

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

Régis BISMUTH*

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

* Ph.D. (Université Paris 1 Panthéon-Sorbonne), LL.M. (Columbia Law School, Harlan Fiske Stone Scholar), Research and Teaching Fellow in Public International Law at Université Paris 1 Panthéon-Sorbonne (since 2004). The author is grateful to Prof. Pieter Bekker, Christopher Boog, Eugenia Levine, and Matthew Jasilli for their useful comments on previous drafts of this article and wishes to thank Prof. Franco Ferrari for stimulating discussions on this topic. The views expressed in this article are those of the author only and any errors or omissions are his sole responsibility.

¹ Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 RECUEIL DES COURS 9, 23 (1993).

² JEROME B. ELKIND, INTERIM PROTECTION: A FUNCTIONAL APPROACH 162 (1981).

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.”⁴ The judge expresses therefore a part of police powers, highlighting the *mixtum of imperium* and *jurisdictio* 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

⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 3, 16, para. 25 (Order of April 8) (request for the indication of provisional measures).

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 BELLET* 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 *jurisdictio* 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 YEŞILIRMAK, *PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION* (2005).

⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159 [hereinafter “ICSID Convention”]; Rules of Procedure for Arbitration Proceedings (2006), available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> [hereinafter “ICSID Arbitration Rules”].

⁸ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (2006), available at <http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf> [hereinafter “ICSID Additional Facility Rules”].

⁹ United Nations Commission on International Trade Law Arbitration Rules, U.N. G.A. Res. 31/98, U.N. Doc. A/31/17 (December 15, 1976) [hereinafter “UNCITRAL Rules”].

¹⁰ Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2007), available at <www.sccinstitute.se/filearchive/2/21686/2007_arbitration_rules_eng.pdf> [hereinafter “SCC Rules”].

¹¹ Rules of Arbitration of the International Chamber of Commerce (1998), available at <www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf> [hereinafter “ICC Rules”].

¹² Arbitration Rules of the London Court of International Arbitration (1998), available at <www.lcia.org/ARB_folder/arb_english_main.htm> [hereinafter “LCIA Rules”].

¹³ NOAH D. RUBINS & NORMAN STEPHAN KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER’S GUIDE* 311 (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.

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., YEŞİLIRMAK, *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 YEŞİLIRMAK, *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"),¹⁹ 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 YEŞİLIRMAK, *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"²⁰ 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"),²¹ but that the domestic law of the seat of arbitration does not interfere with or impose mandatory rules on the ICSID arbitration process.²² 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"²³ 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 treaty²⁴ and/or a specific agreement between the investor and the host state, representing the *lex arbitralis specialis*.²⁵ The *lex arbitralis specialis* can be superseded by the mandatory provisions of the ICSID Convention and Arbitration Rules.²⁶

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,²⁷ or to disregard

²⁰ Andrea Giardina, *ICSID: A Self-Contained, Non-National Review System*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?* 199 et seq. (Richard B. Lillich & Charles N. Brower eds., 1994); YEŞILIRMAK, *supra* note 6, at 62; CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 666 (2001).

²¹ ICSID Arbitration Rules, art. 39(6). See also *infra* notes 78–87 and accompanying text.

²² SCHREUER, *supra* note 20, at 672, 683.

²³ *Id.* at 1078.

²⁴ The arrangement is subject to the possibility of attracting a more favorable interim protection regime through the most-favored-nation clause mechanism. See Alejandro Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?* 25 J. INT'L ARB. 89 (2008); Bruno Poulain, *Clauses de la nation la plus favorisée et clauses d'arbitrage investisseur-état: est-ce la fin de la jurisprudence Maffezini?* 25 A.S.A. BULL. 279 (2007).

²⁵ An odd situation might arise if the consent for an ICSID arbitration lies in the host state legislation. We could indeed wonder if it implies the application of the *lex arbitri*. To our knowledge, no dispute has dealt with this issue so far. However, art. 44 of the ICSID Convention indicates that the provisions of the Convention and the Arbitration Rules shall govern the arbitration "except as the parties otherwise agree." Although the unilateral character of the host state legislation renders the *lex arbitri* not agreed upon between parties, it could be argued that the investor's consent to ICSID jurisdiction through host state legislation implies an acceptance of the conditions under which the host state has consented to offer jurisdiction to an ICSID tribunal.

²⁶ SCHREUER, *supra* note 20, at 672–73.

²⁷ *Railroad Development Corp. v. Republic of Guatemala*, *supra* note 15, paras. 27–30 (the arbitral tribunal reproduced the relevant provisions on interim measures included in the ICSID Convention, ICSID Arbitration Rules, and the CAFTA without discussing the interplay between them).

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.”²⁸ 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 have 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).²⁹

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 “[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,” 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)³⁰ or the 2004 U.S. Model Bilateral Investment Treaty (BIT).³¹ 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,³² 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,

²⁸ Art. 18(c) of the agreement mentioned in the arbitral tribunal’s decision, see *infra* note 29, para. 7.

²⁹ *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.

³⁰ North American Free Trade Agreement (NAFTA), U.S.–Canada–Mexico, December 17, 1992, 32 I.L.M. 289; 32 I.L.M. 605.

³¹ Model Bilateral Investment Treaty (2004), art. 28(8), available at <www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf> [hereinafter “2004 U.S. Model BIT”].

³² 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 1134.³³ 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.³⁴ 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 superseded³⁵ by the mandatory provisions of the *lex arbitri* of the seat of the arbitration and of the arbitration rules chosen by the parties.³⁶

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).

³³ MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, 1134–35 (2006).

³⁴ See the recent amendments (U.N. Doc. A/RES/61/33 (2006)) resulting in the modification of art. 17 (“Interim Measures and Preliminary Orders”) of the UNCITRAL Model Law on International Commercial Arbitration, available at <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> [hereinafter “UNCITRAL Model Law”].

³⁵ YEŞİLIRMAK, *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. U.N.3481, 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 YEŞİLİRMAK, *supra* note 6, at 64.

⁴¹ See, e.g., art. 1696(1) of the Belgian Judicial Code forbidding an arbitral tribunal seated in Belgium ordering of seizure of goods; ERIC SCHÄFER, HERMAN VERBIST, & CHRISTOPHE IMHOOS, *ICC ARBITRATION IN PRACTICE* 115 (2005).

from requesting interim protection from domestic courts during this critical lapse,⁴² 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.⁴³

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.⁴⁴ A recent amendment to the American Arbitration Association–International Center for Dispute Resolution (AA-ICDR) Arbitration Rules⁴⁵ in 2006 has established a genuine interim relief procedure before the formation of the tribunal by permitting the appointment of an emergency arbitrator.⁴⁶ Contrary to the ICC pre-arbitral referee procedure, this mechanism is integrated in the standard arbitration rules and is applicable unless the parties agreed otherwise.⁴⁷ 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.⁴⁸ Such measures may be adopted, modified, or lifted by the arbitral tribunal⁴⁹

⁴² See, e.g., the hypothetical cases highlighting the crucial importance of this lapse, cited in Ben H. Sheppard, Jr. & John M. Townsend, *Holding the Fort Until the Arbitrators are Appointed: The New ICDR International Emergency Rule*, 61 DISP. RESOL. J. 75, 76–77 (No. 2, 2006).

⁴³ ICSID Convention, art. 66(1). Indeed, an amendment to the ICSID Convention would have been necessary considering that, under art. 47 of the Convention, it is the sole authority for the arbitral tribunal to adopt interim protective measures.

⁴⁴ YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO ICC RULES OF ARBITRATION 297–98 (2d ed. 2005). For some recent applications, see Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22 J. INT'L ARB. 245, 250 (2005); Emmanuel Gaillard, *ICC Pre-Arbitral Referee: A Procedure into its Stride*, N.Y.L.J., October 5, 2006, at 3.

⁴⁵ International Arbitration Rules of the International Centre for Dispute Resolution of the American Arbitration Association (2008), available at <www.adr.org/sp.asp?id=33994#International%20Arbitration> [hereinafter “AAA-ICDR Rules”].

⁴⁶ See AAA-ICDR Rules, art. 37.

⁴⁷ Sheppard & Townsend, *supra* note 42, at 77–78. See also Guillaume Lemenez & Paul Quigley, *Emergency Arbitrator: The ICDR's Procedure in Action, Part I: Look at the Empirical Data*, DISP. RESOL. J. 1 (2008).

⁴⁸ ICSID Arbitration Rules, art. 39(1); ICSID Additional Facility Rules, art. 46(1); SCC Rules, art. 31(1); ICC Rules, art. 23(1).

⁴⁹ ICSID Arbitration Rules, art. 39(3); ICSID Additional Facility Rules, art. 46(2). See also YEŞİLIRMAK, *supra* note 6, at 200–01.

at any time between the appointment of the tribunal and the final award, regardless of whether the plain jurisdiction of the tribunal is established.⁵⁰ As pointed out by the ICSID arbitral tribunal in *Casado v. Chile*:

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.⁵¹

Likewise, in *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.”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.⁵³

Initiative of the request and 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.⁵⁴ It must be noted that such requests may be filed by the claimant, the respondent, or both parties.⁵⁵

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

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 265–276 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 Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, UNCITRAL, Order on Interim Measures, September 2, 2008, para. 52, available at <<http://ita.law.uvic.ca/documents/Paushok-Interim.pdf>>.

⁵¹ Victor 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.

⁵² Railroad Development Corp. v. Republic of Guatemala, *supra* note 15, para. 31.

⁵³ SANTULLI, *supra* note 18, at 440–41.

⁵⁴ UNCITRAL Rules, art. 26(1) (“[a]t the request of either party”); SCC Rules, art. 26(1) (“at the request of a party”); ICC Rules, art. 23(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 *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.

⁵⁵ For some examples, see SCHREUER, *supra* note 20, at 749–50.

⁵⁶ SCHREUER, *supra* note 20, at 749.

⁵⁷ The I.C.J. indicated interim measures *proprio motu* only once in its history; Karin Oellers-Frahm, Article 41, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 923, 945 (A. Zimmermann, C. Tomuschat, & K. Oellers-Frahm eds., 2005).

⁵⁸ JULIAN D.M. LEW, LOUKAS A. MISTELIS, & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 789 (2003).

although the ICSID Arbitration Rules underline that the tribunal “give priority to the consideration of a request made [by a party],”⁵⁹ it “may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request.”⁶⁰ 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.⁶¹ This authority is notable in enabling the tribunal to grant less restrictive measures than those requested but pursuing “the same objective.”⁶² 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.⁶³

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.”⁶⁴

Such provisions are curiously absent from non-ICSID arbitration frameworks and, more broadly, from arbitration rules and *lex arbitri*.⁶⁵ It may be argued that interim measures’ specific procedures are covered by general due process rights of the arbitration framework.⁶⁶ The UNCITRAL Rules provide, for instance, that arbitration is conducted to ensure that “each party is given a full opportunity of presenting his

⁵⁹ ICSID Arbitration Rules, art. 39(2); ICSID Additional Facility Rules, art. 46(1).

⁶⁰ ICSID Arbitration Rules, art. 39(3); ICSID Additional Facility Rules, art. 46(2).

⁶¹ For more details, see Pierre Lalive, *The First “World Bank” Arbitration (Holiday Inns v. Morocco): Some Legal Problems*, 51 BRITISH Y.B. INT’L L. 123, 136 (1980).

⁶² *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 propose others with the same objective.” Available at <<http://ita.law.uvic.ca/documents/Azurix-Jurisdiction.pdf>>. See also *infra* notes 320–327 and accompanying text.

⁶³ 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 on its own initiative ... A tribunal operating under Article 26 of the UNCITRAL Arbitration Rules cannot 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.

⁶⁴ 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>>. See also *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, May 8, 2009, para. 68, available at <<http://ita.law.uvic.ca/documents/PerencoEcuadorDecision.pdf>>.

⁶⁵ LEW, MISTELIS, & KRÖLL, *supra* note 58, at 607.

⁶⁶ KINNEAR ET AL., *supra* note 33, at 1134–44.

case,⁶⁷ similar provisions being included in the SCC, ICC, and LCIA Rules.⁶⁸ Besides, a tribunal in a recent investment dispute under the UNCITRAL Rules also adopted this stance.⁶⁹

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.⁷⁰ 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,⁷¹ 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 cases⁷² and under specific conditions regarding their duration.⁷³ A similar position has been taken by the I.C.J.⁷⁴ 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”⁷⁵ and such violations of the principle of adversarial proceedings may expose an arbitral award to annulment in the case of an ICSID Convention arbitration.⁷⁶ Or, under other mechanisms, it may prevent its recognition and enforcement for other arbitration frameworks under the New York Convention.⁷⁷

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.

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 YEŞİLIRMAK, *supra* note 6, at 223–24; LEW, MISTELIS, & KRÖLL, *supra* note 58, at 607–08.

⁷³ ANDREW TWEEDALE & KEREN TWEEDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* 304–05 (2005).

⁷⁴ Pieter H.F. Bekker, *Provisional 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. 52(1)(d) of the ICSID Convention, a party may request annulment of the award if “there has been a serious departure from a fundamental rule of procedure.”

⁷⁷ 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,⁷⁸ and the solutions adopted by domestic courts and arbitral tribunal on this issue were inconsistent.⁷⁹ 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.”⁸⁰ In order to dispel doubts, an amendment to the Arbitration Rules was adopted in 1984.⁸¹ 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,

⁷⁸ For a summary of the arguments on both sides, see SCHREUER, *supra* note 20, at 382–83.

⁷⁹ For instance, in *Atlantic Triton Co. v. People’s Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award, April 21, 1986, 3 ICSID Rep. 17, 35, the claimant sought attachment of property before French courts before starting ICSID arbitration. His request was first accepted by the Commercial Court of Quimper (October 12, 1983), then refused by a judgment of the Cour d’appel de Rennes which pointed out (October 26, 1984) that “the clear purpose and spirit of the Convention, as revealed by the Arbitration Rules, implies that the arbitral tribunal has the general and exclusive power to rule not only on the merits of the dispute but also on all provisional measures.” The Cour de Cassation quashed this judgment (November 18, 1986), considering that art. 26 of the ICSID Convention “was not intended to prohibit parties from applying to a national court to seek conservatory measures in order to guarantee the execution of an award which might subsequently be given” (3 ICSID Rep. 5–12). Between the two latter decisions, the arbitral tribunal decided that ICSID jurisdiction to recommend such measures “should be exclusive and prohibit any recourse to national courts, traditionally and universally recognized as having sole jurisdiction to order such measures.” For an overview of the relevant ICSID cases, see Collins, *supra* note 1, at 101–5.

⁸⁰ *Atlantic Triton Co. v. People’s Revolutionary Republic of Guinea*, *supra* note 79, at 35.

⁸¹ Charles N. Brower & Ronald E.M. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, 6 ICSID REV. 431, 435 (No. 2, 1991).

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.”⁸² 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,⁸³ 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,⁸⁴ 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.⁸⁵

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,

⁸² LEW, MISTELIS & KRÖLL, *supra* note 58, at 788.

⁸³ NAFTA, art. 1121(1)(b) and (2)(b), specify that the investor “waive[s] their right to initiate or continue before any administrative tribunal or court under the law of any Party ... except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” KINNEAR ET AL., *supra* note 33, at 1134–212. 2004 U.S. Model BIT, art. 25(3), provides that “the claimant ... may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.”

⁸⁴ RUBINS & KINSELLA, *supra* note 13, at 275.

⁸⁵ It is therefore important for domestic courts to deal very carefully with the condition of likelihood of success on the merits which is a frequent prerequisite for the granting of provisional measures in domestic law.

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 dispute settlement mechanism that allows interim measures at the pre-arbitral stage, such as the UNCITRAL Arbitration Rules.⁸⁶ Investors should therefore pro-actively assess the opportunity to request interim measures in domestic courts.⁸⁷ 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.⁸⁸ ICSID Additional Facility Rules provide indeed that “[t]he parties may apply to any competent judicial authority for interim or conservatory measures.”⁸⁹ Arbitration Rules of UNCITRAL,⁹⁰ SCC,⁹¹ ICC,⁹² and LCIA⁹³ 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 *ratione temporis* conditions under which seeking interim relief in domestic courts is possible. This silence 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 “[b]efore the file is transmitted to the Arbitral Tribunal and in appropriate circumstances even thereafter,”⁹⁴ and under LCIA Rules under which the same relief may be requested “before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter.”⁹⁵ 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 ICSID Additional Facility Rules, art. 46(4).

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”⁹⁶ 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.⁹⁷ 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.⁹⁸ 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.”⁹⁹ Moreover, considering an arbitrator’s ability to draw negative inferences from non-compliance,¹⁰⁰ parties toward whom those measures are directed generally spontaneously comply with them,¹⁰¹ 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

⁹⁶ YEŞİLIRMAK, *supra* note 6, at 93.

⁹⁷ LEW, MISTELIS, & KRÖLL, *supra* note 58, at 618.

⁹⁸ YEŞİLIRMAK, *supra* note 6, at 95.

⁹⁹ *Id.* at 71.

¹⁰⁰ Notably in ICSID Convention arbitration; LEW, MISTELIS, & KRÖLL, *supra* note 58, at 593. This issue will be developed *infra* notes 183–190 and accompanying text.

¹⁰¹ Andrea Carlevaris, *The Enforcement of Interim Measures Ordered by International Arbitrators: Different Legislative Approaches and Recent Developments in the Amendment of the UNCITRAL Model Law*, in INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 13 (Association for International Arbitration ed., 2007); YEŞİLIRMAK, *supra* note 6, at 238.

be posed.¹⁰² 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.”¹⁰³ 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,¹⁰⁴ it is possible to infer from other provisions of the Convention¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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*.¹⁰⁸ 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.¹⁰⁹

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

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).

¹⁰³ See, e.g., *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *supra* note 51, para. 17 et seq.; *City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, *supra* note 64, para. 92; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, para. 9, available at <http://ita.law.uvic.ca/documents/Maffezini-ProvisionalMeasure-English_000.pdf>.

¹⁰⁴ See ICSID Convention, art. 48.

¹⁰⁵ *Id.* art. 53(2) provides that “[f]or 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,¹¹⁰ 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.¹¹¹ The analysis will focus on the enforcement abroad through the 1958 New York Convention.¹¹²

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.¹¹³ 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.”¹¹⁴ Lastly, the UNCITRAL Rules leave no doubt by specifying that “[s]uch interim measures may be established in the form of an interim award.”¹¹⁵ 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,¹¹⁶ it has *res judicata* effect and it cannot be issued *ex parte*.¹¹⁷

The recognition and enforcement mechanism established by the New York Convention is applicable to “arbitral awards,”¹¹⁸ 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”¹¹⁹ for which enforcement is sought more than the terminology used by the

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/WP.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); YEŞİLIRMAK, *supra* note 6, at 247–54.

¹¹² YEŞİLIRMAK, *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; YEŞİLIRMAK, *supra* note 6, at 192–93.

¹¹⁸ New York Convention, art. 1(1).

¹¹⁹ TWEEDALE & TWEEDALE, *supra* note 73, at 328.

arbitrators.¹²⁰ French, U.S., and English courts have, for instance, considered the form of the decision as an irrelevant element in deciding on its enforceability.¹²¹ In this “substance over form”¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵ 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

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. Carbonneau 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; YEŞİLİRMAK, *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 262–65.

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; YEŞİLİRMAK, *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

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.”¹³¹ 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.¹³² 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.”¹³³

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 “[t]he Tribunal’s authority to rule on provisional measures is no less binding than that of a final award.”¹³⁴ The tribunal justified its interpretation by a reference to the Spanish version of the Arbitration Rules using the word “*dictación*.”¹³⁵ 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

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.

¹³² *Agip S.p.A. v. Government of the People’s Republic of Congo*, ICSID Case No. ARB/77/1, Award of November 30, 1979, 1 ICSID Rep. 306, 311, para. 9 (citing the decision of the arbitral tribunal of January 18, 1979 addressing recommendations to the Government of Congo); *Amco Asia Corp. & others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, December 9, 1983, 1 ICSID Rep. 410, 412 (underlining that “the Tribunal does not deem it appropriate to issue a recommendation to the parties”); *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4, January 11, 1999, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=show-Doc&docId=DC561_En&caseId=C160>, where the tribunal “[r]ecommends that the above-mentioned bankruptcy proceedings be suspended.”

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.

¹³⁵ *Id.* 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.”¹³⁶

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.”¹³⁷ Indeed, relying on the then recent judgment of the I.C.J. in *LaGrand*,¹³⁸ where the Court “reached the conclusion that orders on provisional measures under Article 41 [of the I.C.J. Statute] have binding effect,”¹³⁹ 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.¹⁴⁰

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)¹⁴¹ 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.¹⁴²

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.¹⁴³ 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

¹³⁶ Interpreting art. 47 of the ICSID Convention, in *Tokios Tokelés 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 *Victor 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 *Victor 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.”¹⁴⁴ 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.’”¹⁴⁵

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.”¹⁴⁶ The ordinary meaning of the terms “recommend” (understood as “to praise or commend to another as being desirable or worthy”)¹⁴⁷ 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”¹⁴⁸) 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*,¹⁴⁹ *Zhinvali v. Georgia*,¹⁵⁰ *Plama v. Bulgaria*,¹⁵¹ *Biwater v. Tanzania*¹⁵² and

¹⁴⁴ *Id.* para. 25.

¹⁴⁵ *Id.* para. 18.

¹⁴⁶ Vienna Convention on the Law of Treaties, art. 31(1).

¹⁴⁷ WEBSTER’S II NEW COLLEGE DICTIONARY 926 (1995).

¹⁴⁸ *Id.* at 564.

¹⁴⁹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, October 16, 2002, 8 ICSID Rep. 388, 397.

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.

¹⁵¹ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, September 6, 2005, para. 38, available at <<http://ita.law.uvic.ca/documents/PlamaOrderonProvisionalMeasures.pdf>>.

¹⁵² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, Request for Provisional Measures, September 31, 2006, paras. 88–98, available at <<http://ita.law.uvic.ca/documents/BiwaterTanzaniaProvisionalMeasures31March2006.PDF>>; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006, para. 163, available at <<http://ita.law.uvic.ca/documents/Biwater-PONo.3.pdf>>.

Saipem v. Bangladesh,¹⁵³ 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.¹⁵⁴

This position, adopted again more recently in *OPC v. Ecuador*,¹⁵⁵ 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*’.¹⁵⁶

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.”¹⁵⁷ 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

¹⁵³ Saipem S.p.A. v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, para. 173, available at <<http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf>>.

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

¹⁵⁵ Occidental Petroleum Corp. and Occidental Exploration & Production Co. v. Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, para. 58, available at <http://ita.law.uvic.ca/documents/Oxy_001.pdf>.

¹⁵⁶ City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, *supra* note 64, para. 52. See also Perenco Ecuador 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 “[j]t is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed.”).

¹⁵⁷ Robert Kolb, *Note on the New International Case-Law Concerning the Binding Character of Provisional Measures*, 74 NORDIC J. INT’L L. 117, 129 (2005).

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 orders¹⁶¹ 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.

¹⁵⁸ LUCIUS CAFLISCH, *Provisional Measures in the International Protection of Human Rights: The Mamatkulov Case*, in VÖLKERRECHT ALS WERTORDNUNG [COMMON VALUES IN INTERNATIONAL LAW] FESTSCHRIFT FÜR [ESSAYS IN HONOUR OF] CHRISTIAN TOMUSCHAT 493 (2006).

¹⁵⁹ LE FLOCH, *supra* note 3, at 401–14.

¹⁶⁰ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Order of December 5) (Request for the Indication of Interim Measures of Protection). See also Paolo Palchetti, *The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute*, 21 LEIDEN J. INT'L L. 623, 624 et seq. (2008).

¹⁶¹ ELKIND, *supra* note 2, at 23 et seq.

¹⁶² Kolb, *supra* note 157, at 612.

¹⁶³ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *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 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *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.¹⁶⁶ This theory was explicitly referred to by the I.C.J. in the *Nuclear Tests* cases, where it emphasized that:

[T]he 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.¹⁶⁷

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,”¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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 measures¹⁷¹ regardless of the explicit provisions of Article 26.¹⁷² This had no impact on the binding nature of such measures, but permitted the expansion *ratione materiae* of the scope of the tribunal’s interim measure powers

¹⁶⁶ GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE*, vol. II, 542–43 (1986); Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 *BRITISH Y.B. INT’L L.* 195, 211–22 (2005); David D. Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran–United States Claims Tribunal*, 46 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 465, 476 (1986); Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, in *MAN’S INHUMANITY TO MAN, ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 353 (2003).

¹⁶⁷ *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253, 259–60, para. 23 (Judgment of December 20); *Nuclear Tests (New-Zealand v. France)*, 1974 I.C.J. 457, 463, para. 23 (Judgment of December 20).

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 404. See also Gaeta, *supra* note 166, at 362–64.

¹⁶⁹ LE FLOCH, *supra* note 3, at 410.

¹⁷⁰ *Id.* at 410–11.

¹⁷¹ *E-Systems, Inc. v. Islamic Republic of Iran*, Interim Award No. ITM 13–388–FT, February 4, 1983, 2 Iran–U.S. C.T.R. 51, 52; *RCA Global Communications, Inc. v. Islamic Republic of Iran.*, Interim Award No. ITM 29–160–I, October 31, 1983, 4 Iran–U.S. C.T.R. 5, 7.

¹⁷² *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 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,¹⁷⁷ and therefore did not prevent consideration of the binding nature of such measures within the sole sphere of arbitral proceedings.

¹⁷³ CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 217 (1998).

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.

¹⁷⁶ *Pope & Talbot, Inc. v. Canada, UNCITRAL (NAFTA), Ruling by Tribunal on Claimant's Motion for Interim Measures*, January 7, 2000, available at <www.naftaclaims.com/Disputes/Canada/Pope/PopeAwardOnInterimMeasuresMotion.pdf>.

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.¹⁷⁸ 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 47¹⁷⁹ cannot be interpreted *de plano* as “orders.”¹⁸⁰

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,¹⁸¹ the question of the consequences of non-compliance are not of a purely theoretical nature. Considering that arbitrators lack coercive powers,¹⁸² 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.”¹⁸³

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.”).

¹⁷⁹ Cases cited *supra* notes 149–153.

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; YEŞİLIRMAK, *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.

¹⁸³ 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 “[t]he Tribunal may fix a penalty for failure to comply with provisional measures” but this provision was withdrawn by “nearly unanimous vote” of negotiating parties (*quoted in* Caron, *supra* note 166, at 511).

Therefore, and absent “the power to penalize parties,”¹⁸⁴ arbitral tribunals nevertheless have the possibility to draw adverse inferences from non-compliance, notably on the issues involving the production of evidence.¹⁸⁵

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.”¹⁸⁶

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.¹⁸⁷

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.¹⁸⁸

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,¹⁸⁹ thereby implementing a sort of psychological

¹⁸⁴ Caron, *supra* note 166, at 511. *Contra* Laurent Levy, *Les Astreintes et l'Arbitrage International en Suisse*, 19 A.S.A. BULL. 21 (2001) (suggesting that arbitrators have such a power).

¹⁸⁵ LEW, MISTELIS, & KRÖLL, *supra* note 58, at 788.

¹⁸⁶ *Agip S.p.A. v. Government of the People's Republic of Congo*, *supra* note 132, para. 42.

¹⁸⁷ YEŞİLIRMAK, *supra* note 6, at 242–43.

¹⁸⁸ Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-Production of Evidence*, 22 ARB. INT'L 549, 554–70 (2006).

¹⁸⁹ YEŞİLIRMAK, *supra* note 6, at 242, n. 20.

penalty.¹⁹⁰ 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.¹⁹¹ Likewise, some commentators found in the jurisprudence of the I.C.J., notably in the *Fisheries Jurisdiction* case,¹⁹² that “a violation of an interim measure would carry with it the responsibility of reparation.”¹⁹³ 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,¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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

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 YEŞİLIRMAK, *supra* note 6, at 243–44.

¹⁹² *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), 1974 I.C.J. Rep. 175 (Judgment of July 25).

¹⁹³ C. H. Crockett, *The Effects of Interim Measures of Protection in the International Court of Justice*, 7 CAL. W. INT’L J. 348, 372 (1977). See also Caron, *supra* note 166, at 411–12.

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.

¹⁹⁶ *Watkins-Johnson Co., et al. v. Islamic Republic of Iran, et al.*, Award No. 429-370-1, July 28, 1989, 22 Iran-U.S. C.T.R. 218, 253; *Touche Ross and Co. v. Islamic Republic of Iran*, Award No. 197-480-1, October 30, 1985, 9 Iran-U.S. C.T.R. 284, 301. See also BROWER & BRUESCHKE, *supra* note 173, at 240.

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,¹⁹⁷ 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 production¹⁹⁸ and preservation¹⁹⁹ of evidence; the confidentiality of proceedings;²⁰⁰ the interruption of parallel proceedings in domestic courts²⁰¹ or in another arbitral tribunal;²⁰² to specific performance such as a suspension of payments,²⁰³ a ban on the transfer of funds outside the host state²⁰⁴ or on

¹⁹⁷ Oellers-Frahm, *supra* note 57, at 953.

¹⁹⁸ Agip S.p.A. v. Government of the People's Republic of Congo, *supra* note 132, cited in 1 ICSID Rep. 311 (production of books, cards and registers); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005, 11 ICSID Rep. 352, 358–60, paras. 24–36 (order to produce several kinds of documents).

¹⁹⁹ Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (No. 1), *supra* note 152, para. 88 (preservation and no adverse step in relation to documents).

²⁰⁰ Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (No. 3), *supra* note 152, *dispositif* (recommendation that all parties refrain from disclosing to third parties the documents related to the proceedings).

²⁰¹ Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, *supra* note 132 (suspension of bankruptcy proceedings in domestic courts); Zhinvali Development Ltd. v. Republic of Georgia, *supra* note 150, at 18, para. 45) (stay and suspension of proceedings in a Georgia court and to bring the arbitral tribunal's recommendation to the attention of the Georgia court to inform it about the exclusive jurisdiction of ICSID); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, *supra* note 149, at 397 (recommendation that the Government of Pakistan do not "take any step to initiate a complaint for contempt"); Tokios Tokelés v. Ukraine (No. 1), *supra* note 136, para. 7 ("both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other"); City Oriente Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, *supra* note 64, para. 92 (decision that Ecuador and Petroecuador should refrain from instituting or prosecuting "any judicial proceeding or action of any nature whatsoever against or involving City Oriente Limited").

²⁰² SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, *supra* note 149, at 397 ("the Tribunal recommends that the Islamabad-based arbitration pending between the Government of Pakistan and SGS be stayed until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute, and the award is no longer capable of being interpreted, revised or annulled pursuant to the ICSID Convention.").

²⁰³ Saipem S.p.A. v. People's Republic of Bangladesh, *supra* note 153, para. 183 (recommendation that Bangladesh "take the steps necessary to ensure that Petrobangla refrain from encashing the Warranty Bond ... issued by Banque Indosuez"); 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 "demanding that City Oriente Limited pay any amounts as a result of the application of the Law ... Amending the Hydrocarbon Law"); Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, *supra* note 50, *dispositif* para. 1 (suspension of payment of certain taxes); Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, *supra* note 64, para. 79 (provisional measures restraining the respondent from demanding that the investor "pay any amounts due pursuant to Law 42").

²⁰⁴ Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Company v. Mongolia, *supra* note 50, *dispositif* para. 3.

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 *YEŞİLİRMAK*, *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

²¹³ UNCITRAL Rules, art. 26(1).

²¹⁴ *Id.* art. 26(3).

²¹⁵ YEŞİLIRMAK, *supra* note 6, at 96. ICC Final Award 7589 of 1994, cited in YEŞİLIRMAK, *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’”).

²¹⁶ 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 which, when applied in connection with the ICSID Convention, breaches arbitral tribunals’ monopoly to adopt interim measures²¹⁸ 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

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*).

²²¹ GAILLARD, *supra* note 16, at 226.

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 relevant de la seule competence 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 interpretation²²³ 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, *cautio judicatum solvi*.²²⁴ The justification of arbitral tribunals on this issue seems, however, inconsistent. In *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."²²⁵ On the contrary, while recognizing "the very broad and varied nature of the possible provisional measures available within the ICSID regime,"²²⁶ the tribunal in *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."²²⁷ If the *Casado* tribunal attempted to reconcile this position with the *Atlantic Triton* ruling considering this measure admissible "in certain circumstances"²²⁸ but not as "an ordinary and general measure,"²²⁹ this case demonstrated how uncomfortable ICSID tribunals are in dealing with such requests, preferring to leave the unrewarding work to domestic courts. In *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."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.²³¹

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."

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>>.

²²⁵ Quoted in *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *supra* note 51, para. 88.

²²⁶ *Id.* para. 83.

²²⁷ *Id.* para. 86.

²²⁸ *Id.* para. 88.

²²⁹ *Id.* para. 86.

²³⁰ *Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd.*, *supra* note 29, para. 14.

²³¹ Paul D. Friedland, *Provisional Measures and ICSID Arbitration*, 2 *ARB. INT'L* 335, 348 (1986) (commenting on the decision in *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

²³² ETI Euro Telecom Int'l N.V. v. Republic of Bolivia, ICSID Case No. ARB/07/28.

²³³ The facts are in the decision referred to *infra* note 234.

²³⁴ ETI Euro Telecom Int'l N.V. v. Republic of Bolivia and Empresa Nacional de Telecomunicaciones Entel S.A., United States District Court SDNY, No. 08 Civ. 4247 (LTS)(FM), July 30, 2008, available at <www.asil.org/pdfs/ilib080814.pdf>.

²³⁵ ETI Euro Telecom Int'l N.V. v. Republic of Bolivia & another, [2008] EWCA (Civ) 880.

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.

²³⁸ ETI Euro Telecom Int'l N.V. v. Republic of Bolivia & another, *supra* note 235, para. 58.

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

²⁴⁰ *Id.* para. 109.

²⁴¹ *Id.* para. 1.

²⁴² John Fordham, *Disarming Litigation Terrorists*, May 9, 2008, at 2, available at <www.venezlon.co.uk/pdf/disarming_litigation.pdf>.

²⁴³ *Mobil Cerro Negro Ltd. v. Petroleos De Venezuela S.A.*, Court of Appeal, Commercial Court, March 18, 2008, [2008] EWHC (Comm) 532.

²⁴⁴ Fordham, *supra* note 242, at 1.

²⁴⁵ *Venezuela Rails at Exxon Asset Freeze “Terrorism,”* February 8, 2008, available at <www.reuters.com/article/worldNews/idUSN0848021720080208>.

in recent years a growing mistrust, manifesting itself in the withdrawal of some countries from international investment arbitration mechanisms, notably from ICSID.²⁴⁶ 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,"²⁴⁷ whereas the UNCITRAL Rules mention "measures ... in respect of the subject-matter of the dispute."²⁴⁸ In *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."²⁴⁹ In our view, these dissimilarities are ultimately insignificant.

Indeed, none of these arbitration rules contains an explicit *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 *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"²⁵⁰ and that the provisions of Article 47 of the Convention and 39 of the Arbitration Rules "contain no indication or exact statement,"²⁵¹ the arbitral tribunal

²⁴⁶ For instance, Bolivia's withdrawal from the ICSID Convention in 2007.

²⁴⁷ ICSID Rules, art. 39(1); ICSID Additional Facility Rules, art. 46(1). The ICSID Convention, from which the ICSID Arbitration Rules derives, mentions the "measures which should be taken to preserve the respective rights of either party" (art. 47).

²⁴⁸ 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)).

²⁴⁹ "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.

²⁵⁰ Víctor Pey Casado and President Allende Foundation v. Republic of Chile, *supra* note 51, para. 15.

²⁵¹ *Id.*

recognized that interim measures “can be extremely diverse and are left to the appreciation of each Arbitral Tribunal.”²⁵²

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),²⁵³ such as the preservation of evidence,²⁵⁴ order of specific performance²⁵⁵ or a stay of proceedings in domestic courts.²⁵⁶ 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,”²⁵⁷ 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.”²⁵⁸

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

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 YEŞİLIRMAK, *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.

²⁵⁸ *Id.* See also *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, para. 45, available at <<http://ita.law.uvic.ca/documents/Phoenix-ProvisionalMeasures.pdf>>.

require such measures,²⁵⁹ whereas the UNCITRAL Rules simply mention measures that the arbitral tribunal “deems necessary in respect of the subject-matter of the dispute.”²⁶⁰ 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 author²⁶¹) 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.²⁶²

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.”²⁶³ 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.²⁶⁴ 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.

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 YEŞİLIRMAK, *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 UNCITRAL²⁶⁹ 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 prejudice the final determination of the tribunal on its jurisdiction.²⁷³

²⁶⁵ Fisheries Jurisdiction (United Kingdom v. Iceland), 1972 I.C.J. 12, 16 (Order of August 17) (Request for the Indication of Interim Measures of Protection); Fisheries Jurisdiction (Republic of Germany v. Iceland), 1972 I.C.J. 30, 34 (Order of August 17) (Request for the Indication of Interim Measures of Protection).

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.”). See also J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 INT’L & COMP. L.Q. 90, 91 et seq. (1995).

²⁶⁷ 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 Petroleos del Ecuador, *supra* note 64, para. 50. See also Yaung Chi Oo Trading Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Procedural Order No. 2, Request for Provisional Measures, February 27, 2002, 8 ICSID Rep. 456, 459, para. 12 (relying on the I.C.J. case on the *Legality of Use of Force*).

²⁶⁹ Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, *supra* note 50, paras. 47–54 (relying on the *Nicaragua* case).

²⁷⁰ YEŞİLIRMAK, *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 Paushok, 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 prejudices 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 prejudice the question of jurisdiction. It is, therefore, independently of the present Order on provisional measures that this Tribunal will have to rule on the jurisdictional objections raised by the Respondent.”).

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,

²⁷⁴ ICSID Convention, art. 36(3).

²⁷⁵ Víctor Pey Casado and President Allende Foundation v. Republic of Chile *supra* note 51, para. 11. See also Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador, *supra* note 64, para. 39 ("It is not enough for the Tribunal that the Secretary-General has found that the dispute is not manifestly outside the jurisdiction of the Centre and has therefore registered the Request for Arbitration under Article 36(3) of the ICSID Convention and Rule 6(1)(b) of the Institution Rules.")

²⁷⁶ SCHREUER, *supra* note 20, at 765. See also Brower & Goodman, *supra* note 81, at 431, 452–56 (and noting further that "the fact that the Secretary-General, in registering the Request for Arbitration, has found the dispute not to be 'manifestly outside the jurisdiction of the Centre,' although not *ipso jure* determinative of the tribunal's jurisdictional entitlement to act under Convention Article 47, must give rise to a presumption, theoretically rebuttable but in practical terms virtually immune to rebuttal that its jurisdiction exists *prima facie*.")

²⁷⁷ YEŞİLIRMAK, *supra* note 6, at 177.

²⁷⁸ Oellers-Frahm, *supra* note 57, at 938; LE FLOCH, *supra* note 3, at 101–03.

²⁷⁹ It is unclear whether both the decisions in *Maffezini* and *Casado* implement this test. See *infra* notes 291–294 and accompanying text.

²⁸⁰ Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, *supra* note 50, para. 55.

²⁸¹ See also Caron, *supra* note 166, at 490.

²⁸² Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia, *supra* note 50, para. 55.

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.”²⁸³ 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)²⁸⁴ so as to refer to *fumus boni juris* as well as *fumus non mali juris*.²⁸⁵ 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.²⁸⁶

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.”²⁸⁷ 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.

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: “[l]’on peut exiger du demandeur qu’il établisse *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>). *See also* CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14, Decision on Whether to Continue Stay and Order, July 14, 2004, 11 ICSID Rep. 225, 228, para. 13 (“While some national jurisdictions require as a basis for injunctive orders, conservatory measures or stay that the underlying substantive application meet some standard of probability of success, until now this has not been required in international proceedings.”).

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.”); Biwater 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 pre-judge 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.²⁸⁸ 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.²⁸⁹

(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.”²⁹⁰ 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.”²⁹¹ 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.”²⁹² Underlining that “[i]t is clearly not a question for the Tribunal of prejudging in any way ... its eventual decision on the substance,”²⁹³ 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.²⁹⁴

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”²⁹⁵ and that the claimant “need only

²⁸⁸ *Railroad Development Corp. v. Republic of Guatemala*, *supra* note 15, para. 64. (pointing out that “Article 47 of the ICSID Convention does not specify any particular circumstances”).

²⁸⁹ The cumulative character of the conditions should be underlined. For instance, in *OPC v. Ecuador*, *supra* note 155, para. 87, the arbitral tribunal pointed out first that “an order for provisional measures will only be made where such measures are found to be necessary *and* urgent” and further considered that “[t]here is no necessity *or* urgency” (emphasis added).

²⁹⁰ SCHREUER, *supra* note 20, at 773.

²⁹¹ *Maffezini v. Spain*, *supra* note 103, para. 13. The tribunal stated (para. 14) that “[a]n example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property.”

²⁹² *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *supra* note 51, para. 45.

²⁹³ *Id.* para. 45.

²⁹⁴ *Id.* para. 46. This passage was quoted in *OPC v. Ecuador*, *supra* note 155, para. 64.

²⁹⁵ *OPC v. Ecuador*, *supra* note 155, para. 64.

show that they allege the kind of claims that—if ultimately proven—would entitle claimants to substantial relief.”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.²⁹⁷ Arbitral tribunals have relied on this standard, such as in *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.”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,²⁹⁹ but interim protection cannot be granted so as to protect the rights of third parties such as subsidiaries.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.³⁰¹

(ii) *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,”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.”³⁰³ However, as pointed out by one author, “the terms of ‘grave’ or ‘substantive’ might be more appropriate than ‘irreparable.’”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

²⁹⁶ *Id.* para. 63.

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.

²⁹⁸ *Plama Consortium Ltd. v. Republic of Bulgaria*, *supra* note 151, para. 40.

²⁹⁹ *Biwater Gauff v. Tanzania*, Procedural Order No. 1, *supra* note 152, paras. 84–88.

³⁰⁰ *EnCana Corp. v. Republic of Ecuador*, *supra* note 37, para. 17.

³⁰¹ SCHREUER, *supra* note 20, at 776–77.

³⁰² *Tanzania Electricity Supply Co. Ltd. v. Independent Power Tanzania Ltd.*, *supra* note 29, para. 14.

³⁰³ For the I.C.J., see Oellers-Frahm, *supra* note 57, at 939–40.

³⁰⁴ CARON ET AL., *supra* note 271, at 537.

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

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 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, *supra* note 51, para. 5.

³¹² *Saipem S.p.A. v. People’s Republic of Bangladesh*, *supra* note 153, para. 175.

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.”³¹⁴ A certain degree of certainty or likelihood is therefore expected by arbitrators, such as in *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.”³¹⁵

b. *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) *Availability of the measure.* Except in the very specific cases where the measure sought is expressly prohibited by the *lex arbitralis specialis*,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 *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.”³¹⁷ Hence, interim measures consisting of a *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,”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.³¹⁹

(ii) *Proportionality of the measure.* According to the arbitrators in *Sergei Paushok v. Mongolia*, the tribunal “is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.”³²⁰ Interestingly, some arbitrators have already relied

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).

³¹⁵ *OPC v. Ecuador*, *supra* note 155, para. 89.

³¹⁶ Such as, e.g., in NAFTA, *Pope & Talbot v. Canada*, *supra* note 176; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2 Concerning a Request for Provisional Measures and the Schedule of the Proceeding, May 3, 2000, para. 5, *available at* <<http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanProceduralOrder2.pdf>>.

³¹⁷ *OPC v. Ecuador*, *supra* note 155, para. 179.

³¹⁸ *Id.* para. 86.

³¹⁹ *Id.* para. 81.

³²⁰ *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

³²¹ *OPC v. Ecuador*, *supra* note 155, para. 82.

³²² See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

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.

³²⁶ *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Mongolia*, *supra* note 50, para. 90.

³²⁷ *Phoenix v. Czech Republic*, *supra* note 258, para. 37.

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.

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”).