e-pública
Revista Eletrónica de Direito Público

Interim Measures in International Investment Arbitration

Medidas Cautelares na Arbitragem Internacional de Investimento

BENOIT LE BARS

VOL. 6 Nº 2 SETEMBRO 2019

WWW.E-PUBLICA.PT

ICJP INSTITUTO DE CIÊNCIAS JURÍDICO-POLÍTICAS
FACULDADE DE DIREITO Universidade de Lisboa
U LISBOA
CIDP CENTRO DE INVESTIGAÇÃO DE DIREITO PÚBLICO

COM O APOIO DE:

FCT Fundação para a Ciência e a Tecnologia

ISSN 2183-184x

e-Pública **Vol. 6** No. 2, Setembro 2019 (055-072)

INTERIM MEASURES IN INTERNATIONAL INVESTMENT ARBITRATION

MEDIDAS CAUTELARES NA ARBITRAGEM INTERNACIONAL DEINVESTIMENTO

BENOIT LE BARS*
215 Rue du Fauburg Saint Honoré,
75008, Paris, France
lebars@l-lb.com

Summary: It is current practice today for arbitral tribunals to grant interim or provisional measures in international investment arbitration. Efficiency and impact of the measures are however largely debated in terms of legal grounds to grant those measures and because they are not self-executing, due to the fact that arbitral tribunals do not dispose of coercive power unlike state judge. This power to grant measures is then influenced by the will of the parties to respect the orders, even if non-compliance with orders can influence the decision making of the arbitrators in a final award.
In practice, the time between the commencement of investment arbitration and the rendering of the final award can be rather long, and events occurring during this time could threaten the conduct of the proceedings and render the final award hollow. Interim measures may prove critical to preserving a party's rights pending the final award.

Key words: International investment arbitration-Interim measures-ICSID-UNCITRAL-Urgency.

Sumário: É prática corrente e actual que os tribunais arbitrais adoptem medidas cautelares ou provisórias em arbitragens internacionais de investimento. A eficiência e o impacto das medidas são, porém, largamente debatidas a respeito do respectivo fundamento legal e, também, porque não são auto-exequíveis, devido ao facto de os tribunais arbitrais não gozarem, ao contrário dos tribunais estaduais, de poder coercivo. O poder para adoptar medidas cautelares ou provisórias é influenciado, portanto, pela vontade das partes em respeitar as medidas dos tribunais, mesmo se o desrespeito possa influenciar a decisão final dos árbitros.
Na prática, o tempo transcorrido entre o início da arbitragem de investimento e a prolação da decisão final pode ser bastante longo e os eventos que decorrem no entretanto podem ameaçar o normal decurso do processo ou mesmo tornar a sentença inútil. As medidas provisórias podem demonstrar-se críticas para preservar os direitos de uma parte enquanto a decisão final não é prolatada.

Palavras chave: Arbitragem internacional de investimento; medidas cautelares; ICSID-UNCITRAL; urgência.

The authority of arbitral tribunals to grant interim or provisional measures in international investment arbitration is today uncontested and represents current practice[1]. However, their efficiency and impact are largely debated as provisional measures are not self-executing. This is due to the fact that arbitral tribunals do not dispose of *imperium*, i.e., coercive power, which distinguished them from their state judges[2]. Their power to grant measures is therefore largely influenced by the will of the parties to respect the orders, even if non-compliance with orders can influence the decision making of the arbitrators in a final award. It remains that interim measures can be of immense importance to parties involved in investment arbitration proceedings and the recent reform proposed for the ICSID Rules will generate additional debates.

In practice, the time between the commencement of investment arbitration and the rendering of the final award can be rather long, and events occurring during this time could threaten the conduct of the proceedings and render the final award hollow. Interim measures may prove critical to preserving a party's rights pending the final award. Securing interim measures in investment arbitration presents several particularities that arbitration practitioners have to familiarise themselves with.

I. Jurisdiction to Order Interim Measures

All the major institutional rules provide for the granting of interim relief. The rules surveyed here include rules commonly used in investment arbitration – ICSID, ICSID Additional Facility (ICSID AF), UNCITRAL (both 1976 and 2010) and SCC – as well as the ICC Arbitration Rules and the recently released SIAC Investment Rules.[3] All of the UNCITRAL 1976,[4] UNCITRAL 2010,[5]

1. *See* P.D. FRIEDLAND, Provisional Measures and ICSID Arbitration, *Arbitration International*, Vol. 2, 1986, pp. 335-357; R. BISMUTH, Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, Journal of International Arbitration* 26(6), 2009, pp. 773-821; L. BENTO, "Chapter 13: Mapping the Genetic Code of Provisional Measures: Characteristics and Recent Developments", in C. Baltag, *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International, 2016, pp. 363-384; A. ANTONIETTI, G. KAUFMANN-KOHLER, "Interim relief in International Investment Agreements", in K. Yannaca-Small (Ed.), *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Oxford University Press 2010, pp. 507-550; P. KARRER, Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please, *International Arbitration and National Courts*, ICCA Congress Series n°10, 2010; D. SAROOSHI, Provisional Measures and Investment Treaty Arbitration, *Arbitration International*, Vol. 29, N° 3, 2013, pp. 361-379.

2. Ch. JARROSSON, "Réflexions sur l'imperium', in *Etudes offertes à Pierre Bellet*, Litec, pp. 245-279.

3. ICSID Rule 39(1); ICSID AF Rules, Article 46(1); 1976 UNCITRAL Rules, Article 26(1); 2010 UNCITRAL Rules, Article 26(1); SCC Rules, Article 37(1); ICC Rules, Article 28(1); SIAC Investment Rules, Article 27.1.g.

4. 1976 UNCITRAL Rules, Article 26(1).

5. 2010 UNCITRAL Rules, Article 26(1).

ICC,[6] SCC[7] rules and the SIAC Investment Rules[8] expressly condition the grant of interim relief on there being a request made by a party. Exceptionally, the ICSID and ICSID AF Rules allow a tribunal to recommend interim measures of its own initiative.[9] The ICSID AF Rules additionally specify that the tribunal may recommend measures other than those requested.[10]

All sets of rules examined also provide that parties may apply to national courts for interim relief.[11] However, the ICSID Rules additionally require that the parties must consent to recourse to national courts in order to be able to do so.[12] This requirement of party consent was introduced in the 1984 amendments to the ICSID Rules[13] to engineer compatibility between the interim measures regime and the exclusive jurisdiction that an ICSID tribunal enjoys over a dispute submitted to ICSID arbitration.[14]

More generally, the parties' freedom to have recourse to domestic interim relief after the arbitration tribunal is constituted is often limited. The ICC Rules stipulate that this may only be done in 'appropriate circumstances', while the as yet untested SIAC Investment Rules require 'exceptional circumstances'.[15] Such circumstances would exist when the tribunal is not in a position to provide effective relief, for example, against third parties over which the tribunal has no jurisdiction.

Of all the arbitration rules examined, only the ICSID and ICSID AF Rules expressly require that the tribunal give each party an opportunity to be heard.[16] The remaining rules surveyed are silent on the issue. However, ex parte relief is probably not available in investment arbitration as this could amount to a fundamental breach of procedural fairness, leaving the award vulnerable to being set aside.

A different issue is whether tribunals have the power to issue orders maintaining the status quo pending a response from the party against whom the request for interim measures is submitted. The UNCITRAL Model Law expressly provides

6. Article 28(1).

7. Article 37(1).

8. SIAC Investment Rules, Article 27.1.

9. ICSID Convention, Article 47 and ICSID Rule 39(3); ICSID AF Rules, Article 46(2).

10. ICSID AF Rules, Article 46(2). See also Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009), page 763 for examples of cases in which ICSID tribunals departed from the requests in recommending provisional measures.

11. ICSID Rule 39(6); ICSID AF Rules, Article 46(4); 1976 UNCITRAL Rules, Article 26(3); 2010 UNCITRAL Rules, Article 26(9); ICC Rules, Article 28(2); SCC Rules, Article 37(5); SIAC Investment Rules, Article 27.2.

12. ICSID Rule 39(6).

13. C. Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioner's Guide* (Koninklijke Brill, 2014), pages 196–198.

14. ICSID Convention, Article 26.

15. ICC Rules, Article 28(2); SIAC Investment Rules, Article 27.2.

16. ICSID Rule 39(4); ICSID AF Rules, Article 46(3). C. H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd Ed, 2009), pages 762–763.

for such a possibility,[17] which is not uncommon in investment arbitration practice, irrespective of the set of arbitration rules applicable.[18] In the *Von Pezold v. Zimbabwe* case, the state ordered the claimants to allow an inspection of share registers of all companies linked to the ICSID proceedings, which was to take place two days later, and threatened criminal prosecution if the claimants refused to comply. Immediately upon receiving the state's letter, the claimants filed a request for an order preventing such research. The president of the tribunal ordered, one day later and without inviting the state's comments, the requested relief, [19] highlighting that he would 'confer with [the other arbitrators] as soon as possible regarding the final determination of the Application, including the need, if any, for reconsideration of these instructions'. This approach, that can be understood based on the urgency of this specific matter, does not mean that Tribunals can rule on their own without a proper debate. Acting differently is dangerous for the validity of the final award and, in any case, the arbitrators have to motivate precisely why they step one way or another, in order to avoid further difficulties for the parties at the stage of enforcement.

Another difference between the various sets of rules is the availability of emergency relief, or relief before the tribunal is constituted. Given the time-sensitive circumstances under which most interim relief is commonly requested, parties may require relief prior to the relatively lengthy process of constituting the tribunal. Only the ICC, SCC and SIAC Investment Rules allow for emergency relief.

As a matter of fact, there is some uncertainty as to whether emergency relief is available in treaty-based investment arbitration conducted under the ICC Rules. While the SIAC Investment Rules require the parties' express consent before the emergency provisions apply,[20] and the SCC rules do not impose any separate requirement of party consent, the ICC emergency arbitrator provisions require both parties to be signatories to the arbitration agreement.[21] Certain commentators consider that this excludes treaty-based investment arbitration;[22] given that the state's offer to arbitrate is contained in the treaty and is accepted by the investor's request for arbitration, there is no orthodox arbitration agreement.

Under the SCC and SIAC Investment Rules (but not the ICC Rules), emergency orders granted cease to be binding if the dispute is not referred to a tribunal within 90 days of their granting. This safeguards against abuse of the emergency process by a party that has no intention of commencing arbitral proceedings.

Only the SCC provisions on emergency proceedings have been tested in

17. UNCITRAL Model Law, Article 17B(2).

18. For ICC practice, see Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012), page 291, paragraphs 3–1040.

19. *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Directions Concerning Claimants' Application for Provisional Measures, 12 June 2012.

20. SIAC Investment Rules, Article 27.4.

21. ICC Rules, Article 29(5).

22. Chiara Giorgetti ed, *Litigating International Investment Disputes: A Practitioner's Guide* (Koninklijke Brill, 2014), pages 203–205.

investment arbitration, with emergency relief granted in three reported cases.[23] Two questions of note were answered by the emergency arbitrators in these proceedings: (1) emergency relief could be granted even if the investment treaty had been concluded before the introduction of the SCC emergency provisions; [24] and (2) emergency relief could be granted notwithstanding the requirement of a cooling-off period in an investment treaty.[25]

II. Conditions for the Granting of Interim Measures

The conditions for the granting of interim measures are generally not expressly set out in the applicable arbitration rules. Indeed, the ICC and SCC Rules contain no further indication than requiring that the arbitral tribunal grant only the measures it 'deems appropriate'.[26] For its part, Article 47 of the ICSID Convention merely states that '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,'[27] and Article 39 of the ICSID Rules does not provide more details on the requirements that a request for interim measures must meet: 'the request shall specify the rights to be preserved, the measures the recommendation of which is requested and the circumstances that require such measures.'[28] This wording use the word 'recommend' has always lead to strong debates regarding the binding or non-binding nature of the orders rendered, the current discussions for the adoption of renewed INCID Rules does not seem to clarify.

Only the UNCITRAL Rules 2010 expressly set out the preconditions for the granting of interim measures, namely (1) the threat of a 'harm not adequately reparable by an award of damages' (necessity), (2) that 'substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted' (proportionality), and (3) a 'reasonable possibility that the requesting party will succeed on the merits of the claim' (*prima facie* claim on the merits).[29] These preconditions are also included in Article 17 of the UNCITRAL Model Law.[30]

Commentators and investment arbitration jurisprudence refer to most (or all) of the following criteria for the granting of interim measures: (i) prima facie jurisdiction; (ii) a *prima facie* claim on the merits; (iii) necessity; (iv) urgency; and (v) proportionality.[31]

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24. *Griffin Group v. Poland*, see Koh Swee Yen, 'The Use of Emergency Arbitrators in Investment Treaty Arbitration' (2016) 31(3) ICSID Rev 534, pages 543–545; L. E Peterson, 'Investigation: New Details Emerge About Use of Emergency Arbitrators in Investment Treaty Cases', *IA Reporter* (8 October 2015); www.iareporter.com/articles/investigation-new-details-emerge-about-use-of-emergency-arbitrators-in-investment-treaty-cases/ (last accessed on 27 February 2017).

30. UNCITRAL Model Law, Article 17.

31. R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration' (2009) 26(6) *J. Int'l Arb. 773*, pages 814–819; G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia

i. Prima facie jurisdiction

Even though none of the rules examined provide for this condition, tribunals often assess their *prima facie* jurisdiction before granting interim measures.[32] The assessment is *prima facie* only, as requests for interim measures must be dealt with as a matter of priority. Arbitrators are required to simply satisfy themselves that they do not manifestly lack jurisdiction over the underlying claim.[33] ICSID tribunals can rely on the Secretary General's registration of a request for arbitration as a token of such *prima facie* jurisdiction, as he or she would not do so where the dispute falls manifestly outside ICSID jurisdiction.[34] Accordingly, the granting of interim measures does not prejudge the tribunal's ultimate jurisdiction over the dispute, or preclude a jurisdictional challenge.

ii. Prima facie claim on the merits

Only the UNCITRAL Rules 2010 specifically require this precondition. However, it has also been applied in arbitrations under other sets of rules.[35] It is not a stringent requirement, and the tribunal here needs only to assess a *prima facie* review of the merits[36] to satisfy itself that the claims made are 'not, on their

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Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 507, at pages 528–544; S. Luttrel, 'ICSID Provisional Measures "In The Round"' (2015) 31(3) *Arb. Int'l* 393, pages 398–410. See also N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration* (OUP, 2015), paragraphs 5–32, where the authors consider that only necessity and urgency are inherent preconditions to the granting of interim measures.

32. R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration' (2009) 26(6) *J. Int'l Arb. 773*, page 812; G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 507, at page 531.

33. R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration' (2009) 26(6) *J. Int'l Arb. 773*, page 812; G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 507, at page 532; *Occidental Petroleum Corporation v. the Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 55. *Pugachev v. Russia* (Interim Award, 7 July 2017) The tribunal found that the 'Claimant must prove, not only that this Tribunal has prima facie jurisdiction over the general dispute, but also that it has prima facie jurisdiction for the requested interim measures.' (paragraph 216). In this regard, the tribunal found that it did not have prima facie jurisdiction to suspend provisional measures that were related to the suspension of civil proceedings in third states, i.e., states that were not parties to the BIT in question (para 226).

34. C. H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd edition, 2009), page 772, paragraph 48.

35. *TSIKinvest LLC v. The Republic of Moldova*, SCC Emergency Arbitration No. EA(2014/053), Emergency Decision on Interim Measures, 29 April 2014, paragraphs 62–65.

36. C. Mouawad & E. Silbert, 'A Guide To Interim Measures in Investor-State Arbitration' (2013) 29(3) *Arb. Int'l 381*, page 399.

face, frivolously or obviously outside the competence of the [t]ribunal'.[37]

iii. Necessity

One of the main criteria that arbitrators have to assess before ordering interim measures is whether these measures are necessary to preserve the rights of one of the parties to the arbitration.[38]

Two standards on the requisite level of necessity have emerged in international arbitration practice. The higher standard is inspired by the International Court of Justice, which in *LaGrand* interpreted necessity as the prospect of irreparable harm.[39] This standard was applied by the ICSID tribunal in *Occidental v. Ecuador*, which considered that a provisional measure is necessary where the actions of a party are 'capable of causing or of threatening irreparable prejudice to the rights invoked'.[40] The claimant in *Occidental v. Ecuador* requested provisional measures to compel Ecuador to fund and preserve a particular oil field. The tribunal refused to grant the requested provisional measures on the grounds that the relief sought was merely aimed at reducing the amount of damages incurred by the claimant. Since the alleged harm was compensable by monetary damages, provisional measures could not be granted.[41] The tribunal in *Quiborax v. Bolivia* acknowledged the ICJ jurisprudence, and, by referring to Article 17A of the UNCITRAL Model Law (reproduced in the UNCITRAL Rules 2010),[42] explained that irreparable harm is harm that cannot be repaid by the award of damages.[43] This view was shared by the ICSID tribunal in *Plama v. Bulgaria*. The dispute involved the decision by a Bulgarian district court that had ordered that the company constituting the claimant's investment in Bulgaria be declared bankrupt, and that its assets be sold and distributed to its creditors. The tribunal refused to order the discontinuance of the insolvency proceedings, as it considered that, regardless of the outcome of the Bulgarian proceedings, the claimant's right to pursue its claim for damages in the ICSID arbitration and the tribunal's ability to decide this claim remained unaffected.[44]

37. S. Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, paragraph 55.

38. As formulated in ICSID Rule 39.

39. *La Grand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, paragraph 23.

40. *Occidental Petroleum Corporation v. the Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 59. See also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, paragraph 8.

41. *Occidental Petroleum Corporation v. the Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraphs 26, 59 and 98.

42. Article 26(3)(a).

43. *Quiborax SA and others v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 156;

44. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Or-

The lower standard requires merely that the applying party risk suffering significant harm should the provisional measures not be granted. In *Perenco v. Ecuador*, the tribunal considered that 'where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages, the test in [Article 47 of the ICSID Convention] is likely to be met. But the Article does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction.'[45] The tribunal ordered that Ecuador refrain from collecting on certain taxes, because this would expose the claimant to imminent seizure of its assets in Ecuador and bring the claimant's business in the country to an end.[46]

In *City Oriente v. Ecuador*, the tribunal noted that 'it is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.'[47] Therefore, the *City Oriente* tribunal replaced the requirement of irreparable harm with a proportionality element.

It is worth noting that the ICJ's test in *LaGrand* was birthed in extreme circumstances, in which provisional measures were sought to stay the execution of a German national by the United States.[48] It is difficult to think of a more acute situation of irreparable harm. Such situations are unlikely in investment arbitration, and it is questionable whether this high threshold is adequate in that specific field.[49]

iv. Urgency

Although not expressly required by the arbitration rules surveyed, urgency has been referred to as 'the most important (even a *sine qua non*) consideration

der, 6 September 2005, paragraphs 3(b) and 46.

45. *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paragraph 43. See also, *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Decision on Provisional Measures, 23 November 2017, paragraph 103.The tribunal in that case defined irreparable harm as "a material risk of serious or grave damage to the requesting party and not harm that is literally irreparable" and added that the degree of seriousness will vary depending on the case at hand.

46. *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paragraphs 43, 46 and 79.

47. *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, paragraph 72.

48. *La Grand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, page 9, paragraph 23. See also Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Provisional Measures Order, 9 April 1988, page 13, paragraphs 35–37.

49. D. Sarooshi, 'Provisional Measures and Investment Treaty Arbitration' (2013) 29(3) *Arb. Int'l* 361, pages 372–376.

for the granting of interim measures',[50] as provisional measures 'will only be appropriate where a question cannot await the outcome of the award on the merits'.[51] Thus, tribunals have regularly considered urgency as a requirement for the granting of interim measures.[52]

In practice, urgency appears to be the assessment of necessity in the prevailing circumstances.[53] This was well articulated by the tribunal in *Perenco v. Ecuador*: '[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them'.[54]

The degree of urgency required before provisional measures should be granted depends on the circumstances and nature of the measures sought.[55] Typically, urgency is related to the prospect of potential harm being caused to the applying party before the final award is rendered by the tribunal.[56] In any event, the applying party is obliged to demonstrate that the threat to its interests is imminent and likely to occur. Mere possibility or hypothetical harm are insufficient grounds for such measures.[57]

v. Proportionality

It is generally admitted that 'the risk of harm must be assessed with respect to the rights of either party.'[58] Most of the institutional arbitration rules are silent on this requirement, except for Article 26 of the UNCITRAL Rules 2010, which expressly requires that the harm the applicant is likely to suffer 'substantially outweighs the harm that is likely to result to the party against whom the measure

50. S. Luttrel, 'ICSID Provisional Measures "In The Round"' (2015) 31(3) *Arb. Int'l* 393, page 406. See also R. Bismuth, 'Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration' (2009) 26(6) *J. Int'l Arb.* 773, page 817.

51. C. H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd edition, 2009), page 775, paragraph 63, quoted with approval in *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, paragraph 68.

52. S. Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, paragraph 45; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Interim Award, Request for Interim Measures of Protection, 31 January 2004, paragraph 13.

53. C. Mouawad and E. Silbert, 'A Guide To Interim Measures in Investor-State Arbitration' (2013) 29(3) *Arb. Int'l* 381, page 388.

54. *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paragraph 43.

55. *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, paragraph 76.

56. *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003, paragraph 33.

57. *Occidental Petroleum Corp and Occidental Exploration & Production Co v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 89.

58. G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 541.

is directed if the measure is granted'.[59]

This is akin to the common law doctrine of the 'balance of convenience', whereby a tribunal must compare the harm that would result to either party if it turned out at the stage of the final award that provisional measures were wrongly granted or withheld.[60] Tribunals may consider proportionality either as a standalone requirement[61] or, more commonly, as part of the requirement of necessity.[62]

Tribunals pay heightened attention to the requirement of proportionality when potential impingement on the sovereign powers of a state is at stake. This is particularly obvious in cases involving applications for the stay of domestic criminal proceedings to protect the arbitral process. As the tribunal in *Hydro S.r.l v. Albania* considered, 'criminal law and procedure are a most obvious and undisputed part of a State's sovereignty' and, therefore, 'any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary'.[63] The tribunal granted the measures sought, reasoning that the state's threat to incarcerate the claimants would affect their ability to participate in the arbitration, while a stay of the criminal proceedings would merely postpone the state's ability to bring those proceedings.[64]

The question of irreparable harm can be rather specific when one party requests security for costs. This can occur when the petitioner will suffer an injury that is "neither remote nor speculative but actual and imminent" and cannot be made whole through monetary damages awarded at the end of the proceedings.[65] For example one can cite the impossibility for one party to pay an award allocating damages or even only costs due to the impecuniosity of the other party to the arbitration.

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59. 2010 UNCITRAL Rules, Article 26.3(a).

60. S. Luttrel, 'ICSID Provisional Measures "In The Round"' (2015) 31(3) *Arb. Int'l* 393, pages 407–408; G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 541.

61. S. Paushok, *CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, paragraph 79; *Occidental Petroleum Corp and Occidental Exploration & Production Co v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 93.

62. *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, paragraph 72; *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, paragraphs 81 and 82.

63. *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.16.

64. Ibid., paragraphs 3.14, 3.16. See also *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraphs 164–165.

65. Emirates Int'l Inv. Co. v. ECP Mena Growth Fund, LLC 2012 WL 2198436, US District Court, Southern District of New York (15 June 2012), p. 15.

III. Types of Measures Granted by Investment Tribunals

There is generally no restriction on the types of interim measures available for the mere reason that the rules mostly use a very broad wording in order for the Tribunals to get flexibility in their potential rulings. Practically speaking, measures granted by tribunals are generally measures that: require the parties to cooperate in the proceedings or preserve evidence, or decide on confidentiality[66]; preserve the status quo between the parties and avoid further aggravation of the dispute through unilateral action; prevent the parties from seeking relief through other remedies, for example, by staying parallel proceedings; or secure compliance with an eventual award, for example, by ordering security for costs.[67]

i. Measures to maintain the status quo and avoid further aggravation of the dispute

The principle that a dispute should not be aggravated is part of general international law.[68] It was the basis upon which Article 47 of the ICSID Convention (which empowers the arbitral tribunal to grant interim relief) was drafted,[69] and has been expressly acknowledged as a general obligation incumbent on disputing parties by several ICSID tribunals.[70]

The preservation of the status quo or the non-aggravation of the dispute, rather than being considered as a type of interim measure, may be considered as a criterion for granting interim measures, which applies to several types of measures. In practice, the preservation of the status quo or the non-aggravation of the dispute has been used as a ground for a very wide range of applications for relief, such as ordering the stay of proceedings in domestic courts,[71] preventing

66. This type of measures which can be found also in commercial arbitration and is broadly aaccpted will not be discussed in details in this commentary.

67. C. H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd edition, 2009), page 780.

68. *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, 5 December 1939, PCIJ Rep Series A/B No. 79, page 199, cited in *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, paragraph 62, and in *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, paragraph 127. See also, *Frontier Dispute Between Burkina Faso & Mali*, Order on Provisional Measures of 10 January 1986, [1986] ICJ Rep 3, page 11 (ICJ), and *Nuclear Tests (Australia v. France)*, [1973] ICJ Rep 99, pages 104 and 106 (ICJ).

69. Note A to ICSID Rule 39 in its 1968 version, 1 ICSID Rep 99.

70. It was acknowledged for the first time in *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 183, page 412. See also, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, paragraph 67; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 Claimant's Request for Provisional Measures, 1 July 2003, paragraph 7.

71. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, Claimant's Request for Provisional Measures, 1 July 2003.

the respondent from publicising criminal investigations,[72] or preserving disputed contractual rights.[73]

This large scope of measures that fall under the preservation of the status quo and non-aggravation of the dispute can be seen as contradicting the application of the high threshold for the necessity criterion. But preventing aggravation of a potential harm can also be analysed as avoiding aggravation of the dispute, therefore leading to this criterion being neutralized as least partially for this type of measures.

ii. Measures to stay parallel proceedings

Many international tribunals have granted interim measures directed at the conduct of domestic courts.[74] The most controversial variety of such measures consists in injunctions against the state's conduct of criminal proceedings against the claimant.

States' power to prosecute has regrettably been used against claimants in retaliation for the commencement of arbitral proceedings, resulting in applications to the arbitral tribunal for injunctive relief. On the other hand, tribunals are reluctant to infringe on a core aspect of state sovereign power: the national judge's ability to initiate criminal proceedings.[75] Relief will only be granted where there is a clear abuse of the criminal process, for example, where the criminal proceedings were politically motivated, initiated as a 'defence strategy' to the arbitration,[76] or as a means of compelling the claimant to comply with alleged obligations that are disputed in the arbitration.[77] In most cases, the principle of separation of powers

72. *Teinver SA v. Argentina*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016.

73. *Perenco v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009.

74. C. Mouawad and E. Silbert, 'A Guide To Interim Measures in Investor-State Arbitration' (2013) 29(3) *Arb. Int'l* 381, page 402. What is meant by domestic courts is the courts of the host State. The *Pugachev* tribunal clarified that it did not have jurisdiction to order interim measures aiming at the suspension of court proceedings in a third country. See *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 216.

75. The issue was raised in *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 Claimant's Request for Provisional Measures, 1 July 2003. See also *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraphs 120 and 123; *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, paragraph 137; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 272; *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, Decision on Claimant's Request for Provisional Measures, 29 March 2017, paragraphs 327–328.

76. *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 122; *Teinver SA v. Argentina*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, paragraph 190.

77. *City Oriente Ltd v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, paragraph 62.

when constitutionally protected limits the power of the arbitrators, specifically when the criminal action was initiated totally or partially before the arbitration started.

iii. Measures ordering security for costs

The SCC Arbitration Rules explicitly provide for the possibility for tribunals to order security for costs.[78] Security for costs can also be considered as provided for under Article 26(2)(c) of the UNCITRAL Rules 2010, which refers to measures that 'provide a means of preserving assets out of which a subsequent award may be satisfied'.[79]

The new version of the ICSID Rules seems to be opting for a new regime of security for costs, independent from the set of rules applicable for interim measures[80]. Although investment arbitration tribunals have generally acknowledged their power to grant security for costs, even under other sets of rules,[81] they are very reluctant to grant such measures. Tribunals have referred to various reasons for their refusals, including that it would be improper to prejudge the claimant's case,[82] or because there is no imminent harm at stake.[83]

78. SCC Rules, Article 38.

79. 2010 UNCITRAL Rules, Article 26(2)(c). See also G. Kaufmann-Kohler and A. Antonietti, 'Interim Relief in International Investment Agreements', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreement: A Guide to the Key Issues* (OUP, 2010), page 507, at p. 528.

80. Under the structure of the proposed revised Rules, it appears that security for costs will not be a type of provisional measure, as it is provided for in Rule 51, separated from Rule 50 dealing with provisional measures. It can also be noticed that, unlike proposed Rule 50, Rule 51 on security for costs uses the verb to "order". This indicates that an order for security for cost is binding. Indeed, the proposed Rule 51 provides arbitral tribunals with the power to sanction a party that refuses to comply with such an order, by suspending or discontinuing the proceedings. Similar sanctions (or any other sort of sanctions) do not exist under proposed Rule 50 in relation to provisional measures. It can also be noted that while the initiative to order provisional measures may be either the parties' or the tribunal's, an order for security for cost can only be rendered following a request submitted by one of the parties. Furthermore, the criteria tribunals are asked to apply when considering a request for provisional measures is different from the criteria applied when a request for security for cost is considered. In particular, a tribunal is allowed to recommend provisional measures only if it considers it to be urgent and necessary to do so. This is not required when a tribunal considers a request for security for costs. This possible evolution of the Rules is to be monitored strictly in order to define more precisely the boundaries between preliminary measures and security for costs. The impact of this reform on other Rules of arbitration which mainly referred to security for costs as an interim measure can also be considered.

81. *Libananco Holdings Co Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, paragraph 57; *Commerce Group Corp & San Sebastian Gold Mines Inc v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, paragraph 45; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, paragraph 82.

82. *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. 97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, paragraphs 20–21.

83. *Burimi SRL and Eagle Games SHA v. Republic of Albania*, ICSID Case No. ARB/11/18,

Tribunals have stated that security for costs might be ordered in the most extreme cases, such as where essential interests of either party stand in danger of irreparable damage,[84] or where abuse or serious misconduct is apparent.[85] Financial difficulties and third-party funding do not constitute in themselves exceptional circumstances justifying the granting of security for costs.[86] Neither would the fact that the claimant investor is a 'shell company' without assets of its own, as special purpose or joint venture vehicles are common in investment making.[87]

The tribunal in *RSM Production Corporation v. Santa Lucia* ordered the claimant to provide security for the respondent's costs, as it was satisfied that such exceptional circumstances were met, highlighting that 'the difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied, is that in this case the circumstances

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Procedural Order No. 2 on Provisional Measures Concerning Seucirty for Costs, 3 May 2012, paragraph 35; *Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Procedural Order No. 14, 11 March 2013, paragraph 6; *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paragraph 50.

84. *Libananco Holdings Co Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, paragraph 57.

85. *Commerce Group Corp & San Sebastian Gold Mines Inc v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs, 20 September 2012, paragraph 45.

86. *EuroGas Inc and Belmont Resources Inc v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, Decision on the Parties' Request for Provisional Measures, 23 June 2015, paragraph 123; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3, Decision on Respondent's Request for Provisional Measures, 12 April 2017, paragraphs 36–38: in this matter Italy requested security for costs, since Ekosol was bankrupt, and it had suspicions that pending existing bankruptcy proceedings Eskosol was relying on a third-party funder that would not be bound by an award on costs (paragraph 15-17). However, the tribunal rejected the respondent's request, since Italy did not demonstrate that a posting of security for costs was either necessary or urgent in the circumstances (para. 37). The tribunal noted that it was not aware of any obligation on the part of the funder to meet an eventual costs order against Ekosol, and that that the funder had assisted Ekosol in obtaining insurance to satisfy an eventual costs order, for an amount higher than the amount of security sought by Italy (para. 37). The tribunal refused Italy's claim as, in the circumstances, an order for security for costs would impose a disproportionate burden on the claimant (paragraph 38).

87. *Libananco Holdings Co Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, paragraphs 58–59; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2, Decision on Respondent's Application for Provisional Measures, 13 February 2016, paragraphs 34, 36, 61 and 62: in this matter Timor-Leste based its request for security of costs on the fact that the claimants were allegedly shell companies with nominal assets, and their indirect owner Mr Jacobs made material misrepresentations about the companies' experience, finances and capacity (paragraph 34).The tribunal rejected the respondent's claim, as it failed to demonstrate the existence of 'exceptional circumstances', as required by the *RSM v. Lucia* tribunal for an order for security for costs (para. 62). The tribunal noted, inter alia, that mere insufficiency of assets would not suffice for an order for security for costs, but that 'something more' was required – this 'something more' was not demonstrated by the respondent (para. 61).

which were brought forward in other proceedings occur cumulatively.'[88] According to the tribunal, there was a material risk of non-compliance with a cost award given the claimant's non-compliance with cost awards in previous proceedings that it had initiated,[89] combined with a serious lack of financial assets given that the claimant's claim was financed by a third party.

RSM Production Corporation v. Santa Lucia paved the way for a more flexible approach in complex cases where a party can demonstrate the impecuniosity of a Claimant. In approaching security for costs, the CIArb Guidelines entitled "Applications for Security for Costs" (the "CIArb Guidelines") has relevant citations for Tribunals consideration, namely (i) Article 1 (2) provides that "When deciding whether to make an order for security for costs, arbitrators should take into account the following matters: 1 – the prospects of success of the claim(s) and defence(s) Article 2); 2 – the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award (Article 3); and 3 – whether it is fair in all of the circumstances to require one party to provide security for the other party's costs (Article 4)."[90]

According to Redfern and O'Leary, "*there are three criteria that an international arbitral tribunal should expect to be established before acceding to an application for security for costs: first, that there is a reasonable possibility that the requesting party will succeed in its defence to the claim; secondly, if the requesting party does succeed in its defense, that it is likely to be awarded costs; and thirdly, that there is a risk that those costs will not be paid unless some form of security is ordered. If these criteria are established, then the tribunal must consider whether it is fair and just in all the circumstances that the order be made*."[91] This element of fairness allows for the appropriate test to include a 'reasonable possibility of success'. If one party can demonstrate that there is a reasonable chance that a cost award will never be paid (for example, because the agreement with a third party funder does not cover an adverse cost award or if it can be demonstrated that one party was never a company with proper financial capacity to pay) this element of reasonableness may be met.

IV. The Effeciency and Enforcement of Interim Measures

The ICSID Rules state that a tribunal may 'recommend' interim measures.[92] The ICC and SIAC Investment Rules use the more imperative term 'order',[93] while

88. *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paragraph 86.

89. See *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011; *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010.

90. CIArb Guidelines entitled "Applications for Security for Costs 2016.

91. A. Redfern & S. O'Leary, "Why it is time for international arbitration to embrace security for costs" (2016) Arbitration International, vol. 32, pp. 397-413, at p. 410.

92. ICSID Rule 47.

93. ICC Rules, Article 28(1); SIAC Investment Rules, Article 27.1.

the remaining rules surveyed use more neutral terms such as 'grant' or 'take'.[94] Notwithstanding the difference in terminology, interim measures ordered in investment arbitration are considered as binding on the parties.[95]

On the other hand, tribunals lack the coercive power of state courts, and have limited ability to compel enforcement of the interim relief granted. The tribunal's own coercive powers extend only to costs sanctions, and the drawing of adverse inferences against a party on matters of evidence. For example, an adverse inference was drawn by the tribunal in *AGIP v. Congo* against the respondent for failing to cooperate with orders to preserve evidence.[96]

There are examples of respondent states pre-empting orders for provisional measures, by voluntarily undertaking to preserve certain rights for the claimant. For example, the government in *Vacuum Salt v. Ghana* undertook that it would not deny the claimant access to certain records requested. The tribunal considered that this satisfied the claimant's concerns expressed in its request for provisional measures, and did not see the need to order relief.[97] Another example is found in *Italba v. Uruguay*, where the claimant sought to restrain Uruguay's criminal investigations against two of the claimant's witnesses. The government of Uruguay undertook that these investigations would not impede the witnesses' ability to participate in the claimant's case and freely offer their testimony. The tribunal was persuaded by these undertakings, inter alia, and declined to restrain the investigations.[98]

On the other hand, and more particularly where anti-enforcement or anti-suit injunctions regarding proceedings against the claiming investor are concerned, there is an understandable difficulty with enforcing the interim measures, given that a state's sovereign rights are implicated. Reportedly, out of 10 orders granted by ICSID tribunals between 2000 and 2010 for relief suspending domestic litigation, only two were complied with.[99]

If measures of enforcement are required, the requesting party must resign itself to turn to national courts for assistance. This can be a complicated exercise given

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94. 1976 UNCITRAL Rules, Article 26(1); 2010 UNCITRAL Rules, Article 26(1); SCC Rules, Article 37(1).

95. *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, paragraph 9; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, paragraphs 17–26; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 Claimant's Request for Provisional Measures, 1 July 2003, paragraph 4; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 58. See also Caline Mouawad and Elizabeth Silbert, 'A Guide To Interim Measures in Investor-State Arbitration' (2013) 29(3) *Arb. Int'l* 381, pages 381 to 416.

96. *AGIP SpA v. People's Republic of the Congo* (1979) 1 ICSID Reports 306, page 317.

97. *Vacuum Salt Products Ltd v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, paragraph 16.

98. *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on Claimant's Application for Provisional Measures and Temporary Relief, 15 February 2017, paragraphs 119–120.

99. M. D Goldhaber, 'The Rise of Arbitral Power over Domestic Courts' (2013) 1(2) SJCL 373, page 402, referring to Rodrigo Gil, 'ICSID Provisional Measures to Enjoin Parallel Domestic Litigation' (2009) 3 *World Arb & Mediation Rev* 535, pages 553–564.

that international conventions, in particular the New York Convention,[100] and domestic rules typically only provide for the enforcement of awards and not orders.

In this regard, in *Chevron v. Ecuador*, the tribunal re-issued interim measures previously granted in procedural order in the form of an interim award,[101] stating that such an award was 'immediately final and binding' upon the parties. The relevant interim measures sought to preclude the state from enforcing an anticipated judgment issued by an Ecuadorian court against the claimants. There is a practice among certain national jurisdictions to refuse to enforce interim orders as awards under the New York Convention 1958, no matter their title.[102]

On the other hand, jurisdictions that have adopted Articles 17H and 17I of the UNCITRAL Model Law 1985 with the amendments of 2006, specifically provide that interim measures issued by an arbitral tribunal are binding and shall be enforced by a competent national court subject to specified grounds for refusing such enforcement.

About the author : Benoit Le Bars

Lazareff Le Bars

Benoit Le Bars, co-founder and managing partner of Lazareff Le Bars, represents clients in international arbitration, mediation and alternative dispute resolution, and has specialist expertise in corporate law, international trade law, international contracts and OHADA law.

Benoit Le Bars' practice focuses principally on commercial and investment arbitration involving complex trade relationships between businesses, investors and states, and spans a broad range of jurisdictions and arbitral institutions.

In addition to his work as counsel, he is often appointed as arbitrator and has extensive experience in arbitral forums worldwide.

His international arbitration expertise is recognised in the leading international legal directories, including *Chambers* and *The Legal 500*.

In 2018, Benoit published an exhaustive treatise of French law judgments in international commercial arbitration (*International commercial arbitration: landmark decisions of French arbitration law, Lexisnexis 2018*). He is also a professor of law in the United States and in France.

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100. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

101. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, First Interim Award on Interim Measures, 25 January 2012, pages 16–17.

102. See, e.g., Cour de Cassation, 1st Civil Chamber, 12 October 2011, No. 09-72.439, *Groupe Antoine Tabet v. Congo* (2012) Rev arb 86, note by François-Xavier Train; B. Le Bars & J. Dalmasso, International commercial arbitration: landmark decisions of French arbitration law, Lexisnexis 2018, Topic 20, p. 369 and sub.