s request "is not to avoid aggravation of the dispute per se, but rather aggravation of the monetary damages resulting from an already existing dispute."\(^{308}\)

In our view, these positions are questionable. While it seems inappropriate to grant monetary damages reflecting the anticipated aggravation of the dispute as an interim protection, reparation in international investment disputes often results in monetary compensation, and it should not prevent the granting of measures, such as specific performance, deemed to lessen the final amount of damages. The arguments of the tribunals in Plama and OPC should have been placed on the ground of the availability of the measure rather than denying that the circumstances were likely to cause an aggravation of the prejudice.

(iii) Circumstances justifying the interim protection (urgency). The risk of prejudice to parties’ rights deserving protection has not only to be substantive, grave, or sufficient, it has also to be imminent.\(^{309}\) Urgency is indeed the decisive factor justifying an upheaval of the arbitration process and "acceleration of these requests"\(^{310}\) in order to decide them promptly.\(^{311}\)

Urgency is, of course, a factual determination and arbitral tribunals enjoy great latitude and "broad discretion"\(^{312}\) while considering these criterion. Arbitral decisions tend to converge toward an objective factual analysis and one tribunal stated "the standard to be applied is one of reasonableness."\(^{313}\) The test is therefore similar to the one applied by the I.C.J. according to which "there is urgency in the sense that action prejudicial to

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305 Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, supra note 50, para. 68.
306 Biwater Gauff v. Tanzania, Procedural Order No. 3, supra note 152, paras. 146.
307 Plama Consortium Ltd. v. Republic of Bulgaria, supra note 151, para. 46.
308 OPC v. Ecuador, supra note 155, para. 98.
309 Although it has no effect de plano on investment arbitration frameworks, it is noteworthy to mention that urgency is no longer a separate condition under the new UNCITRAL Model Law (supra note 34). Art. 17(a)(1) indeed provides that "[t]he party requesting an interim measure … shall satisfy the arbitral tribunal that (a) [h]arm 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."
310 Biwater Gauff v. Tanzania (No. 1), supra note 152, para. 109.
311 Víctor Pey Casado and President Allende Foundation v. Republic of Chile, supra note 51, para. 5.
313 Railroad Development Corp. v. Republic of Guatemala, supra note 15, para. 34.
the rights of either party is likely to be taken before such final decision is given."\textsuperscript{314} A certain degree of certainty or likelihood is therefore expected by arbitrators, such as in \textit{OPC v. Ecuador}, where the tribunal rejected the request since in its view "the claimants are seeking a provisional measure in order to prevent an action which they are not even sure is being planned."\textsuperscript{315}

b. \textit{Appropriateness of the protective measure sought}

Since it has been established that an imminent danger is likely to substantially prejudice parties’ rights, arbitral tribunals are entitled to adopt an interim measure of protection. However, their leeway in this field is limited in two ways: the measure planned must be available and then proportional, reflecting the principles of limitations guiding the restitution of state responsibility in international law.

(i) \textit{Availability of the measure}.

Except in the very specific cases where the measure sought is expressly prohibited by the lex arbitralis specialis,\textsuperscript{316} the scope of measures available for arbitrators is limited by the scope of measures they have the authority to grant on the merits. This element plays a significant role in international investment arbitration since the remedies that could be granted against a sovereign state are limited in nature.

This question has been dealt with at length in \textit{OPC v. Ecuador}, where the issue at stake was the possibility to grant specific performance against a state by way of interim relief. Relying on a long-standing jurisprudence on expropriation, the tribunal considered that "[i]t is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible."\textsuperscript{317} Hence, interim measures consisting of a \textit{restitutio in integrum} are deemed to infringe rights of host states stemming from their permanent sovereignty over their natural resources. Considering that there is no arguable "right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign state,"\textsuperscript{318} the arbitral tribunal refused to grant a measure that would not have been available on the merits. The solution would be identical if the measure sought would compel the state to modify its regulatory framework.\textsuperscript{319}

(ii) \textit{Proportionality of the measure}.

According to the arbitrators in \textit{Sergei Paushok v. Mongolia}, the tribunal "is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties."\textsuperscript{320} Interestingly, some arbitrators have already relied

\textsuperscript{314} Passage through the Great Belt (Finland v. Denmark), 1991 I.C.J. 12, 17, para. 23 (Order of July 29) (Request for the Indication of Provisional Measures).

\textsuperscript{315}\textit{OPC v. Ecuador, supra} note 155, para. 89.


\textsuperscript{317} \textit{OPC v. Ecuador, supra} note 155, para. 179.

\textsuperscript{318} Id. para. 86.

\textsuperscript{319} Id. para. 81.

\textsuperscript{320} \textit{Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, supra} note 50, para. 79.
on the principles of state responsibility in public international law to justify the recourse to the principle of proportionality while considering interim relief.

In OPC v. Ecuador,321 mention was made of Article 35 of the ILC Articles on State Responsibility322 providing that “[a] State responsible for an internationally wrongful act is under an obligation to make restitution … provided and to the extent that restitution … (b) [d]oes not involve a burden out of proportion to the benefits deriving from restitution instead of compensation.” This parallel seems perfectly logical, as interim relief and reparation both seek the same objective of protection of rights, and it would be inconsistent to grant an interim measure that would have been disproportionate, therefore breaching the principles of reparation in state responsibility.

This limitation justifies the possibility for the arbitrator to decide interim relief not only *proprio mutuo*, but also *ultra petita*.323 Indeed, parties may have a penchant for exaggerating the relief sought, file too general interim requests,324 and tribunals have the authority to adapt these requests to what is strictly necessary to “prevent the erosion of rights pending final resolution of the dispute.”325 An example can be found in Sergei Paushok v. Mongolia, where the arbitral tribunal, considering that “different measures with equivalent results can also be considered,” rejected the specific measure sought by the requesting party and retained another one “having the same effect.”326 Likewise, it is obvious that interim measures “are not deemed to give to the party requesting them more rights than it ever possessed and has title to claim.”327

### IV. Conclusion

Putting aside the contingent shortcomings in the legal reasoning and the lack of clarity of some arbitral interim decisions, an analysis of interim protection in international investment arbitration has demonstrated a great convergence in the practice of arbitral tribunals. This is true despite textual differences in rules governing the conduct of proceedings, mostly between the ICSID Convention and other arbitral mechanisms. While this could suggest the emergence of a distinct regime, the recurrent reliance by arbitrators on the jurisprudence of international courts and tribunals suggests a penchant and a tendency to bind themselves more to the public international law sphere than to a transnational regime of international commercial arbitration. Apart from this, interim protection is an essential function of adjudication that actually goes beyond the written

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321 OPC v. Ecuador, supra note 155, para. 82.
323 Supra notes 58–62.
324 Phoenix v. Czech Republic, *supra* note 258, para. 43 (“The Tribunal does not see what right of the Claimant such a vague and general request is deemed to protect. It should be emphasized that this last request is an application for disclosure of unspecified evidence rather than a proper request for provisional measures. This seems to be analogous to what is sometimes called a ‘fishing expedition.’”).
325 Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd., *supra* note 29, para. 12.
rules deemed to govern the arbitration process and highlights the inherent part of *imperium* every tribunal enjoys, be it a domestic, interstate, or arbitral body.

However, the *imperium* of arbitral tribunals is far from being identical to that of national courts. Lacking the coercive powers of the latter, arbitrators should exclusively focus on their mission of adjudication, and the scope of their interim powers should reflect this genuine *jurisdictio* function. In practice, tribunals arbitrating investment disputes have been reluctant to grant interim measures which guarantee the execution of the award, highlighting the profound discontinuity between arbitration and litigation. The recourse to domestic courts remains a core issue in international investment arbitration, where a significant distinction between ICSID and non-ICSID arbitration appears. Indeed, while the possibility to request interim relief before domestic courts is the default rule for the latter, it requires an opt-in process for the former; therefore, non-ICSID arbitral frameworks leave greater room for the adoption of interim measures by domestic courts, not to mention that arbitral interim measures are more likely to be enforced in the same forums when they emanate from non-ICSID tribunals. Consequently, investors and states, when negotiating arbitration agreements or investment treaties, should be aware of this crucial distinction between the two kinds of arbitral mechanisms.

However, recourse to such measures in domestic courts has also shown a potentially dangerous exploitation of interim protection as a weapon serving the bargaining power of the requesting party to settle the dispute, rather than the efficiency of the entire arbitration process. Such strategies can be counterproductive in the long run and the risks of growing mistrust in international investment arbitration frameworks should not be underestimated. International investment arbitration is a dispute resolution mechanism exclusively depending on consent, and it should not be forgotten that the major declines in international justice, as well as withdrawals of unilateral declarations recognizing the compulsory jurisdiction of the I.C.J., often occurred after decisions that states felt assaulted their sovereignty or misinterpreted their consent.328 While the development of interim protection of rights consolidates and strengthens the place of international judges or arbitrators and, more broadly, the progress of the “judicialization” of international law, the overall growing tendency towards (not to say sometimes abuses of) requests for interim measures in investor-state or interstate disputes329 contributes also to this rising skepticism, and certainly weakens and possibly jeopardizes the overall sustainability of these dispute settlement mechanisms.

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328 *Le Floch*, supra note 3, at 452.
329 For the I.C.J., see *Bekker*, supra note 74, at 32 (referring to the statement of the I.C.J. pointing out “the increasing tendency of parties to request the indication of provisional measures”).