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**PROVISIONAL MEASURES
IN INTERNATIONAL INVESTMENT ARBITRATION**

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Provisional Measures in International Investment Arbitration
Ph.D. Thesis – Federico Lenci

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INTRODUCTION

“La durata del processo non deve andare a danno dell’attore che ha ragione” (Chiovenda).¹

“International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions” (Greenwood).²

This thesis deals with provisional measures in one of the fastest-growing areas of public international law, namely international investment law and arbitration.

It constitutes a relatively recent topic and, since to the best of my knowledge no monograph has ever been devoted thereto, my task in structuring this dissertation was at the same time easy (I was completely free to choose) and difficult (there was no extensive study to which I could refer). Moreover, the fact that this topic is a moving target, as I will demonstrate, rendered my task more complicated and fascinating. Therefore, I feel the need to inform the reader at the outset that this thesis constitutes a very personal endeavour, since it aims at representing the current state of my topic as it appeared to me throughout these three years.

After presenting the investment framework with a broad angle (Chapter one), the analysis proceeds through the adoption of a differentiated approach: in Chapter two I firstly draw on the history of the interpretation and application of provisional measures

¹ CHIOVENDA, *Principii di Diritto processuale civile*, terza edizione, Napoli, 1923, 802. The suggested translation reads as follows: “The duration of the trial shall not cause damage to the claimant who is right”. Of course, provisional measures are also significant in this sense to respondents.

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment dated 19 June 2012, ICJ Reports 2012, 324, Declaration of Judge Greenwood, para. 8.

in inter-State and State-private international adjudication (Section one) and, secondly, address these measures from a comparative perspective inscribed in public international law adjudication (Section two). Such a choice is by no means evident, due to the fact that, to a certain extent, international investment arbitration bear a close resemblance to international commercial arbitration, at least from a procedural viewpoint: in that connection, the apparently most natural choice would have been that of comparing these two mechanisms in the light of provisional measures. The international investment regime is an area of law whose integration in the public-international-law or private-international-law spheres is disputed for many reasons,³ the main two of which are:

- first of all, it is a mixed dispute settlement mechanism, involving a subject of international law (the host State, i.e. the State in which the investment takes place) and a foreign private party (a natural or a legal person, whose international subjectivity is controversial);⁴
- the dispute settlement mechanism adopted is international arbitration, which in and of itself is a hybrid instrument, since it operates in both “pure” spheres (State-to-State arbitration and international commercial arbitration).

Yet, in my opinion the choice of comparing the arbitral provisional power in international investment arbitration and international commercial arbitration would have been a wrong one, for two series of reasons, which can be briefly summarised as follows:

³ For an account of such debate within the Hague Academy of International Law, see ALVAREZ, *The Public International Law Regime Governing International Investment*, Recueil des cours, Vol. No. 344, 2009, in pocketbook form (published in 2011), 93 f.

⁴ The use of the term “participant” is preferred to that of “subject” or “object” of international law, following the teaching of the then recently appointed as the first woman judge on the International Court of Justice, HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, 1995, 49: “There are no ‘subjects’ and ‘objects’, but only participants. Individuals are participants, along with States, international organizations..., multinational corporations, and indeed private and non-governmental groups”; also quoted by ALVAREZ, *Are Corporations “Subjects” of International Law?*, Santa Clara Journal of International Law, Vol. No. 9, Issue No. 1, 8. See also ALVIK, *Contracting with Sovereignty*, Oxford and Portland, 2011, 283.

- The sovereign nature of one of the parties determines a fundamental difference between the two frameworks, causing that group of disputes to be inscribed in public international law adjudication, which merely share with international commercial arbitration the dispute settlement tool;
- As a corollary, investment arbitral case law is perfectly able to influence (and to be influenced by) consolidation, divergence and development of public international law, constituting one of its sources under the terms of Art. 38 (1) lett. d) of the ICJ Statute.⁵

Consequently, I found it more appropriate to follow this approach, setting aside – save for some exceptions, which will be justified – the analysis of arbitral case law in international commercial matters.

Chapter three is devoted to the current state of provisional measures in international investment arbitration. Section one addresses their specific features, namely legal force and exclusive / concurrent jurisdiction to rule upon them. Thereafter, Section two focuses on conditions, purposes and atypicalness of recourse thereto (in the effort to describe the picture of the arbitral default rules as they emerge from case law), whereas Section three sets some aspects of treatification and contractualisation of provisional measures.

Chapter four discusses the rules applicable to the implementation of these measures, considering voluntary compliance, non-compliance and its consequences, finally the options available to the addressee in order to oppose their application.

My thesis concludes with some remarks on the role of consent, namely on the possibility for the parties to amend such default rules before their potential dispute occurs. Thus, they are able to tailor provisional measures to their needs, and particularly to their bargaining power before the investment is carried out in the host State, so as to increase legal security in that respect.

⁵ Art. 38 ICJ Statute provides in relevant part that “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. The ICJ Statute is available at the Court’s institutional website: <http://www.icj-cij.org>.

Provisional Measures in International Investment Arbitration
Ph.D. Thesis – Federico Lenci

CHAPTER ONE

STATE SOVEREIGNTY AND THE RULE OF LAW IN THE INVESTMENT REGIME

A. General framework. – B. Relevance of provisional measures in international investment law. – C. Towards a *common procedural lexicon*.

A. General framework

I. Terminological premises. – II. Overview. – III. Scope of the present study.

A.I. The purpose of this research is to address the most topical and, at the same time, unclear issues raised by a controversial procedural instrument: the request for provisional and protective measures in international – or *transnational*,¹ in order to distinguish it from *inter-State*² – investment arbitration. Actually, it is not controversial in and of itself, since the great deal of uncertainty derives to some extent from the available legal reactions to the failure of a party to abide by provisional measures taken by international courts or tribunals in favour of the other party. The logical origin of such difficulty consists in the question of the legal character of these measures, in particular whether they are binding or not; in this sense, the use of the rather “neutral” verb *taken*³ is not fortuitous, as the issue of the binding nature of provisional measures also relates to the verbs adopted in the relevant articles of certain international legal instruments.

As will be showed more extensively, said measures are *recommended*⁴ in the ICSID Convention, *indicated*⁵ in the Statutes of the International Court of Justice (ICJ) and of

¹ CARLEVARIS, *La tutela cautelare nell'arbitrato internazionale*, Studi e pubblicazioni della Rivista di Diritto internazionale privato e processuale, Padova, 2006, 19.

² SACERDOTI, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, Recueil des Cours de l'Académie de La Haye, vol. 269, 1997, 269.

³ Unless otherwise specified, it is deemed appropriate to use this term throughout the paper when referring to provisional measures without reference to any particular legal instrument.

⁴ Art. 47, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 *United Nations Treaty Series* 259, signed on 18 March 1965, entered into force on 14 October

its predecessor, the Permanent Court of International Justice (PCIJ), *prescribed*⁶ in the UN Convention on the Law of the Sea (UNCLOS).⁷

Terminology, when misused, has yet another puzzling implication: expressions like *provisional measures* and *conservatory measures* are often employed interchangeably, while the latter indicates the *purpose* of said decisions (they serve the purpose of safeguarding parties' rights, a situation or evidence), and the former indicates the nature of said decisions (i.e., they are *reversible*).⁸ This distinction is not deprived of importance, since there are measures which are not provisional, and still they fulfill their conservatory character, such as – for instance – orders for the production of documents,⁹ which are meant to safeguard the parties' rights to evidence and, consequently, to a fair trial.¹⁰ That being said, some authors challenge such distinctions, claiming that they lack precision.¹¹

It is significant, in this sense, to underline the fact that in relevant provisions on international arbitration the two adjectives are joined together in the expression *provisional and conservatory measures*.¹² Terms like *interim*, *provisional*, *protective*, *interlocutory*, *preliminary*, *precautionary*, *conservatory measures* are often adopted

1966, available at the ICSID institutional website: <http://icsid.worldbank.org> (hereinafter "ICSID Convention").

⁵ Art. 41, Statute of the Permanent Court of International Justice (hereinafter, "PCIJ Statute"); art. 41, Statute of the International Court of Justice (which "forms an integral part of the Charter" under art. 92, UN Charter), signed on 26 June 1945, entered into force on 24 October 1945, available at the ICJ institutional website: www.icj-cij.org.

⁶ Art. 290, United Nations Convention on the Law of the Sea, signed on 10 December 1982, entered into force on 16 November 1994 (hereinafter, "UNCLOS").

⁷ See *infra*, Chapter 2, B.II.i., lett. b).

⁸ FOUCHARD, GAILLARD, GOLDMAN, *Traité de l'arbitrage commercial international*, Paris, 1996, 723.

⁹ See *Azpetrol v. Azerbaijan*, ICSID Case No. ARB/06/15, Procedural order on the Respondent's request for production of documents dated February 26, 2008; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Procedural order concerning the parties' respective requests for production of documents dated August 9, 2007.

¹⁰ For a comparative analysis and further reference, see CARLEVARIS, quoted *supra* footnote 2, 14 (quoting in support of such inclusion DE BOISSESON, HORY, and FOUCHARD, GAILLARD, GOLDMAN in relation to France; REDFERN – the UK – and KÜHN – Germany).

¹¹ BESSON, *Arbitrage international et mesures provisoires*, Zürich, 1998, 40: "A notre avis, ces critères sont trop incertains pour permettre une délimitation suffisamment précise. Nous renoncerons dès lors à distinguer les mesures provisoires des mesures conservatoires".

¹² CARLEVARIS, quoted *supra* footnote 1, 17, referring to art. 183 of the Swiss law on private international law, art. 26 of the UNCITRAL Arbitration Rules, art. 23 of the 1998 ICC rules.

without distinction.¹³ The term which will be more frequently employed – failing a reason to the contrary – in this thesis is *provisional*, simply because it is the one adopted in the ICSID system, which is the principal frame of reference in international investment arbitration; moreover, it seems more appropriate to stress the intrinsic nature of these measures, rather than their variably declined finality (i.e., the element of conservation).

A.II. Before addressing the core issue of this study (chapter 3) and the relationship between the need to enforce provisional measures so as to create a reliable and investor-friendly system – on the basis that such an environment is capable of promoting economic development and prosperity of both home States and host States, as expressed in the preamble to the ICSID Convention¹⁴ – and the necessity to respect host States’ sovereignty to regulate in the public interest, firstly it is deemed appropriate to focus on the relevance of provisional measures in international investment arbitration, taking into due account the asymmetries in this type of arbitration and the issues raised by its fragmented approach to the matter. Indeed, it is suggested that the issue of the evolution towards legal certainty as far as provisional measures are concerned is of paramount

¹³ YESILIRMAK, *Provisional Measures in International Commercial Arbitration*, London, 2005, 8.

¹⁴ “The Contracting States,

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:”; for the Convention see the ICSID institutional website at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last accessed on 30 October 2014).

importance in strengthening a friendly, effective and efficient environment in the struggle with its major enemies, namely length and costs in the conduct of arbitral proceedings.

Due relevance shall be paid to meta-legal and interdisciplinary subjects such as – among others – the relationship between economic and legal globalization, since they are of crucial importance in depicting the framework in which investments regulations operate and modify their own scope and content. Such modifications have an impact on the role attributed to public international law in the creation and development of investment arbitration.

Its main characteristics will be addressed, in order to show the differences with international commercial arbitration¹⁵ and the gnoseological reasons for its inclusion into the public-international-law framework:¹⁶ indeed, it will be demonstrated that international investment law shall not be considered as a legal regime through and through detached from public international law. As a matter of fact, it is a *self-contained regime* (only in part), but in the sense that it embodies its own rules of procedure; moreover, mandatory provisions of the *lex loci arbitri* – i.e., those of the state in which the seat of arbitration is placed – do not apply: therefore, it is a “non-national review system”.¹⁷ This is so if the arbitration is ruled by the ICSID or NAFTA systems, while

¹⁵ For a discussion on the differences between the two types of arbitration in relation to the severability of the arbitral clause from the contract, see AUDIT, FORTEAU, *Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?*, *Journal of International Arbitration*, Vol. 29, No. 5, 2012, 583; in general, see ALVIK, *Contracting with Sovereignty*, Oxford, 2011, 1.

¹⁶ In support of this theory, see COLLINS, *Provisional and Protective Measures in International Litigation*, *Recueil des Cours de l'Académie de La Haye*, Vol. 234, 1992, 98; BÖCKSTIEGEL, *Commercial and Investment Arbitration: How Different are they Today?*, *The Lalive Lecture 2012*, *Arbitration International*, Vol. 28, No. 4, LCIA, 2012, 579: “As far as *public international law* is concerned, for commercial arbitration, the only really relevant treaty is the New York Convention which ‘only’ deals with the recognition and enforcement of foreign arbitral awards, while the other traditional instruments play no major role today. On the other hand, for investment arbitration, treaties of public international law provide the fundamental framework, particularly bilateral instruments as the more than 2,000 BITs, and multilateral instruments as the ICSID Convention, the Energy Charter Treaty, and regional instruments such as NAFTA and CAFTA”.

¹⁷ GIARDINA, *ICSID: A Self-Contained, Non-National Review System*, in LILICH, BROWER (eds.), *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?*, New York, 1994, 199.

if the parties choose the ICC or LCIA rules, arbitrators and parties have to apply the mandatory law of the place of arbitration.¹⁸

Secondly, the survey will deal with the relevant sources of international investment arbitration and their connections with each other (chapter 2). The analysis will put under scrutiny legal basis and features of provisional measures, in consideration of the interrelationships between customary international law and other non-treaty sources of law – arbitration rules, guidelines, model clauses and other soft-law documents – on the one hand, treaty sources of law – bilateral, regional and sectoral investment treaties – on the other hand. Straight thereafter, the focus will move to the matter of the origin of the arbitral power to adjudicate in this field, the rule giving effect to the will of parties to resort to arbitration in said legal order.

A brief account of the relevance of the most common provisional measures in investment arbitration will be extensively dealt with in the appropriate chapter (3), with a broad recourse to arbitral case law¹⁹ as well as for the other most recurring provisional measures sought by parties and (at times) granted by investor-State arbitral tribunals. The survey of the relevant case law will also be of great help in the task of drawing the main conditions, common characteristics and purposes of their requests.

It is possible to anticipate that the latter can be divided into four categories: - securing discovery of evidence (in analogy with the judicial creation of the Anglo-Saxon category of *Anton Piller Orders*²⁰); - preserving the parties' rights;²¹ - preventing self-help;²² - safeguarding the award's enforcement.²³

A.III. In a nutshell, this study aims at assessing the effects of the abovementioned changes, and namely at examining whether and to what extent a new set of rules governing provisional measures has indeed developed in the broader context of the

¹⁸ This explains why it is suggested that international investment arbitration is only in part a *self-contained regime*.

¹⁹ GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Leiden/Boston, 2008, 64.

²⁰ See REYNOLDS, *Arbitration*, London, 1993, 35.

²¹ The so-called *conservatory character* of provisional measures.

²² This purpose is linked to the general problem of the effectiveness of any international system of adjudication.

²³ This latter purpose is in certain cases closely related to that of ensuring that the arbitral tribunal's jurisdiction is made fully effective.

gradual emergence of general rules of procedure in international adjudication. This process of “cross-fertilization”, in the words of Professor Chester Brown,²⁴ occurs in many respects, also due to the fact that international law makes no sharp distinction between substantive law and procedural law.²⁵

It is well known that the sources of international law are listed in art. 38, para. 1 of the Statute of the International Court of Justice (ICJ), providing that

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.²⁶

This provision is fundamental in the general analysis of the system, also considering the exact wording “in accordance with international law” contained therein.²⁷ As a consequence, if international investment arbitration – both ICSID and non-ICSID – is included within the public-international-law framework, then the sources listed in art. 38 apply to procedure and contribute to the shaping of its content. Indeed, looking at this issue from another perspective, if international law and investment law pertain to two different legal orders, their respective sources of law are independent and therefore may deny the legal character of each other.²⁸ This explains the relevance, as a preliminary step, of attempting to delimit the scope of investment law through the analysis of the consequences deriving from the existence of a dispute with at least one

²⁴ BROWN, *A Common Law of International Adjudication*, Oxford, 2007, 36.

²⁵ ROSENNE, *The Law and Practice of the International Court, 1920-2005*, Vol. III, Leiden, 2006, 1021.

²⁶ The text of the Statute is available at the ICJ institutional website: www.icj-cij.org.

²⁷ LUZZATTO, *Il diritto internazionale generale e le sue fonti*, in CARBONE, LUZZATTO, SANTA MARIA (ed.), *Istituzioni di diritto internazionale*, IV ed., Torino, 2011, 52.

²⁸ For a discussion of legal orders as the basis of the *teoria istituzionistica del diritto* see ROMANO, *Realtà giuridica*, in *Frammenti di un dizionario giuridico*, Milano, 1947, 204.

public party (a State or a State entity). This complex task – if successfully accomplished – will also be of help in the endeavour of drawing a distinction between investment and commercial disputes, which has significant implications in the present study.²⁹

Turning back to the issue of *self-contained regime*,³⁰ this aspect is one of the most significant consequences of the difference between the two mechanisms, since in the latter domestic courts participate in many phases of the arbitral proceeding such as, for the purpose of this study, when provisional measures have to be dealt with.³¹ Thus, it refers to the independence of the arbitral process until the achievement of the *res iudicata* effect, in the sense that it prohibits review of the arbitral award by national courts of member States.³² However, the need for assistance of the latter is by no means eliminated in the final phase, since for the recognition and enforcement of the award rendered in its favour the winning party needs national courts' power as provided for, in the ICSID framework, by art. 54 of the ICSID Convention.³³ In addition, such an assistance in terms of the procedure that has to be followed is not specified in the

²⁹ For a general clarification of the differences concerning the issues of jurisdiction, confidentiality v. transparency and consistency of decisions, see BÖCKSTIEGEL, quoted *supra* footnote 16, 583.

³⁰ See *supra*, 34.

³¹ ORREGO VICUÑA, *The Evolving Nature of Provisional Measures*, in FERNÁNDEZ-BALLESTEROS, ARIAS (eds.), *Liber amicorum Bernardo Cremades*, Madrid, 952: “If it is looked upon purely from the point of view of commercial arbitration it is difficult to explain its self-contained character, particularly since most arbitration mechanisms allow for an ample participation by domestic courts in various stages of the proceeding, ranging from the adoption of provisional measures to the challenge of the final award. Conversely, if the ICSID system is looked upon purely from the perspective of traditional dispute settlement under international law, it will become apparent that it does not fully share those characteristics and features either”.

³² See Committee on International Commercial Disputes of the New York City Bar Association, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered under the ICSID Convention*, ICSID Review, Vol. 27, No. 1, 2012, 209.

³³ Art. 54: “1. Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

2. A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

3. Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought”.

Convention, and therefore courts are free to decide the means by which they will comply, as State agents, with this treaty obligation.³⁴ Furthermore, it has to be briefly outlined that, as provided for by art. 55 of the ICSID Convention, national law rules as applied by courts are also relevant as far as the execution of the award is concerned, since by agreeing to arbitration States have only waived their sovereign immunity from jurisdiction, not execution.³⁵ It is one of the few remainders of the concept of due deference to States as equal and *superiorem non recognoscentes* powers in interational investment arbitration.

³⁴ See Committee quoted *supra* footnote 32, 210.

³⁵ Art. 55 ICSID Convention provides that “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”.

B. Relevance of Provisional Measures in International Investment Arbitration

I. The international economic environment. – II. Asymmetries in investment arbitration. – III. A key issue: striking a balance between State sovereignty and protection of investor's rights.

B.I. The mechanism of investment disputes settlement lies in the so-called *mixed* or *transnational* arbitration,³⁶ in which a private party – generally, the claimant – clashes with a public one, i.e. the State – generally, the respondent host of the investment within its borders.

Said condition raises issues of equality of arms in many respects, among which that of provisional measures in investment arbitration. Just to make an example of structural inequality, it is convenient to consider one of the most common measures requested by respondent host States: security for costs (*cautio iudicatum solvi* in ancient Roman times).

When respondent asks the arbitral tribunal to request the claimant to post a bond or other security so as to cover expenses and legal fees of the arbitration alleging that its case is groundless, if the tribunal issues such a decision and the claimant fails to comply with it, the tribunal may consider it an admissibility issue, and thus suspend the proceedings. As a matter of fact, by failing to comply with such a measure, the Claimant shows an unwillingness to respect *bona fide* the ICSID tribunal's jurisdiction: this behaviour gives an evidence about its probable future non-compliance should an adverse award be rendered against it.

Diplomatic espousal – originally exercised through *gunboat diplomacy*, before the judicialisation/arbitralisation of such disputes – has always been a sovereign prerogative: the investor had no rights to have its state protect its rights and interests. It seems that recent developments have occurred in this field, and that they are worth of research.³⁷

³⁶ LEBEN, *La théorie du contrat d'Etat et l'évolution du droit international des investissements*, Recueil des Cours de l'Académie de La Haye, Vol. 302, 2003, 218.

³⁷ See, for the possibility for the investor to obtain compensation from its State of nationality in case of failure to act in diplomatic espousal, Italian Court of Cassation, judgment No. 21581 dated October 19, 2011, and PUSTORINO, *Protezione diplomatica e interesse legittimo dell'individuo*, Rivista di diritto internazionale, Vol. 1, 2012, 156-159.

Through international arbitration, investors had the opportunity to control its dispute with the host State – contrary to what happened with diplomatic espousal – without being compelled to exhaust local remedies. From States' perspective, the deal was profitable, as it permitted to depoliticise the atmosphere entouring international investments, thanks to the shift from State-to-State to investor-State disputes.³⁸

By means of such a mechanism – even if it was limited to entering into legal treaty (ICSID) commitment only to procedural issues under the auspices of a stable arbitral institution, although not completely as will be addressed in this study on provisional measures and namely on their “dark side” – its proponents, backers and policy-makers aimed at giving certainty³⁹ to investment outflows from developed capital-exporting countries to developing (often newly-independent) ones.

As a matter of global macroeconomic policy, legal-economic certainty – or security – through clear rules is a core element which has an enormous influence on the investment climate.⁴⁰ Conversely, it has been demonstrated that, when faced with high uncertainty, firms reduce investment demand and delay their projects because they need to understand the environment which they have to deal with.⁴¹ This hard reality is valid for both national and international investment projects, and the same goes for the microeconomic character of each scheme.

Uncertainty covers many aspects, and it is a multiplier of the effects of a financial crisis which slows recovery by attacking the business cycle. It refers to a framework in which the image is out of focus because information is lacking. In the majority of cases, the adjective which has to be added to the noun “information” is “legal”. It is suggested that the “dark side” of provisional measures is a part of the image which foreign investors are struggling to bring into focus, and this aspect arguably contributes to slow down

³⁸ SHIHATA, *Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA*, in *The World Bank in a Changing World*, 1991, 309; DOLZER, SCHREUER, *Principles of International Investment Law*, II ed., Oxford, 2012, 9.

³⁹ On the paramount relevance of certainty of the rule of law in international investment law, see ALVIK, quoted *supra* footnote 15, 7.

⁴⁰ VANDELDE, *Bilateral Investment Treaties*, Oxford, 2010, 114: “By promoting rule of law principles such as security, reasonableness, nondiscrimination, transparency, and due process, BITs help establish the institutional framework necessary for a modern, developed economy able to benefit from economic globalization”.

⁴¹ See IMF, *World Economic Outlook*. October 2012, 50-53, available at the IMF's institutional website: <http://www.imf.org> (last accessed on 30 October 2014).

economic growth and development in today's ever more integrated international markets.

In the last fifty years, many elements which put at risk a healthy economic development have gradually been removed, in particular those which prevented foreign investors from engaging into a fair competition with local firms while they were carrying out their investment: for instance, many host States used to require from foreign multinational enterprises that they share the property of their branches in those States with local private investors or – in socialist countries – with the State itself, by means of the creation of joint-ventures. From an economic point of view, greenfield investments may have been much more profitable in many situations, not only for the foreign investors but also for the host State and its taxpayers as well as any other individual living therein, as it was demonstrated in early publications dating back to the 1960's and 1970's.⁴²

That state of facts has gradually been overcome in many respects, in particular after the entry into force of the so-called "Trade-Related Investment Measures" (TRIMs) which implemented national investment policies within the GATT/WTO framework, providing that no member State shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions).⁴³

That evolution was driven by economic considerations, and in the same way even if it appears difficult today to attribute the exact economic cost of uncertainties surrounding – and, in part, historically incorporated into – provisional measures in international arbitration, it cannot be excluded that such a task will be accomplished tomorrow. Moreover, given the recent increase and consequent success of the ICSID arbitral system, the opportunity to ask the tribunal to issue binding provisional orders so as to avoid the negative effects of lengthier proceedings is and will be more and more urgent.

⁴² See for example VERNON, *Les entreprises multinationales*, Paris, 1973, 176-189 and the vast bibliography indicated in those pages.

⁴³ Agreement on Trade-Related Investment Measures, available at the WTO institutional website: <http://www.wto.org> (last accessed on 30 October 2014).

B.II. Focus on investment law and arbitration allows a clarification of the interrelationship – or, rather, hierarchy – between norms of procedure in the field as well as the procedural autonomy or delocalization of international arbitration.⁴⁴ In fact, it is suggested that not only treaty law – multilateral and bilateral investment treaties – and case law, provided that the *stare decisis* principle does not apply in investment arbitration,⁴⁵ come into play in assessing the exact content of provisional measures in the specific case at stake, but also in investor-State contracts. This consideration notwithstanding, which reflects the principle of party autonomy in the choice of procedural law applicable to the dispute, it must be noticed that parties rarely address the issue of provisional measures specifically, since much more often they simply make reference to institutional rules of procedure or resort to *ad hoc* arbitration allowing the arbitral tribunal to determine the rules of procedure which it will follow.

At the same time, certain issues relating to provisional measures, such as that of their nature – whether conventional, inherent or implied – and most importantly of their binding force – whether merely recommendatory or binding – cause legal uncertainty,⁴⁶ which in turn severely affects investment flows in many respects.

Generally, before the foreign direct investment is made, the investor enjoys an advantageous bargaining position while it is contracting with the host State, since the latter needs the inflow of foreign capital, technology, jobs and income for its economic development. However, after the investment has been made, if it proves to be successful, that position is reversed. The investor counts on the contract – the former so-called *economic development agreement* – it has entered into with the host State in order to attain the estimated return on its investment, which normally takes a large amount of time. During this period, if a change of policy towards FDIs occurs within the host State, for instance due to a change of government, and the latter decides to amend the provisions contained in the contract or even terminate it – withdrawing from its original commitment – the investor lies in a critical position since it lacks those truly effective means of reaction apart from that of resorting to arbitration: for the time being,

⁴⁴ For a discussion see RENNER, *Towards a Hierarchy of Norms in Transnational Law?*, Journal of International Arbitration, Vol. 26, No. 4, 2009, 554, in particular the interesting assumption of the emergence of constitutional norms of international arbitration.

⁴⁵ See *infra*, 45 f. (*soft stare decisis* principle in arbitral case law).

⁴⁶ See *supra*, 40 f.

it finds itself deprived of its own investment. Therefore, political risk is generally taken into consideration together with commercial risks linked to the sector where the investment is about to be carried out. Consequently, there comes what has been called the “vicious circle”⁴⁷ of the contractual balance between investor and host State: the investor may use its advantageous initial bargaining position to attain particularly lucrative conditions meant to take into consideration the political risk and permitting it to reap the desired return on its investment in a shorter (thus, less risky) period of time.

The problem is that this is exactly what may be deemed to justify direct or creeping expropriation from the host State’s perspective, since it is compelled to avoid being “subjected” to a commitment which – if successful – grants excessive gains to the investor. This vicious circle compromises, or at least significantly limits, economic growth and development of the host State and the investment climate in general; therefore it may be appropriate to be mitigate it through the rule of law, both substantive and procedural (of course, including the rules on provisional measures).

Before addressing these measures, it is convenient to analyse the question whether investor-state arbitral tribunals take part of the international system of dispute settlement: can they be considered *international jurisdictions*? In order to elaborate an appropriate and grounded reply, it is necessary to analyse the elements which characterise such a jurisdiction as compared to national jurisdiction, and see if *mixed arbitrations* comply with them. Professor Leben⁴⁸ decides to draw these elements from the International Court of Justice – which is undoubtedly an international jurisdiction – and then to compare them with ICSID tribunals. The former was created on the basis of a treaty, its procedure is consistent with international law, it applies international law, it rules over legal disputes of an international character and its judgments are binding. In relation to the application of international law, Mr. Broches – one of the negotiators of the ICSID Convention – affirmed that ICSID tribunals should proceed through the examination of the dispute having regard to applicable national rules and to international law, as the latter lies in a hierarchically higher level.⁴⁹

⁴⁷ ALVIK, quoted *supra* footnote 15, 3.

⁴⁸ LEBEN, quoted *supra* footnote 36, 331.

⁴⁹ BROCHES, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Recueil des cours, Vol. 227, 1972, 392: “The Tribunal will first look at the law of the host

The other elements of ICSID tribunals will be further extensively dealt with, but it is possible to anticipate that they are all met: the conclusion of the analysis will consist in the assessment that they are true *international jurisdictions*.⁵⁰ This issue will be further developed also in relation to non-ICSID arbitral tribunals. From these considerations it is possible to derive significant implications, one of which for example is the opportunity-necessity to analyse the legally (or not) binding force of provisional measures in the light of the recent ICJ developments, starting from the *LaGrand* case, according to the new interpretation which seems to be gradually emerging as a means to resolve the traditional problems of effectiveness of any mechanism of international adjudication. Such problems originate from the consensual basis of said jurisdictions.

B.III. After the conclusion of the abovementioned survey aimed at demonstrating that investment dispute settlement mechanisms – including, with certain peculiarities, the Iran-US claims tribunal created with the adoption of the Algiers agreements⁵¹ – apply, interpret and therefore influence the formation and evolution of international law provisions and are inserted in the public-international-law regime,⁵² the focus moves to the study of the way in which they are related with the other sources of international

State and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law. That process will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it when that law, or action taken under that law, violates international law. In that sense [...] international law is hierarchically superior to national law under article 42".

⁵⁰ LEBEN, quoted *supra* footnote 36, 342.

⁵¹ The Iran-US claims tribunal was established pursuant to the Declaration of the Government of the Democratic Republic of Algeria dated January 19, 1981.

See also the arbitral tribunal's Rules of Procedure dated May 3, 1983, available at <http://www.iusct.net/General%20Documents/5-TRIBUNAL%20RULES%20OF%20PROCEDURE.pdf>, whose art. 26 on Interim Measures of Protection states as follows: "1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

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

Note to Article 26: as used in Article 26 of the UNCITRAL Rules, the term "party" means the arbitrating party".

⁵² ALVAREZ, *The Public International Law Regime Governing International Investment*, Leiden, Boston, 2011.

investment law, in particular but not exclusively treaty law. As a matter of fact, States – and not just arbitrators of investor-State claims – retain the initiative for change as they enter into investment treaties that contain more provisions in common (the so-called *Common Lexicon* of international investment law, which extends also to procedural rules governing provisional measures, through the evolution of BITs and arbitral case law). Before addressing the controversial aspects of an incidental procedure within the realm of investment dispute resolution, it is deemed necessary to firstly conduct a survey on the legal panorama governing the phenomenon of the mutual relationship between a State – or State entity – and a foreign private investor.

The historical context in which the ICSID Convention was negotiated, signed and ratified explains the fact that many concessions had to be accorded to the block of the newly independent capital-importing States in order to reach a broader consensus at least to the relevant set of rules of procedure,⁵³ in the effort of finding a balance between sovereignty and investment protection.⁵⁴ Among said concessions are the rather “soft” provisions of the mere recommendatory power of tribunals to issue provisional measures as expressed in art. 47 of the ICSID Convention.

As it has been noticed,⁵⁵ tribunals have on many occasions ruled that they are under no obligation to follow earlier decisions.⁵⁶ Nonetheless, case law plays a major role in evaluating and contributing to the development of international investment law.

In *AES v. Argentina*, the tribunal addressed the issue:

“Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this

⁵³ Actually, the original project also envisaged substantive provisions to be included into the treaty. On Broches’ concept of “procedure before substance”, see DOLZER, SCHREUER, quoted *supra* footnote 38, 9.

⁵⁴ *Ibid.*, 8; BROCHES, quoted *supra* footnote 49, 392.

⁵⁵ DOLZER, SCHREUER, quoted *supra* footnote 38, 33.

⁵⁶ See *Romak v. Uzbekistan*, Award dated November 26, 2009, para. 170; *Gas Natural v. Argentina*, Decision on jurisdiction dated June 17, 2005, paras. 36-52; *AES Corp. V. Argentina*, Decision on jurisdiction dated April 26, 2005, paras. 17-33; *Enron v. Argentina*, Decision on jurisdiction (ancillary claim) dated August 2, 2004, para. 25; *Feldman v. Mexico*, Award dated December 16, 2002, para 107; *LETCO v. Liberia*, Award dated March 31, 1986, para. 352; *AMCO Asia Corp. & others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on jurisdiction dated September 25, 1983, and Decision on annulment dated May 16, 1986, para. 44.

tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution”.⁵⁷

Thus, arbitral case law plays a significant role as a source of international investment law, since the interpretation of BITs and international investment agreements (IIAs) by investor-State arbitrators affects the legitimacy of this regime and the assessments of increasingly fragmented or harmonious law.⁵⁸

In this attempt, due consideration will be given to the differences between ICSID and non-ICSID arbitration, the peculiarities of international investment arbitration – a part of public international law – as compared to international commercial arbitration and the consequences in terms of *rejected* and *accepted* concurring jurisdiction⁵⁹ to issue provisional measures: indeed, according to the former – which seems to be purported by art. 26 of the ICSID Convention – State courts have no power to issue provisional measures, since the ICSID tribunal is given jurisdictional exclusivity.⁶⁰ In ICSID cases where provisional measures are requested in order to enjoin parallel domestic litigation, there is a struggle between the supremacy of international tribunals and the autonomy of domestic courts. Indeed, provisional measures to enjoin domestic litigation challenge States’ sovereignty to exercise their jurisdiction to conduct national proceedings within their own territory.⁶¹

A review of ICSID cases involving the request to enjoin parallel domestic proceedings shows that the main rights invoked in support of provisional measures – according to

⁵⁷ *AES Corp. v. Argentina*, para. 30 (also quoted by DOLZER, SCHREUER, *supra* footnote 38, 34).

⁵⁸ *Ibid.*, 176.

⁵⁹ See FOUCHARD, GAILLARD, GOLDMAN, quoted *supra* footnote 8, 725; CARLEVARIS, quoted *supra* footnote 1, 341; BERNARDINI, *L’arbitrato commerciale internazionale*, seconda edizione, Milano, 2008, 178-181.

⁶⁰ See *Burlington Resources, Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the request for provisional measures dated June 29, 2009; *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Interim decision on the request for provisional measures dated November 19, 2007; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on the request for provisional measures dated November 29, 2004; *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on the request for provisional measures dated March 1, 2000.

⁶¹ GIL, *ICSID Provisional Measures to Enjoin Parallel Domestic Litigation*, World Arbitration & Mediation Review, Vol. 3, Nos. 4-5, 2009, 535.

ICSID arbitration rule 39 – is the Claimant’s right to exclusivity of ICSID proceedings and the right to non-aggravation of the ICSID dispute, both procedural rights. The first is expressly set forth in art. 26 of the ICSID Convention. The second was firstly established by the Permanent Court of International Justice (PCIJ) in *Electricity Company of Sofia v. Bulgaria*, which held 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”.⁶²

The interrelationships between the investment treaty regime and non-treaty sources of international law – among which is arbitral case law – has a huge impact on the real world of States and investors. A great number of investors have potentially significant stakes in knowing whether these treaties constitute a part of customary international law. There are aspects of BITs that are *lex specialis*: that is, intended to exclude the applicability of any general rules to the contrary. And, as in a pyramid, there are provisions on the law applicable to the possible disputes between investor and host state which are included into an investor-state contract (when the investor has sufficient bargaining power – it is not, of course, always the same – to compel the state to enter into a contract in order to specify certain aspects of the investment and the protections provided to it).⁶³ In a nutshell, this part addresses the issue of the capability to create tailor-made provisions on interim measures in investor-State contract.

⁶² *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ Series A/B No. 79, Judgment dated 5 December 1939, 199.

⁶³ LEBEN, quoted *supra* footnote 36, 289: “Le choix du droit applicable peut être opéré, comme on l’a déjà indiqué, soit dans une clause du contrat d’investissement soit dans un article d’un traité bilatéral ou multilatéral de protection de l’investissement. On a vu que la plupart des clauses des contrats pétroliers cités ci-dessus (n. 135 ss.) combinent le droit de l’Etat contractant et les principes du droit international, en ajoutant parfois les principes de droit international tels qu’appliqués par les tribunaux internationaux ou les principes généraux de droit reconnus par les nations du monde, ou les traités de protection des investissements conclus par l’Etat contractant, ou encore les principes généralement acceptés de l’industrie pétrolière internationale. Les traités bilatéraux ou multilatéraux de protection des investissements comportent eux aussi des dispositions portant sur le droit applicable aux litiges susceptibles de se produire entre l’Etat d’accueil et les investisseurs. Si l’investissement s’opère par contrat avec l’Etat d’accueil et que ce contrat comporte une clause d’*electio iuris*, il faudra voir comment cette clause s’articule avec la disposition du traité bilatéral sur les investissements qui peut exister entre l’Etat cocontractant et l’Etat national de l’investisseur. La question est complexe, mais on considère, en

C. Towards a *common procedural lexicon*

I. Concerns about the fragmentary structure of the matter at issue. – II. The role of arbitral tribunals. – III. Some provisionally open problems.

C.I. From some assumptions above it is possible to derive one of the core issues relating to the panorama of provisional measures, consisting in the capability of parties to delimit their scope of application as provided for in art. 47 of the ICSID Convention and in art. 39 ICSID Arbitration Rules. Such matters can be expressed as follows:

- C. Considering the rather ambiguous content and force of said measures, since they are textually *recommended* under art. 47 of the ICSID Convention, are States entitled to increase its binding nature, simply by stating in the BIT that this is the way they consider provisional measures to be possibly issued by arbitral tribunals? Then, will the principle *lex specialis derogat legi generali* be applicable (*lex generalis* being the ICSID Convention, customary international law and general principles of law recognized by art. 38, para. 1 c) of the ICJ statute)?
- D. In the abovementioned case, is it possible for parties to the investment contract to agree on a different evaluation of the content of provisional measures, and therefore soften their force by an express clause clarifying that parties interpret them as mere recommendations?
- E. Is the presence of an *umbrella clause* in the relevant BIT necessary in order to permit parties to an investor-State contract to shape the scope of provisional measures which can be issued should a dispute arise between them?

général, que la préférence doit être donnée à la clause contractuelle, du fait qu'elle est la *lex specialis* par rapport à la *lex generalis* du traité”.

- F. Are parties to a BIT entitled to exclude the power of the ICSID tribunal to issue provisional measures? And what about parties to an investor-State contract? Is the *umbrella clause* necessary in such cases?
- G. Considering the *de officio* power of the tribunal to issue provisional measures, are parties to a BIT entitled to exclude them also in this particular case? What about parties to an investor-State contract? Is the *umbrella clause* necessary in such cases?

Parties to a BIT, and even more parties to an investor-State contract will be interested in adopting legal rules providing them with tailor-made systems concerning provisional measures, for different reasons which are justified by their different nature. Indeed, the investor could, through this means, manage to obtain greater security to its investment; the host state, assuming that it is a capital-importing state, could be able to send a clear message to other potential investors about its investor-friendly attitude, and in general about its commitment to free-market economy and free flow of capitals.

C.II. There is another aspect about freedom of parties to differ from ICSID Convention provisions, which concerns the question of ICSID's jurisdictional exclusivity under art. 26 of the Convention in issuing decisions on provisional measures. As a matter of fact, art. 47 of the Convention provides that, except as the parties otherwise agree, a tribunal may, if it considers that circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party. Under art. 39 (5) Arbitration Rules, the parties may, if they have so provided in their agreement, also request a court or other authority to take provisional measures. If the parties wish thus to provide for the possibility of seeking court-ordered provisional measures, they may use Model clause 14, which reads as follows: "Without prejudice to the power of the Arbitral tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, for the preservation of its rights and interests". Unlike the trade regime, there is no single, overarching multilateral treaty on investment, nor is there an accepted "model" for an

investment protection, but still there is an emerging body of soft law rules, or rather auxiliary provisions which may be of help to parties when negotiating their positions.

The issue of the enforcement of provisional measures is logically connected to their legal authority: if we are dealing with mere recommendations, any reflection on their enforceability is inevitably groundless.

In his *Commentary*,⁶⁴ Professor Schreuer notes that the *travaux préparatoires* of the ICSID Convention reveal that the negotiating States were reluctant to grant tribunals the power to issue binding provisional measures.⁶⁵ In particular, such a force was opposed by the newly-independent States, which saw it as a possible means to impose a new form of economic colonization, or at least of *gunboat arbitration*⁶⁶ as will be further discussed. Indeed, art. 47 and art. 39 Arbitration Rules stipulate that tribunals may *recommend* provisional measures. Nevertheless, as Professor Schreuer explains,⁶⁷ this does not detract from the legal relevance of such measures. The general obligation devolving on parties to behave *bona fide* pending international adjudication and not to frustrate the object of arbitral proceedings generally gives rise to the obligation to abide by any measures, issued in the course of such proceedings, which may be necessary for the effectiveness of the arbitral dispute settlement mechanism on the whole.

The legal authority of ICSID tribunals to issue binding rulings on provisional measures is undisputed, beyond any doubt. The most relevant arbitral precedent in this sense is *Maffezini v. Spain*: in Procedural Order no. 2, the tribunal noted that the difference between the term *recommend* used in arbitration rule 39 and the term *order* used elsewhere in the rules to indicate a tribunal's power to direct a party to undertake a certain action, is "more apparent than real". For the tribunal, its authority to rule on

⁶⁴ SCHREUER, MALINTOPPI, REINISCH, SINCLAIR, *The ICSID Convention. A Commentary*, Cambridge, 2009, 764.

⁶⁵ See also MALINTOPPI, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order*, Essays in Honour of Christoph Schreuer, Oxford, 2009, 160.

⁶⁶ This expression has been formulated for the first time by MONTT, *What International Investment Law and Latin America Can and Should Demand from Each Other: Updating the Bello/Calvo Doctrine in the BIT Generation*, 3 Res Publica Argentina 75, 2007, 80.

⁶⁷ SCHREUER, MALINTOPPI, REINISCH, SINCLAIR, quoted *supra* footnote 64, 764.

provisional measures was “no less binding than that of a final award” and the word *recommend* was deemed to be of equivalent value to the word *order*.⁶⁸

The tribunal’s reasoning in *Maffezini* was relied upon by the tribunal in *Victor Pey Casado v. Chile* in order to support the conclusion that the question of the binding nature of provisional measures is no longer controversial. In its decision on preliminary measures, the *Victor Pey* tribunal also drew an analogy with the case law of the International Court of Justice on the interpretation of art. 41 of its statute (in particular, the *La Grand* case) and with the precedents offered by the Iran-US Claims tribunal.

In *Biwater Gauff v. Tanzania*, the tribunal both *recommended* and *ordered* provisional measures in response to Biwater’s various applications. Although the tribunal did not explain the reasons for the different wording used in its Procedural Order, it appears that it *recommended* certain measures when it did not wish to indicate any specific finding or final determination, but simply intended to recognize the existence of a need to preserve evidence or chose to proceed in that manner for reasons of case management.⁶⁹

In contrast, the tribunal *ordered* the production of a narrow category of documents given their relevance and materiality for the case. By the way, such orders in certain cases have been issued by ICSID tribunals under art. 43 of the Convention, not art. 47: this fact will be more broadly dealt with, since it concerns some important aspects of the definition and nature of interim measures (i.e., whether they are all *provisional* or not).

In any event, it appears that the *Biwater* tribunal intended to assign different degrees of legal force to the measures granted, whereby certain measures which were *ordered* seemed to be more binding than those that were simply *recommended*.

C.III. After introducing the relevant elements of the consideration on the possibility to enforce provisional measures, this survey will focus on the means through which said enforcement could be viable. Home States may resort to countermeasures, or to diplomatic protection, which they renounced by concluding the ICSID Convention (art. 27). States may act in diplomatic protection if the other party fails to comply with its obligation to respect judicial decisions, and thus to pay the award rendered against it.

⁶⁸ *Maffezini v. Spain*, Decision on Provisional Measures (Procedural Order No. 2) dated October 28, 1999.

⁶⁹ MALINTOPPI, quoted *supra* footnote 65, 161.

The same could go for the failure to respect provisional measures, but it is an ambitious hypothesis which shall be deeply verified: it could be constitute a possibility for future developments, because neither the current status of treaty law (ICSID, BITs, IIAs) nor arbitral case law give any indication in this sense.

Secondly, sanctions will be addressed, and other potential perspectives towards the confirmation of the binding nature – and effectiveness – of provisional measures, thanks to the adoption of the 2012 US Model BIT.

This area of international law is living a period of great expansion: the ICSID mechanism of investment dispute settlement has proved to be affordable. The number of applications filed with the Centre has significantly increased, and thus – proportionally – the duration of proceedings. This aspect, combined with greater conflictuality between capital-importing and capital-exporting States and the impact on their respective investors show the importance of clear rules concerning provisional measures.

CHAPTER TWO

THE TWO-FOLD LEGAL PERSPECTIVE CONCERNING PROVISIONAL MEASURES IN THE INTERNATIONAL LEGAL ORDER

A. Introduction to the structure of the chapter. – B. Differentiated approach on the sources from an historical and comparative perspective.

A. Introduction to the structure of the chapter

I. Cross-fertilization. – II. Consolidation of arbitral *jurisprudence*. – III. The doctrine of precedent in international investment arbitration as *soft stare decisis* principle.

A.I. First of all, it is deemed appropriate to explain the exact content of the title of this chapter. Provisional measures will be addressed hereinbelow through what I termed a “differentiated approach”. Indeed, it is submitted that the exercise of attempting to grasp all the elements of such a fascinating procedural instrument is best served through the adoption of two perspectives, *qua re* its two-fold nature:

- 1) the historical approach. To put it in an image, the straight line;
- 2) the comparative approach. To put it in an image, the circle.¹

It is common knowledge that the institution of provisional measures does not constitute a novel phenomenon within the mechanisms of international dispute settlement. As a matter of fact, this type of incidental proceeding derives its origin from the common – though differentiated – practice in national legal orders. To analyse the evolution from national to international *fora* in this respect and distinguish every characteristic and consequent peculiarities consist of fascinating tasks which will contribute to a better

¹ See *infra*, 56.

understanding of the real nature of these measures in international investment arbitration.

It is of utmost relevance to note that the domestic / international divide between legal orders may play a role as a descriptive key; however, such an exercise of drawing analogies² thereupon shall be conducted with great caution in this field,³ as the “compulsory / voluntary” jurisdiction binomial can impair our capability to understand the peculiar features of the institution. Nonetheless, reference to said binomial will be made whenever it will be deemed appropriate for descriptive purposes and bearing in mind such a *caveat*.

Indication has been made to the theoretical legal framework of the present inquiry, the one which most influences its development throughout these pages, namely that international investment arbitration is inscribed in public international law,⁴ with all the consequences deriving therefrom which will be discussed in detail below. However, this does not mean that a rigid separation between public international law and private international law shall be maintained or – even worse – erected.⁵ On the contrary, it is submitted, and will be later demonstrated in detail, that there exists an interesting dialogue between these two areas. Nonetheless, distinguishing the origins of each aspect thereof will help to grasp the true nature of provisional measures in the international legal order.

To put it briefly through an image, such an endeavour is analogous to that of a narrator describing the characteristics of each of two speakers who discuss: the content of their dialogue will be better understood by the reader throughout said description.

Short of addressing the topic of fragmentation / proliferation⁶ of public international law,⁷ which is outside the purpose of the present study, it is nonetheless deemed

² For a general and foundational monograph authored by a leading figure in international law, see LAUTERPACHT, H., *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*, Cambridge, 1927.

³ In this sense, see ROSENNE, *Provisional Measures in International Law. The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford, 2005, 4.

⁴ See discussion in the previous chapter.

⁵ In the words of COLLINS, *Provisional and Protective Measures in International Litigation*, Recueil des cours de l'Académie de La Haye, vol. 234, no. 3, 1992, 20: “This author would not be the first to deprecate a rigid division between the disciplines of private international law and public international law, and research for this paper has revealed some fascinating parallels”.

⁶ The second term is generally considered more optimistic than the first one.

appropriate to insist on the refusal to consider this branch as a *self-contained régime*. As a matter of fact, it is sufficient to review the plethora of recent as well as older ICSID cases – easily available due to a policy more favourable to overcome confidentiality – to ascertain the issues arising from the mixed-disputes system: since they involve a public party (the Sovereign or one of its emanations – public companies), reference is constantly made – by the parties and arbitral tribunals – to public international law both as body of rules applicable to the dispute and as general framework in order to construe the case and solve it. State immunity, sovereignty and responsibility are examples thereof.

Furthermore, arbitral tribunals constantly – and to an increasing pace – refer to the construction of public international law as interpreted and applied by the International court of justice. Such a judicial borrowing, so far unilateral,⁸ contributes to giving evidence – if need be – that the two “systems” constitute a single legal order, wherein the investment framework differs *ratione materiae*, on the adjudication mechanism and so forth, but still within the same set of applicable rules and – to a certain extent as will be seen – procedural settings. Such cross-fertilizations (one of which has so far remained hidden) represent vital energy for the overall international arena.⁹

So far, analogies and differences in the procedure of international adjudication organs have not been sufficiently explored. Indeed, they have attracted little attention, since a significant majority of academics tend to specialise in a particular area of law and analyse-monitor the single court – or group of arbitral panels – which deals with that particular area. The purpose of this study is exactly to counter such a tendency and show the existing interrelationships between courts and their *jurisprudences*.

⁷ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682 (13 April 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (11 August 2006), under the chairmanship of Prof. Koskenniemi in the ILC study group. On the contribution of this report on the assessment of public international law, see *inter alios* MURPHY, *Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project*, Temple International & Comparative Law Journal (forthcoming).

⁸ On the issue of one-way reference by ICSID tribunals to the jurisprudence of the ICJ, see PELLET, *The Case Law of the ICJ in Investment Arbitration*, The 2013 Lalive Lecture, ICSID review, Vol. no. 28, Issue no. 2, 2013, 223 ff.

⁹ On the issue of cross-fertilisation in relation to the perspective of the theory of inherent powers, see BROWN, *The Inherent Powers of International Courts and Tribunals*, British Yearbook of International Law, Vol. No. LXXVI, 2005, 195 ff.

With reference to the structure of the chapter, section B is divided into two parts: after the approach to the matter of the institution of provisional measures in the international framework from an historical perspective in para. I, in para. II a comparative analysis of the sources concerning the institution will follow, grounded on the theoretical basis that international investment law is inscribed in public international law: as a consequence, the idea is that of attempting to bridge the divide between disciplines of the same family and in this respect the previous presentation of the history of the institution will be helpful.

Treaties, arbitration rules, guidelines and general principles of law will be the *dramatis personae* which will appear on stage, accompanied by the constant presence of arbitral *jurisprudence* on the conditions, purposes and atypicalness of provisional measures in the following chapter. Indeed, all chapters are interdependent with each other.

For instance, let us refer to the relationship between chapter 2 and chapter 3.

The former consists of a two-fold analysis of this incidental proceeding, wherein the differentiated approach expressed through the historical and comparative inquiry is presented in sequence.

Chapter 3 aims at presenting the current status of provisional measures in international investment arbitration (i.e., the descriptive phase, *Sein*; in an image, the point) and at discussing their foundation in order to construe the avenues for their legitimate development (i.e., the normative phase, *Sollen*; in an image, the straight line going forward). Consequently, chapter 3 constitutes a step forward in relation to chapter 2 in both respects: indeed, there is a *ratione temporis* shift to the current status of provisional measures and at the same time a *ratione materiae* shift to investment arbitration.

To put in simplified images the two-fold differentiated approach of chapter 2, the historical evolution of the institution is represented by a straight line, whereas the comparative narrative is represented by a circle.¹⁰ As a consequence, figuratively, the straight line and the circle of chapter 2 represent the vehicle through which the legitimacy of focusing on a point – rather, a series of points – and indicating the straight line going forward in chapter 3 is construed.

¹⁰ The scientific relevance of comparative perspectives in international law can not be explained in all its facets: it is herewith simply submitted that it is vital to construe this field by pursuing this path.

A.II. As far as consolidation of arbitral precedents is concerned, it has to be noted that, starting from the beginning of the new millennium, we are witnessing a true “baby-boom”¹¹ of investment treaty arbitration. Said phenomenon is due to many factors, among which – as a temporal sequence – the following general steps: fall of the communist ideology and, consequently, generalised endorsement of the *Washington consensus*;¹² worldwide proliferation of a web of BITs, generally providing for international arbitration under the auspices of ICSID or *ad hoc* arbitration under the UNCITRAL rules as main dispute settlement mechanisms in addition to recourse to local courts; in such a investment-friendly climate – or, at least, apparently so – the flow of outward investments increases significantly,¹³ bearing with it the related increased ratio of disputes, for the main reason that these systems proved to be effective and relatively less costly in terms of legal certainty, time and expenses.

As a consequence, there has been a consolidation of arbitral *jurisprudence* on the most significant topics of the investment framework, including issues concerning provisional measures.

A.III. Arbitrators in the investment framework constantly refer to previous cases either in support of their interpretation and application of the law, or in order to oppose their assessments, or – thirdly – to harmonise and propose new paths: in any of these three approaches, arbitrators contribute to the development of international investment arbitration through consolidation of the adjudication process. As a matter of fact, they pay due attention to previous cases even if they do not deem to be compelled to do so.¹⁴

¹¹ The expression has been introduced by ALEXANDROV in a leading article on the theme: *The ‘Baby Boom’ of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals. Shareholders as ‘Investors’ and Jurisdiction Ratione Temporis*, 4 *The Law and Practice of International Courts and Tribunals* 19, 2005.

¹² For an in-depth analysis from the special perspective of the eminent negotiator of US BITs in the 1980s and 1990s, VANDEVELDE, *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford, 2010.

¹³ A detailed account thereof is provided for by ALVAREZ, *The Public International Law Regime Governing International Investment*, *Recueil des cours de l’Académie de la Haye*, vol. no. 344, 2009, also published in pocketbook form, AIL, 2011, 17.

¹⁴ FERNÁNDEZ ARROYO, *Los precedentes y la formación de una jurisprudencia arbitral*, in GAILLARD, FERNÁNDEZ ARROYO (dir.), *Cuestiones claves del arbitraje internacional*, Bogotá y D.C., 2013, 236: “Sin embargo, ni los autores ni los árbitros parecen convencidos de la obligación de seguir la

One may also bear in mind the fact that arbitrators are inclined to refer to previous cases due to the submissions of the parties, who try to substantiate their cases through an abundant – sometimes excessive¹⁵ – invocation of arbitral awards. Short of generalising too much on that, it is argued that they feel their role as being not limited to the arbitral settlement of the dispute¹⁶ before them: the majority of them understand that their role is also that of setting the general framework, a task which is beneficial not only to the parties of that specific dispute but to the whole international investment community (investors and home/host States).¹⁷ Such an element sets a significant divide between international investment arbitration on one side, international commercial arbitration on the other: indeed, it has been demonstrated that, as far as the latter is concerned, arbitrators refer significantly less often to previous cases.¹⁸ This is probably due, it is submitted herewith, to the different approach to the theme of confidentiality¹⁹ and – more importantly – because international commercial disputes are more fact-specific and so it may be more difficult to derive general principles applicable to other cases,

jurisprudencia. Los árbitros la siguen, como veremos, pero en general lo hacen sin creer que estén obligados a ello”.

¹⁵ GAILLARD, *Foreword*, in GAILLARD, BANIFATEMI (eds.), *Precedent in International Arbitration*, New York, 2008, 3.

¹⁶ By “arbitral settlement of the dispute” reference is made to the first, fundamental but not final, step towards the real settlement of the dispute, i.e. the moment in which either the claimant manages to enforce the award declaring in its favour, or the award denying compensation or – less frequently – *restitutio in integrum* to it acquires its *res iudicata* state and the respondent manages to cover its expenses and legal fees.

¹⁷ In this respect I acknowledge the profound influence that an outstanding series of lectures exerted to my position on the subject: I had the privilege to attend the general course of the 2013 Arbitration Academy in Paris taught by Prof. CARON. This general course will soon be published as part of the “Collected courses of the International Academy for Arbitration Law” [forthcoming in paper form and which will also be accessible through the Academy’s website: <http://www.arbitrationacademy.org>].

¹⁸ KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, The 2006 Freshfields Lecture, *Arbitration International*, vol. no. 23-3, 2007, 362 f.; in the same sense and referring to the author abovementioned see also FERNÁNDEZ ARROYO, quoted *supra* footnote 14, 241: “Los resultados de la investigación dirigida por una profesional de dilatada experiencia – que es además una de las personas que más se ha ocupado de este tema -, al menos, reflejan que si en general la autoridad reconocida al precedente jurisprudencial depende de las materias y de las cuestiones específicas tratadas, en el arbitraje comercial internacional *lato sensu* los árbitros hacen lo que quieren o, según las circunstancias, lo que pueden, siendo la proporción de casos en los que se citan laudos anteriores relativamente pequeña” [footnotes omitted].

¹⁹ STERN, *L’entrée de la Société Civile dans l’arbitrage entre État et investisseur*, *Revue de l’arbitrage*, 2002, 329; KNAHR, REINISCH, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 *Law and Practice of International Courts and Tribunals* 97, 2007, 112; BELOHLAVEK, *Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals*, *Czech Yearbook of International Law CYIL*, Vol. no. 2, 2011, 23 ff. For an early assessment and recommendation in favour of the publication of awards see TAHYAR, *Confidentiality in ICSID Arbitration after AMCO Asia Corp. v. Indonesia: Watchword or White Elephant*, *Fordham International Law Journal*, Vol. no. 10, Issue no. 1, 1986, 122.

while investment disputes resemble each other to a greater extent at least in their backgrounds.²⁰ Moreover, in the words of Prof. Wälde:

“Commercial arbitration is a suitable mechanism for resolving the disputes of equal parties on equal footing and without need for the purpose of taking into account the position of the weaker party; nor is there any policy purpose underlying commercial arbitration – such as to protect and promote investment, enhance transparency and the “rule of law”, create employment or enhance trade opportunities. In commercial arbitration, rules including the caveat emptor and due diligence principle are deeply ingrained in the culture, approaches and principles applied consciously or subconsciously by the tribunals. By contrast, international investment law is aimed at promoting foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country in a situation of relative weakness”.²¹

Besides, one may argue that the growing rejection of confidentiality and the parallel increase of *amicus curiae* briefs – involving significant actors within the global societies and national realities – is nothing but a significant evolution towards the insertion of investment treaty arbitration within the public sphere, whereas earlier studies and sensitivities inscribed the latter in the private one.²²

International investment law is evolving and consolidating at a significant rate. In this process, one may not neglect the role of international investment tribunals in setting the general framework in this field, so peculiar as compared with international commercial arbitration as discussed above, which seems to be more focused on the specific cases at stake.

There is an ongoing debate on the doctrine of precedent among arbitral tribunals.²³ Professor Wälde devoted one of the last efforts of his brilliant mind to a thorough

²⁰ See in more general terms BÖCKSTIEGEL, *Commercial and Investment Arbitration: How Different are they Today?*, The Lalive Lecture 2012, LCIA, Arbitration International, Vol. no. 28, no. 4, 2012, 577 ff.

²¹ *International Thunderbird Gaming Corporation v. Mexico*, *ad hoc* award under UNCITRAL Arbitration rules, IIC 136, 2006 separate opinion Prof. WÄLDE, para. 4, available at <http://italaw.com/sites/default/files/case-documents/ita0432.pdf>.

²² RUNDSTEIN, *L'arbitrage international en matière privée*, Recueil des cours de l'Académie de La Haye, vol. no. 23, III, 1928, 331 ff.

²³ On the role of precedent in investment treaty arbitration, see also British Institute of International and Comparative Law (BIICL), *The Emerging Jurisprudence of International Investment Law*, 9th investment treaty forum (14 September 2007); International Arbitration Institute (IAI), *The Precedent in International Arbitration Seminar* (14 December 2007).

analysis of the theme and summarised his views in his famous separate opinion in the *Thunderbird* case:

“In international and international economic law – to which investment arbitration properly belongs – there may not be a formal “stare decisis” rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not “confronting” established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence. The role of precedent has been recognised de facto in the reasoning style of tribunals, but can also be formally inferred from Art. 1131 (1) of the NAFTA – which calls for application of the “applicable rules of international law”; these include, according to Art. 38 of the statute of the International Court of Justice: “International custom, as evidence of general practice accepted as law” and “judicial decisions” as “subsidiary means for the determination of rules of law”.²⁴

The leading view is that they are not bound to follow earlier precedents, which may be called *hard stare decisis* principle;²⁵ however, if the latter is persuasive, arbitral tribunals may follow them or state the reasons why they decide to decline to follow them. I call the latter *soft stare decisis* principle. A significant list of cases may be quoted in this respect. One of the clearest examples of such an approach is expressed in the *Saipem v. Bangladesh* case, conducted under the auspices of ICSID, whereby the arbitral tribunal firmly stated that

“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious

²⁴ *International Thunderbird Gaming Corporation v. Mexico*, separate opinion Prof. WÄLDE quoted *supra* footnote 21, para. 129; BIRCH, SABAHI, LAIRD, *International Investment Law Regime and the Rule of Law as a Pre-condition for International Development*, in WEILER, BAETENS (eds.), *New Directions in International Economic Law: in Memoriam Thomas Wälde*, Leiden and Boston, 2011, 318 f.

²⁵ With this expression reference is made to the traditional common-law principle.

development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law”.²⁶

Then, the question arises as follows: what is the proper role of investment arbitrators? Sure enough, the arbitral tribunal could not have expressed more clearly its view of the duty of arbitrators in the investment *régime*: these lines, whose main contentions were followed by a relevant number of arbitral tribunals, give a clear indication of the idea in this respect. First of all, it declines to uphold a *hard stare decisis* principle in international investment arbitration like in the common-law tradition; however, it firmly asserts that a relationship with previous decisions is – and indeed has to be – undeniable (“it *must* pay due consideration to earlier decisions of international tribunals” [italics added]).

Immediately thereafter, such a relationship is explained: if the elements of the case at issue do not indicate the necessity to the contrary, the arbitral tribunal has a duty to follow the decisions on points of law made in earlier cases. Such a *soft stare decisis* principle consists in an inversion of the burden of proof, in the sense that – to show it through an image – the playing field is not levelled, i.e. there exists a presumption *iuris tantum* that from certain elements of the case certain findings of law shall derive, and it is up to the opposing party to reverse such a condition, no matter if it is claimant or respondent in the case.²⁷

Finally, the arbitral tribunal explains the reasons behind such an approach, at the same time answering the question about the proper role of arbitrators: their duty is “to seek to contribute to the harmonious development of investment law”, an indication of the relevance of arbitral precedents in the sources thereof.

²⁶ *Saipem s.p.a. v. The People’s Republic of Bangladesh*, ICSID case no. ARB/05/07, Decision on jurisdiction and recommendations of provisional measures dated 21 March 2007, para. 67 [footnotes omitted]. The arbitral tribunal was composed of Prof. Gabrielle Kaufmann-Kohler, Prof. Christoph Schreuer and Sir Philip Otton. It is to be noted that the President of such a high-level panel of arbitrators was Prof. Gabrielle Kaufmann-Kohler, who undoubtedly exerted a significant influence on this aspect of the decision: one may infer that from the doctrinal positions of each of these eminent arbitrators and on the reference made in the abovementioned paragraph to a lecture delivered by the Swiss scholar and referred to *supra* footnote 18.

²⁷ One may not be unaware that such legal terms are borrowed from the different area of fact-finding process, i.e. the way in which the nexus of causality from a known fact to another which is unknown is established. Indeed, it is submitted that the same terms can be helpful in explaining the reasoning of the arbitral tribunal.

Alternatively, or rather additionally, such a burden would lie with the arbitral tribunal: this view was expressed by Professor Wälde in another passage of his famous concurring opinion in the *Thunderbird* case:

“130. In consequence, it appears to me that at the very least that, if a tribunal wishes in a significant question, to adopt a novel philosophy that diverges from well established principles is under an obligation to provide the parties with an opportunity of a full debate – such as calling for a “separate argument on the allocation of fees and expenses after rendering a decision on the merits” – and to provide extensive reasoning which shows that the tribunal is both familiar with established jurisprudence and is prepared to justify its departure from such jurisprudence with in-depth reasoning”.²⁸

In a nutshell, if an investment tribunal deems it appropriate – or, as one may insidiously suggest, “necessary”, because otherwise the previous *tendency* shall be maintained – to depart from an established jurisprudence, it is under three obligations,²⁹ namely:

- 1) to employ a reinforced version of the *contradictoire* principle;
- 2) more significantly, that *sententias novit curia*; and
- 3) to prove that such a departure is justified.

A leading scholar and practitioner, Prof. Fernández Arroyo, sheds light on the distinction above mentioned between *binding* and *persuasive* precedents through reference to – respectively – “*jurisprudencia de iure*” and “*jurisprudencia de facto*”.³⁰ What follows notwithstanding, in terms of issues of legitimacy of the overall process, since such a position is correct and contributes to legal certainty in the field (without preventing other paths from being preferred if appropriate in the view of the law-

²⁸ *International Thunderbird Gaming Corporation v. Mexico*, separate opinion appended by Prof. Wälde quoted *supra* footnote 21, para. 130.

²⁹ It is incidentally and respectfully noted that such a subjective legal condition is quite unusual when dealing with an adjudicating body.

³⁰ FERNÁNDEZ ARROYO, quoted *supra* footnote 14, 228: “Hablaemos de *jurisprudencia de iure* en alusión a la obligatoriedad de fundamentar una decisión sobre las decisiones anteriores y de *jurisprudencia de facto* para aquellos casos en los cuales la autoridad de la decisión anterior se basa en la persuasión y no en la obligación legal”.

making actors), this inquiry will significantly be construed on the arbitral *jurisprudence* concerning provisional measures in international investment arbitration.

Nonetheless, one may not neglect – as a general aspect – that certain States appear as respondents before arbitral tribunals much more frequently than others (for example, Argentina, Bangladesh and Pakistan on one side – the repeat players -, Germany and the United Kingdom on the other).³¹ Therefore, if arbitral tribunals are gradually acquiring the role of shaping the international investment framework, the States which appear very often before them have many more opportunities to contribute in the shaping of such a framework than others. As a consequence, it is submitted that the latter will be compelled to deal with an undue burden of proof incumbent upon them. In other words, these States will – and do – face the difficulty arising from the need to revert certain *jurisprudences* which have consolidated through precedents to which they did not take part, either because they did not obstruct foreign direct investments or because they were mostly capital-exporting States.

By way of example, one may mention the case law on the state of necessity, wherein Argentina – certainly unwilling to do so – contributed significantly. In such a scenario of arbitralisation of international investment law, there may be an evolving process likely to weaken the overall legitimacy of arbitral decisions. Such an assumption might seem to be excessive; indeed, it serves the purpose of provoking examinations and discussions which are not sufficient to satisfy the appetite of those who question the legitimacy of the investment architecture provided in these last fifty years and, more importantly, of those who are convinced that only through questioning the existent framework can institutions develop and prosper.

Is then the need to multilateralise substantial provisions³² through a multilateral convention more stringent?³³ One of the last attempts in this sense was the MAI (Multilateral Agreement on Investments) project, which – curiously indeed – read in the

³¹ Or Brasil, which decided not to participate to the ICSID system and relies consistently – and with an apparent success – on its national legislation (*lei dos investimentos*).

³² See the outstanding monograph by Dr. SCHILL, *The Multilateralization of International Investment Law*, Cambridge, 2009; for another significant contribution on the topic, see LEAL-ARCAS, *The Multilateralization of International Investment Law*, North Carolina Journal of International Law and Commercial Regulation, Vol. 35, no. 1, 2009, 33-135.

³³ It seems so, in particular in the area of the notion of “expropriation”, be it direct or indirect (the so-called *creeping expropriation*).

italian language and then translated into english means “never”, perhaps suggesting its feasibility. To analyse further these substantive-law aspects of the international investment framework is outside the purpose of the present research; however, the aim of these lines is that of presenting the problem of the twofold impact of arbitral *jurisprudence* on both substantive and procedural provisions in this respect, since it influences the consolidation of certain options in both sides of the handling of disputes.

B. Differentiated approach on the sources from an historical and comparative perspective

I. History of provisional measures in public international adjudication: from XIX-century inter-State arbitral tribunals to the day before the creation of the International court of justice. – II. Comparative analysis of the sources concerning provisional measures in contemporary public international law.

After the introductory remarks contained in section A, it has to be added – in order to present the methodological basis from which the structure of this central chapter derives – that such an inquiry will be conducted through two thematic lenses: firstly, the evolution of the institution in international litigation (para. I) and, secondly, a comparative assessment of the current state of the interpretation and application of provisional measures within the public-international-law framework (para. II).³⁴

These two perspectives serve the purpose of constituting premises for the assessment of both the procedural and substantive elements which compose this peculiar incidental proceeding.

B.I. History of provisional measures in public international adjudication: from XIX-century inter-State arbitral tribunals to the day before the creation of the International court of justice

i. International arbitration. *Règlement pour la procédure arbitrale internationale de l'Institut de Droit international* (1877). – ii. Convention for the pacific settlement of international disputes – PCA (1899). – iii. Corinto peace treaty (1902). – iv. International prize court (1907). – v. Central american court of justice (1907). – vi. Bryan treaties (1914-1917). – vii. Mixed arbitral tribunals established by the Treaty of Versailles (1919). – viii. Permanent court of international justice (1920). – ix. Washington convention (1923). – x. Santiago treaty (1923). – xi. Geneva protocol (1924). – xii. Locarno treaty (1924). – xiii. General Act of Arbitration (1928).

The study of the origins of an institution is in the majority of cases – if not all – a fundamental exercise in view of the discussion of the current features thereof. In this respect, the research on the early developments of provisional measures is not an exception. Many fascinating elements can be drawn therefrom and shed light to new issues. One example may provisionally suffice to prove this point.

³⁴ For the reasons of said choice in light of cross-fertilization, see *supra* in this Chapter, A.I.

It is well known that interim³⁵ measures consist in a tool mainly at the disposal of the parties in order to – *grosso modo*, of course not exclusively – safeguard their rights³⁶ *pendente lite* and therefore try to annul, or at least reduce, one of its main defects, i.e. the passing of time and the risks connected thereto. Thus, the dispute is crystallized before the adjudicating body. At this stage, one may call it “abstract framework”, since the latter does not necessarily coincide with the final disposition of the legal position of each party. As a consequence, provisional measures are directed to address the gap between such an intrinsic abstract framework and the real one, thus impacting on the capability of the opposing party of manoeuvring in a prejudicial fashion to the applicant.

In this respect, the wise and still actual words of the German / Polish mixed arbitral tribunal of 1924 are illuminating:

“Par les mesures conservatoires les Tribunaux cherchent à remédier aux lenteurs de la justice, de manière qu’autant que possible l’issue du procès soit la même que s’il pouvait se terminer en un jour”.³⁷

It can be noted that in this passage the use of the word *conservatoire*, underlining the purpose of the measure, substitutes that of *provisoire*, pointing instead to its nature.³⁸ Incidentally again, it is possible to anticipate that such a dichotomy still exists in French Law.

Turning back to our example, the main purpose of these measures consists in the protection of a right or other subjective legal position of the parties. Quite surprisingly, historical traces of the purpose of provisional measures in earlier periods show that their origin is due to the intention of judges to accomplish appropriately their main function,

³⁵ Except when expressly addressed in the text, expressions like “provisional”, “interim” and so forth are adopted interchangeably, as in this case.

³⁶ Or, to be more precise, one shall distinguish between “rights” – as for example the right to a fair trial via the safeguard of a party’s right to evidence – and “alleged rights” or – borrowing a term contained in art. 62 of the Statute of the International court of justice in relation to the institution of intervention – “interest of a legal nature”, stressing the fact that a definitive evidence of their existence has not yet been given, since the arbitral tribunal has not pronounced itself thereupon.

³⁷ Tribunal arbitral mixte 5/457, *Ellermann v. État polonais*, 1924, 459; COLLINS, quoted *supra* footnote 5, 19.

³⁸ This aspect will be discussed further.

namely maintain social peace through the rendering of a *just* decision.³⁹ Such a theoretical line can be found in some passages of the *Procès-verbaux* of the Drafting committee charged with the task to present a text to the Council of the League of Nations for the adoption of the Statute of the Permanent court of international justice, whereby the committee sketched a *right* of initiative for the Court if it considered that the circumstances so required.⁴⁰

Another historical reason consists in the will of the adjudicating power to protect its own authority and prestige: provisional measures prevented the judgment to be issued from being moot and nugatory, lacking any chance of being enforced.

These two reasons constituted the premise of a *de officio*⁴¹ power to guarantee interim protection, which still exists in our times in public international adjudication.⁴²

B.I.i. Before outlining the main steps through which they developed until the creation of the International court of justice,⁴³ a clarification is necessary on the initial term of the research. Indeed, it is well known that international arbitration has a millenary history as an effective dispute settlement mechanism.⁴⁴ For our purposes, however, it is sufficient to start our inquiry at the beginning of the modern era of international arbitration, inaugurated by the early experience of the *Institut de droit international*:⁴⁵ at its first meeting, in 1874 and 1875, it adopted a project of rules for international arbitral

³⁹ For an account, see COLLINS, quoted *supra* footnote 5, 23: “In the modern law the primary function of provisional and protective measures is to preserve the integrity of the final judgment, but there are historical grounds for seeing their origin in the desire of those administering the law to prevent violent self-help, as in some of the interdicts of Roman law, and the sequestration of the Middle Ages” [footnotes omitted].

⁴⁰ Drafting committee for the Statute of the PCIJ, *Procès-verbaux*, twenty-eighth meeting, 20 July 1920, 587 f.

⁴¹ Also named *proprio motu*, especially in earlier practice and literature.

⁴² Such a *de officio* power is currently directed to the protection of one or both parties; however, recourse to it has to be exercised with great caution, due to the concern of any court of law about not appearing partial. On the distinction between *being* and *appearing* impartial and on the binomial independent / impartial see *infra*.

⁴³ The patient reader understands, therefore, that the historical *excursus* necessarily continues in a second phase, namely the assessment of the main developments of the jurisprudence of the International court of justice which, however, for explanatory purposes, are diffused throughout the inquiry and notably – but not exclusively – in sections C, D and E of the present chapter.

⁴⁴ Very interesting articles – in some cases, *summae* of Ph.D. theses conducted on the topic – have been published with the *Revue de l'arbitrage*.

⁴⁵ It has to be underlined that such a temporal reference coincides to the one which an eminent specialist in the history of international law, *inter alia*, considers as the beginning of the modern era of international law *tout court*: KOSKENNIEMI, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960*, Cambridge, 2001.

procedure. The main principle contained in its *Règlement* indicated that the procedural conduct of any arbitration should derive from the agreement between the parties in the *compromis* or, subsidiarily, the decision of the arbitrator(s).⁴⁶ These two sources, with the addition of others⁴⁷ depending on each specific case, still constitute the basis for ascertaining any power / duty of arbitral tribunals, including the issuance of provisional measures. It has to be noted, however, that the time for specific provisions on the measures subject of this study had not come yet.

B.I.ii. General attempts at codifying international arbitral procedure did not meet with success in the literature for quite a long period, even after the Convention for the pacific settlement of international disputes entered into force, thereby establishing the Permanent court of arbitration in 1899: in most cases, recourse to international arbitration depended upon an *ad hoc* agreement. In general, these agreements were very restricted. Still in 1945, Kenneth Carlston, a prominent author in the field, could write – referring to inter-State arbitration – in the American journal of international law that

“Codification of established international arbitral procedure, through establishment of a uniform code of procedure, does not seem likely to furnish an answer for all procedural problems. The statement of rules upon which there can be a general agreement among states will inevitably tend to be confined to those very points where problems are least likely to arise”.⁴⁸

However, the development of arbitral practice seemed to manifest the appropriateness for its regularisation. Such a process was partly achieved through the establishment of the Permanent court of arbitration referred above, still existing and active today.

Its name is misleading,⁴⁹ since it is not a *permanent court*, i.e. it is composed of facilities for the appointment of arbitrators on an *ad hoc* basis. The only permanent organs are the permanent international bureau and the administrative council. Indeed, its

⁴⁶ Institut de droit international, *Règlement pour la procédure arbitrale internationale*, Arts. 12 and 15, *Annuaire de l'Institut de droit international*, 1877, 126 and 129 f.

⁴⁷ They will be dealt with below.

⁴⁸ CARLSTON, *Procedural Problems in International Arbitration*, American journal of international law, vol. no. 39, 1945, 428. Nonetheless, he acknowledged the potential value of *travaux préparatoires* connected thereto for further developments.

⁴⁹ See the Report of the Advisory Committee of jurists, 1920: *Procès-verbaux* of the proceedings, Den Haag, 1920, 698.

name was even more misleading in earlier times, when it was placed side by side with another imprecise term: it was also referred to as “the Hague Court”, particularly before the establishment of the Permanent court of international justice, for intuitive reasons.

It exists, since its creation, under two conventions, that of 1899 and that of 1907 to which a protocol was attached in order to allow an extension of the participant States. Short of reducing its role as a means for the peaceful settlement of disputes and – as a consequence – the development of international law, it has to be underlined that its nature consists, in and of itself, in a sort of *agreement to agree* between States: the Parties to the convention agree to the power to insert, of course if they so wish, in their subsequent agreements a clause providing for arbitration under the auspices of the PCA. In other words, the mere fact of ratifying the convention at issue means only that another instrument to solve potential disputes concerning further agreements or other legal issues – depending on the source – is at disposal of the States parties thereto. It is anticipated that such a mechanism is analogous to the one provided by the Convention for the settlement of investment disputes between States and nationals of other States, establishing the ICSID arbitral option.

For the purposes of the present inquiry,⁵⁰ suffice it to say that the originary arbitration rules did not provide for specific norms regarding provisional measures. In the words of Professor Guggenheim, an eminent specialist of this procedural institution in international law:

“En raison de la conception qui prédomine dans la doctrine du droit international public selon laquelle les mesures provisoires constituent des intrusions particulièrement sensibles dans le domaine de la souveraineté des Etats, il est naturel que celles-ci n’aient été admises que fort tard dans la pratique internationale”.⁵¹

Besides, it is to be added that, in broader terms, the Hague Conferences did not constitute an occasion for the development of international arbitral precedure:⁵² though

⁵⁰ For a classical study on the PCA, see HUDSON, *The Permanent Court of Arbitration*, American Journal of International Law, vol. no. 27, issue no. 3, 1933, 440 ff.

⁵¹ GUGGENHEIM, *Les mesures provisoires de procédure internationale et leur influence sur le développement du Droit des Gens*, Paris, 1931, 33.

⁵² DENNIS, *The Necessity for an International Code of Arbitral Procedure*, American Journal of International Law, vol. no. 7, issue no. 2, 1913, 290 f.

a “step forward”,⁵³ they contributed in a fashion so to crystallize the idea that – in case of absence of specific procedural provisions in the *compromis*, arbitrators may adopt such rules that they deemed appropriate for the conduct of the proceedings, therefore endorsing the view expressed some twenty-five years earlier in the *Réglement* of the *Institut de droit international*.⁵⁴

B.I.iii. The institution of provisional measures appeared for the first time in inter-State arbitration⁵⁵ on the occasion of a convention concluded on 20 January 1902 between four central american republics, namely Costa Rica, Honduras, Nicaragua and Salvador.⁵⁶ Also known as the “Corinto⁵⁷ peace system” under the name of the venue in which the respective Presidents met and concluded the treaty, its main purpose was that of maintaining peace in a particularly animated and conflictual area of the world. Reminiscent of the first Hague convention of 1899,⁵⁸ it established a quite flexible peace-keeping and military allegiance system wherein the four governments

“Will aid each other with military force, if necessary, in maintaining the *status quo*, and that the peace in Central America is thus reasonably assured by making revolutionary efforts more difficult and less liable to achieve success”.⁵⁹

Since the settlement mechanism provided for by the treaty consisted in compulsory arbitration – to a certain extent, an oximoron – its nature may be controversial if the treaty included the right of private parties to bring claims against any State party thereto: the arbitral tribunals established on this basis may be considered internal and parallel adjudicating organs of each State party, therefore deprived of any international character. In this case, instead, since only States were entitled to file claims to the tribunal, its existence in the international legal order could not be questioned. Under the perspective of compulsory arbitration, in addition to the mixed private – public

⁵³ CARLSTON, *Procedural Problems* quoted *supra* footnote 48, 429.

⁵⁴ See *supra*, B.I.i.

⁵⁵ At least in its modern era.

⁵⁶ Convention of Peace and Arbitration, Treaty of Corinto, Parry’s T.S., 1902, 357.

⁵⁷ Corinto (Nicaragua), 20 January 1902.

⁵⁸ See *supra*, B.I.ii.

⁵⁹ United States Minister, *Foreign Relations of the United States*, British and Foreign State papers, 1904, 541.

character of the parties, consideration will be further given to the nature of the Iran – United States claims tribunal.⁶⁰

Art. 11 of the Corinto convention contained the provision whereby States parties mutually agreed that – in case a dispute arose between them – they would not act in any hostile manner against each other through the use and mobilisation of their military troops:

“Los gobiernos de los Estados en disputa se comprometen solemnemente a non ejecutar acto alguno de hostilidades, aprestos bellicos e movilización de fuerzas, a fin de no impedir el arreglo de la dificultad o cuestión, por los medios establecidos en el presente convenio”.⁶¹

Therefore, the first provision dealing with modern-era provisional measures in international arbitration contained an exclusively negative obligation, i.e. the obligation not to modify the *status quo*, to abstain from any hostile act.

Borrowing a term adopted by Toraldo-Serra in this respect, it consisted of a purely “international self-provisional measure”,⁶² an intrinsically out-of-court operation whereby States parties to the dispute autonomously contributed to the conservation of peace until the dispute itself was settled by the collective adjudicating body. It is important to take note of the fact that another eminent international lawyer, Giancarlo Venturini, opposed the view according to which art. 11 of the 1902 treaty constituted a provisional measure for the very reason that the provision pertained to a group of norms having a provisional aim which could be adopted directly by the Parties.⁶³ On this point,

⁶⁰ For a wide panorama of the issue of compulsory jurisdiction, see *inter alios* GIUSTINI, *Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future*, Fordham international law journal, Vol. no. 9, Issue no. 2, 1985, 213 ff.

⁶¹ Nicaragua, Ministerio de relaciones exteriores, *Documentos oficiales referentes a la guerra entre Nicaragua y Honduras de 1907 y a la participación de El Salvador*, Managua, 1907, 50; see GUGGENHEIM, quoted *supra* footnote 51, 34.

⁶² “Autotutela cautelare internazionale”: TORALDO-SERRA, *Le misure provvisorie internazionali*, Roma, 1973, 53.

⁶³ VENTURINI (GIANCARLO), *Le misure cautelari nel diritto internazionale*, Modena, 1938, 27: “A proposito di questo articolo si può anche osservare che, se esso avesse una funzione analoga a quella cautelare, non rientrerebbe egualmente nel numero delle norme sul procedimento cautelare, poiché esso appartenerrebbe invece a quel gruppo di norme che prevedono misure con scopo cautelare adottabili direttamente dalle parti, alle quali ho già accennato. Infatti, nella controversia ricordata, di fronte ad una richiesta del tribunale, basata sull’art. 11, il Nicaragua obiettò tra l’altro che tale articolo era un accordo tra governi e non conferiva alcuna giurisdizione o autorità al tribunale”.

Guggenheim decided to adopt a more cautious stance, abstaining from expressing his views on the nature of art. 11.⁶⁴

For the sake of clarity, it is worth noting that art. 11 led the way to a two-fold application, as will be seen hereinbelow in the case comment related thereto:

- 1) The first step consists in the international self-provisional measure;
- 2) Lacking the appropriate non-hostile behaviour provided for by the article at issue, the arbitral tribunal seised of the dispute decides whether any provisional measure is required (“arbitral provisional measure”).

In 1906, a revolution takes place in Honduras, allegedly instigated by Nicaragua. Military troops of the former State invaded – in order to capture the revolutionaries – the territory of the latter, which demands reparation for the damages caused by said action.

The dispute was brought on 1 February 1907 before an arbitral tribunal sitting in El Salvador.⁶⁵ Having verified the situation, the tribunal, acting under art. 11 of the Corinto convention, declared that the two parties had to withdraw their troops within their respective territories in order to allow the tribunal to discharge its duty. While Honduras complied with the provisional measure, Nicaragua refused to act accordingly. Its main objection lied in the interpretation of said article: according to Nicaragua, that provision did not attribute to the arbitral tribunal any authority whatsoever to issue a provisional measures. In our scheme, the defense of Nicaragua was based in the inexistence of point 2) above, i.e. in a State consent in the convention only insofar as point 1) (international self-provisional measure) is concerned. Quite needless to say, no room was left for the inherent-power nor the implied-power theories.

On 8 February 1907, proceedings were discontinued, due to the outbreak of the war between the two disputants.

B.I.iv. A fascinating international dispute settlement mechanism, though and perhaps because it never operated, was the International prize court. Indeed, the Convention

⁶⁴ GUGGENHEIM, quoted *supra* footnote 51, 34.

⁶⁵ Nicaragua, Ministerio de relaciones exteriores quoted *supra* footnote 61, 179 ff.

convened in The Hague on 18 October 1907⁶⁶ for its creation never entered into force, due to the lack of any ratification.⁶⁷ Its object was to regulate and settle situations of naval capture in times of belligerence.

According to its article 51,⁶⁸ claims could be brought by States parties to the convention and nationals of a party to the convention against another State party thereto.⁶⁹ Thus, its architecture consisted in a mixed framework, wherein private parties could directly bring claims against States of which they were not nationals, with its implications in terms of nature of the tribunal and the legal order concerned as will be dealt with further.⁷⁰

This aspect deserves great consideration, due to the innovations it bore on the subjectivity of private parties in international law. Indeed, for the first time the institution of diplomatic protection was theoretically set aside: parties would be left free to have recourse to the adjudicating body, decide and organise the strategy as far as the influence on the handling of the proceedings, the issues to be treated and the manner in which they would be treated is concerned.

The exercise of presenting the main elements of this court and the consideration of its most significant implications is deemed not only appropriate, but even necessary, if one considers that this passage in the history of arbitration is constantly neglected in current literature in the area of international investment arbitration. This fact is quite curious, since this court is the antecedent not only to the ICSID system as will be showed below, but of each and every mixed institutional and *ad hoc* arbitration, be it conducted under the ICC, LCIA, Stockholm or UNCITRAL rules.

Undoubtedly, the inexistence of cases dealing with the rules provided for by the international prize convention does not deprive the latter of their theoretical relevance in the evolution of the rules concerning our theme, nor of their practical influence in subsequent arbitral application.

⁶⁶ It was elaborated during the second Hague Peace conference.

⁶⁷ Conférence internationale de la paix (1907; the French version is authoritative), 668-679.

⁶⁸ For a complete publication of both the French and English versions of the convention, see the American Journal of International Law, vol. no. 2, 1908, 174-202.

⁶⁹ For a recollection of materials in this respect, both in French and in English, see SCHINDLER, THOMAN, *The Laws of Armed Conflicts: a Collection of Conventions, Resolutions and Other Documents*, Leiden, 1988, 825-841.

⁷⁰ For mixed tribunals see *infra*, B.I.vii.

A collateral damage caused by the abovementioned negligence consists in the fact that certain authors of the following generation dealing with the complex issues of the nature of these types of arbitration, indeed some of the finest minds in international legal literature, are equally being neglected and risk being left behind. A clear example thereof – though of course not exclusively – is given by the figure of Simon Rundstein. In his series of lectures delivered at the Hague Academy of international law in 1928⁷¹ on the nexus between private law and international law and on the legal standing of the individual within the international community, he appropriately underlined that the great innovation introduced by the International prize convention, namely the recognition of legal standing to the individual against foreign States, did not have any impact on the failure of the convention: indeed, the reasons which led to the lack of ratification related to the uncertainty about the applicable rules of international maritime law.⁷²

Moreover, the United States in particular opposed the fact that the Court, as an appeal instance, could review and potentially annul judgments issued by national tribunals.⁷³ The latter element gives an additional evidence to the international nature of the court. It will be useful to refer to such an element when we will further address Anzilotti's theory of the internal and dual nature of these courts, though they are established by an international instrument such as a treaty.⁷⁴ Other Italian scholars later followed his views, notably Giancarlo Venturini in his study "Le misure cautelari nel diritto

⁷¹ RUNDSTEIN, *L'arbitrage international en matière privée* quoted *supra* footnote 22, 331 ff.

⁷² *Ibid.*, 378: "Il faut souligner que les causes de l'échec de la Convention ne dépendaient nullement du fait qu'on a donné aux particuliers un <<jus standi in judicio internationali>>. Les refus de signature et de ratification ont été causés par l'incertitude des normes du droit international maritime à appliquer éventuellement par la Cour nouvellement créée. Une codification n'a pu être immédiatement réalisée; on sait que la Déclaration de Londres [naval court 1910, *A/N*] n'a pu atteindre le but proposé. Les Puissances intéressées ont été forcées de refuser leur approbation à la convention, les dispositions concernant le droit à appliquer les ayant effrayées par leur hardiesse et leurs innovations".

⁷³ *Ibid.*, 379.

⁷⁴ ANZILOTTI, *Corso di diritto internazionale*, terza edizione, Roma, 1928, 270: "Così, i tribunali arbitrali misti istituiti in conformità all'art. 304 del trattato di Versailles (e disposizioni corrispondenti degli altri trattati di pace) in quanto decidono controversie fra privati o fra questi e lo Stato, sono tribunali costituiti nell'uno e nell'altro dei due ordinamenti giuridici [emphasis added, *A/N*]; ma identica essendone in ogni caso la composizione, identiche le norme secondo cui procedono, assunte come proprie da ognuno dei due Stati mediante la regolare pubblicazione del trattato, identico il valore delle loro decisioni, appaiono come tribunali comuni ai due Stati, come un organo unico vivente ad un tempo nelle due sfere giuridiche".

internazionale”⁷⁵ and Nicola Toraldo-Serra in his “Le misure provvisorie internazionali”⁷⁶.

Signatory parties were concerned, as indicated in the preamble, by the need to take into account both private and public interests in occasion of a naval war in matters of prize: therefore, the intention was to establish an international system⁷⁷ which would have functioned as an appeal court with respect to national judgments in these matters. According to art. 2

“Jurisdiction in matters of prize is exercised in the first instance by the prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or officially notified to parties concerned who are neutrals or enemies”.

As far as provisional measures are concerned, though the convention did not provide for an express regulation concerning such an incidental mechanism, the court *might have had*⁷⁸ the authority to issue such measures by reference to either the inherent-power theory or the implied-power one. Neither of the two theories might have been acceptable by a purely positivist mind, as for instance Professor Anzilotti, since it is evidently related to the idea of the existence of general principles of law in national

⁷⁵ VENTURINI (GIANCARLO), quoted *supra* footnote 63, 16 f.: “Anche per i tribunali arbitrali misti, costituiti dopo la grande guerra, mi sembra si debba negare il carattere di giurisdizione internazionale. La questione però non è affatto pacifica e anzi tanto Dumbauld che Guggenheim sono di parere contrario a quello che ho esposto”.

⁷⁶ TORALDO-SERRA, quoted *supra* footnote 62, 48 ff.: “Oltre che da tribunale internazionale, cioè da giudice tra due persone giuridiche internazionali (e si sa che tali in linea di massima sono solo gli Stati), la Corte [referring to the Central American court of justice, A/N] funzionava pure da tribunale interno, in quanto competente nelle questioni tra uno dei cinque Stati ed un semplice cittadino (sprovvisto perciò della personalità giuridica internazionale) di uno Stato firmatario ed in quelle fra i vari poteri dentro ciascuno Stato”. It is interesting to note that the author, when dealing with the issue of the legal personality of certain peculiar courts, referred in his note 54 to some criminal courts, such as the Nuremberg and Tokyo tribunals and their historic antecedent, namely the “International Criminal Court” provided for by the Geneva Convention dated 16 November 1937 and never ratified. The latter expression met with greater success in more recent times, after the 1998 Rome Statute entered into force in 2002 and established a universal court of the same name.

⁷⁷ Art. 1: “The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved”.

⁷⁸ As already mentioned, the court never began its works: therefore, it is not possible to ascertain whether it would have upheld any of the two theories, or neither.

legal orders which may – under certain circumstances – be reproduced in the international sphere.⁷⁹

The difference between the two theories lies in the fact that the first one disregards in a particular fashion the concept of attribution of power to an adjudicating body: in other words, the idea is that the power to issue provisional measures is inherent in the judicial function, complementary – one may argue, ancillary – to its adjudicating task.

According to the second theory, on the other hand, such power derives to a certain extent from the implied attribution of States in their agreement, which in fact remained silent on that specific aspect though it is presumptively considered as attributed in order to let the court accomplish its function. Indeed, in the second theory the consensualistic approach is at least sketched.

Another basis on which provisional measures come into play – although indirectly – consists in the provision of art. 3, according to which

“The judgments of national prize courts may be brought before the International Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral Power or individual;
2. When the judgment affects enemy property and relates to:
 - (a) Cargo on board a neutral ship;
 - (b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;
 - (c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a Convention in force between the belligerent Powers, or of an enactment issued by the belligerent captors.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law”.

This jurisdictional provision shows the relationship with the judgment of national courts: as any court of appeal, the International prize court may adjudge and declare that the judgment of the first court was wrong either in fact or in law regarding either the property of a neutral power (para. 1), or that of an enemy power (2). Therefore, a

⁷⁹ An idea which, as mentioned, positivists oppose, due to its uncertainty and, secondly, to the ambiguity of its legal delimitations.

national judgment confirming the legal validity of a provisional measure issued by the court itself and causing a damage to the appellant before the International prize court may be reviewed and potentially reversed by the latter.

In conclusion, the International prize court constituted a *spes* of mixed tribunal and a major indication of the idea that the feasibility of this sort of private – public settlement mechanism should not be discarded, as the subsequent practice demonstrated.

B.I.v. Another dispute settlement mechanism created in 1907 – which though met with more success –, the same year as the International prize court, was the Central American court of justice. It was the first permanent international tribunal of the modern era: a fundamental step in the evolution of the service of justice and peace for subsequent generations.

It was created by the Convention for the establishment of a Central American court of justice, dated 20 December 1907.⁸⁰ Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua were the States parties to the convention, which provided for a final term of ten years starting from the date of the last ratification, namely that of Guatemala on 11 March 1908.

A particular aspect is that the court was empowered with the authority to hear not only inter-State cases, but also the first mixed – private / public – disputes wherein the private party could not be a national of the respondent State.⁸¹

It consists of a quite brief existence in a highly instable area, due to frequent provocations and tensions between those States. Indeed, political instability and the inadequateness of a court of law to solve that sort of disputes are the main reasons of its failure.

However, some relevant aspects concerning provisional measures shall not be unnoticed. First of all, it has to be underlined that for the first time a standing international court was expressly empowered to issue these measures: indeed, article XVIII of the convention provided that

⁸⁰ 206 CTS, 79.

⁸¹ To a certain extent, it was an antecedent of the ICSID framework in its purpose to seek to depoliticise disputes in such a highly politically sensible context.

“From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved *in statu quo* pending a final decision”.⁸²

This provision gives many indications concerning the early conception of the institution in international procedure:

- 1- “From the moment in which any suit is instituted...”: at the outset, the article provides for the initial temporal limitation for a request for provisional measures to be considered by the court, i.e. there had to be a previous or concomitant filing of application instituting proceedings before the court itself. It has to be noted that such a temporal aspect was later substantially reproduced – after a thorough examination conducted by the Advisory committee of jurists – in art. 41 of the Statute of the Permanent court of international justice and then confirmed in 1945 in the same article of the Statute of the International court of justice. Such a limitation, though quite intuitive, is by no means the only possible option as we will see below in relation to administered investment arbitration under certain *fora*.

Concluding on the temporal element, one may also note that there is an additional indication, referring to the final term before which an application for provisional measures had to be filed with the court: “up to that in which a final decision has been pronounced”, i.e. before the court issued its judgment (in view of the overall provisions of the convention, and in particular of art. XXIII about the distinction between final and interlocutory decisions, “final decision” has the same meaning of “judgment”). By this provision, the drafters stressed another peculiar feature of provisional measures which will be found in all subsequent

⁸² Conferencia de paz centroamericana, Washington, noviembre y diciembre 1907, *Actos y Documentos: Minutes of the Preliminary Central American Peace Conference, September 1907* 65, Washington, 1907; see ROSENNE, quoted *supra* footnote 3, 18, referring to that article.

norms, namely the instrumentality of these measures in relation to the final disposition of the case.⁸³

- 2- “Any suit”: as it has already evoked *supra*,⁸⁴ the court could hear both inter-State and mixed disputes: therefore, this expression means that also private parties could request provisional measures “against” States, thus quite surprisingly – considering the period – impacting on their sovereignty in a special fashion.⁸⁵
- 3- “The court may [...] fix the situation”: through the adoption of the term “may” the drafters clearly manifested the intention to attribute discretionary power to the adjudicating body. Again, this term was later reproduced in the Statutes of the PCIJ and the ICJ.
- 4- “At the solicitation of the parties”: interestingly, the clear terms of the article seem to suggest that *proprio motu* provisional measures were not permitted. However, it has to be borne in mind that such a conclusion is not necessarily the only correct one: indeed, it depends on the overall conception of provisional measures in dispute resolution. As a matter of fact, the abovementioned expression may be subject either to a restrictive interpretation (I) or to an extensive one (II) as far as interpretation of State obligations is concerned. Under (I), if one takes stock of the famous *Lotus* formula,⁸⁶ according to which any limitation of sovereignty is not presumed, the automatic conclusion shall be that, since art. XVIII of the convention does not provide for *proprio motu* measures, the latter are excluded.

⁸³ They cease to exist at the same moment in which the judgment is issued.

⁸⁴ B.I.iii, 20 ff.

⁸⁵ See the remarks below in the paragraph concerning mixed arbitral tribunals, B.I.vii.

⁸⁶ PCIJ, *Judgment no. 9 – The Case of the S.S. Lotus (France v. Turkey)*, 7 September 1927, para. III, 18: “The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed”. Such a *dictum* constitutes a major result of the positivist theory prevailing at the time (of which Prof. Anzilotti, judge of the Permanent court in the case at stake, was one of the leading figures). The judgment is available at the ICJ institutional website: <http://www.icj-cij.org>.

Under (II) instead, if one establishes the interpretation upon the principle of the *effet utile*⁸⁷ – also expressed through the Roman maxim *ut res magis valeat quam pereat* – (s)he will conclude that, since States decided to exercise their sovereignty in limiting the latter through a delegation of power in favour of adjudicating bodies whose main function is to restore peace by rendering a *just* and *effective* judgment, a necessary consequence thereof is that these bodies shall be automatically empowered to adopt those instruments allowing them to accomplish their function. It is deemed appropriate just to briefly anticipate that this idea constitutes the ground for the theory of implied powers.

Furthermore, in a broader perspective, one may ask what is the effect of a treaty provision in the context of the body established thereby (and, in general, in relation to customary international law): does it mean that the parties have expressed the intention to create a norm which did not exist previously in international law (restrictive: I)? Or does it mean, on the contrary, that the parties have intended to confirm – for instance, for the sake of clarity – a norm which already exists in international law (extensive: II)? We will address this general issue further, after having added other appropriate aspects with the aim of replying thereto.

- 5- “In which the contending parties *must* remain” [italics added]: the adoption of this term in lieu of the less compelling *may* or *might* seems to provide for the binding – instead of recommendatory – force of provisional measures issued by the Central American court of justice. However, such a contention shall be confronted with the provision of article XXV of the convention, whereby only the judgments are expressly mentioned as binding on the parties, thus seemingly excluding interlocutory decisions *ex art. XXIII*.⁸⁸

⁸⁷ According to the Oxford Encyclopaedic Dictionary of International Law, the *effet utile* is “a form of interpretation of treaties and other instruments derived from French administrative law which looks to the object and purpose of a treaty, as well as the context, to make the treaty more effective”. It has to be noted, however – as the source itself does – that such a principle is particularly applied in the European system of economic and political integration, which has characteristics of its own.

⁸⁸ See *supra*, point 1.

- 6- “To the end that the difficulty shall not be aggravated and that things shall be conserved *in statu quo* pending a final decision”: the final part of the article simply reminds the main purposes of provisional⁸⁹ measures. It may be added thereto that the broad term “things” permits an extension to both *rights* in dispute and means through which the protection of the latter can be achieved, namely *evidence*.

After these remarks, it is appropriate to draw on a brief presentation of a case dealt with by the court in order to see the law-in-action part regarding provisional measures in this historical passage. Reference is made to the first contentious inter-State case, namely *Honduras v. El Salvador and Guatemala*.⁹⁰ Tensions, allegedly caused by the respondents, led Honduras to file an application instituting proceedings on 10 July 1908. Three days later, the court, apparently acting *proprio motu*,⁹¹ issued provisional measures ordering⁹² respondents to halt military actions. The addressees did not abide by the orders. In its award dated 19 December 1908, the court – addressing the function of art. XVIII of the convention, concerning provisional measures – found that

“4. The function assigned to this Court by article XVIII...of arresting...the course of an armed conflict by determining, from the very moment a claim is filed, the situation in which the contending governments are to remain pending the rendition of an award, presupposes the right to have recourse to the court without delay in matters of urgency, as occurred in the case under consideration, and if we accepted the above-mentioned view of the matter, the humanitarian and unquestionably utilitarian purpose for which this important article was inserted would be essentially frustrated, the article being reserved perhaps for emergencies of minor risk and significance or converted perhaps into a simple expression of wish”.

In these lines, though objectionable insofar as there seem to be an unclear hierarchy between values having an apparent impact on the force of provisional measures, the

⁸⁹ It may not be useless to remind that, regarding this institution, there is a distinction between the *nature* of the measure (i.e., provisional) and the *purpose* thereof (i.e., conservatory).

⁹⁰ Anonymous editorial comment, *The First Case before the Central American Court of Justice*, American journal of international law, vol. no. 2, issue no. 4, 835-841.

⁹¹ ROSENNE, quoted *supra* footnote 3, 18; see *supra*, point 4.

⁹² See *supra*, point 5.

court referred to one fundamental condition for the granting thereof, namely urgency. It constituted an early indication of the potential utility of this institution. The last two cases before the Central American court of justice will be discussed further in the following subparagraph (vi), since they concerned the interpretation and application of one of the Bryan treaties, namely the one between the United States and Nicaragua (the so-called “Bryan-Chamorro treaty”).

B.I.vi. The Bryan treaties⁹³ constitute a fundamental step forward in the gradual provision for provisional measures in international adjudication. Indeed, for the first time this institution was expressly provided for in detail: an evolution, if one compares it with art. 11 of the 1902 Corinto convention⁹⁴ and with art. XVIII of the 1907 Convention for the establishment of a Central American court of justice.⁹⁵ As already mentioned, their history is interrelated with that of the latter court, since it had the venture of applying a version thereof in two occasions. Before discussing these cases (concerning the interpretation and application of art. 4 of the Bryan-Chamorro treaty), it is deemed appropriate to take one step back to a brief account of the drafting of the provision.

As a matter of fact, it is more precise to refer to a plural body of treaties, which became known under the name of the U.S. Secretary of State⁹⁶ who promoted their ratification with central American as well as European and Asian countries: their “core business” is almost always the same – the maintenance or re-establishment of peace through the operation of commissions of inquiry or other dispute settlement mechanisms – but the specific provisions concerning provisional measures and other aspects differed with one another. It has been noted that the practice of inserting provisions regarding provisional measures as relevant elements of a peace-keeping process could benefit from the experience before the Central American court of justice.⁹⁷ The main idea was that these

⁹³ FRANÇOIS, *Règles générales du droit de la paix*, Recueil des cours, Vol. no. 66, Issue no. 4, 1938, 204 f.: “Les Etats-Unis d’Amérique ont conclu avec un grand nombre d’Etats américains des pareils <<Bryan-treaties>>. Les commissions se composent de cinq membres; chacun des gouvernements en désigne deux, dont un seulement peut être son propre sujet; le cinquième membre est nommé par les deux gouvernements d’un commun accord”.

⁹⁴ *Supra*, B.I.iii.

⁹⁵ *Supra*, B.I.v.

⁹⁶ William Jennings Bryan.

⁹⁷ GUGGENHEIM, quoted *supra* footnote 51, 42.

commissions could operate only in a context wherein the disputing parties refrained from having recourse to war pending examination: to this end, provisional measures were a key tool.

Since commissions of inquiry pursue(d) mainly – if not exclusively – a fact-finding mission, these measures necessarily had to focus on the preservation of evidence, one of the purposes for which they are generally addressed today (the Bryan-treaty context is the antecedent thereof).

Bryan treaties may be divided into two groups, which interestingly can be described through the two-fold application which I have presented above⁹⁸ in relation to art. 11 of the Corinto convention, namely the distinction between “international self-provisional measures” and “arbitral provisional measures”. Undoubtedly, the second version theoretically provides for a more intense safeguard of the *status quo*.

The two groups consist of the following:

- 1) Art. 4 of the treaties bilaterally concluded between the United States and Nicaragua (Bryan-Chamorro treaty, which will be further addressed in the evaluation of the last two cases before the Central American Court of Justice), Guatemala, El Salvador, Panama and Iran provides that

“Pending the investigation and report of the International Commission, the High Contracting Parties agree not to increase their military and naval programs, unless danger from a third power should conceal such increase, in which case the Party feeling itself menaced shall confidentially communicate the fact in writing to the other Contracting Party, whereupon the latter shall also be released from its obligation to maintain its military and naval status quo”;

- 2) Art. 4 of the treaties bilaterally concluded between the United States and China, France and Sweden provides that

“In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall, as soon as possible, indicate what

⁹⁸ *Supra*, 56.

measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report”.

The provision of the first group resembles the wording of art. 11 of the Corinto convention: the parties apparently do not exercise their sovereignty through the attribution of the power to issue provisional measures to the tribunal. As a consequence, it constitutes an acknowledgment of the out-of-court exercise thereof and an agreement not to modify the *status quo* pending examination by the commission of inquiry.

The second element, on the contrary, consists of an express attribution of such a power to the arbitral tribunal. Moreover, there is an evolution also in terms of the legal subjective position of the arbitral tribunal itself, since the wording of the article suggests that it is more complex than a mere power: it also consists of a duty (“shall”). Such a power / duty exerts a somehow *soft*, recommendatory effect on the addressee party, since the binding force of the decision⁹⁹ seems to be excluded (“indicate”, “ought in its opinion to be taken”). It is of utmost relevance to note that this provision played a significant historic role as antecedent to the text of art. 41 of the Statute of the Permanent court of international justice.¹⁰⁰

The last two cases before the Central American court of justice¹⁰¹ concerned the application of the Bryan-Chamorro treaty, concluded between the United States and Nicaragua. The treaty regarded the construction of a canal between the Atlantic and the Pacific Oceans.

In the *Costa Rica v. Nicaragua* case,¹⁰² Costa Rica contended that Nicaragua lacked capacity to conclude a treaty with the United States due to a previous obligation it had entered into with Costa Rica,¹⁰³ to which the Bryan-Chamorro treaty¹⁰⁴ was partly conflicting. The court on 1 May 1916 applied art. 4 of the treaty at issue and requested

⁹⁹ It shall also be considered that the commission of inquiry dealt with disputes under a different perspective than a judicial / arbitral organ.

¹⁰⁰ See *infra*, subparagraph B.I.viii.

¹⁰¹ See *supra*, subparagraph B.I.v.

¹⁰² The text of the judgment is published in the American journal of international law, 1917, 181 ff.

¹⁰³ Namely, a boundary treaty concluded in 1838.

¹⁰⁴ For a general assessment of the role played by the Bryan treaties, see KAPLAN, *U.S. Imperialism in Latin America: Bryan's Challenges and Contributions, 1900-1920*, Westport, 1998, (Bryan-Chamorro treaty, 146 f.).

the parties to abstain from modifying the *status quo* pending a final disposition of the case; which was pronounced some months thereafter, on 30 September 1916. Nicaragua did not accept the decision.

In the *El Salvador v. Nicaragua* case, the former alleged that its rights in the Gulf of Fonseca were impaired by the Bryan-Chamorro treaty. The application instituting proceedings was filed on 28 August 1916, therefore the two claims brought against Nicaragua were contemporaneous. In its judgment dated 9 March 1917, the court found that Nicaragua had violated El Salvador's rights.¹⁰⁵ Nicaragua equally as in the previous case rejected the judgment and in April that same year denounced the convention which had established the court: that episode rapidly caused the experience to cease to exist.¹⁰⁶

B.I.vii. The mixed tribunals established by the Treaty of Versailles contained certain peculiarities and advancements with respect to other earlier attempts. Short of addressing each of these aspect, the presentation is limited to the analysis of the main elements bearing relevance for the purposes of this inquiry, namely :

- 1) The legal standing of the individual and its impact on the nature of the arbitral tribunal;
- 2) The force of the provisional measures issued thereby.

A clear example of the distinction with previous instances – as far as the legal standing of the individual is concerned – is constituted by the comparison with the fragile mixed nature of the International prize court established by the 1907 Hague convention.¹⁰⁷

Indeed, according to its art. 4, para. 2

“An appeal may be brought:

¹⁰⁵ Anales de la Corte de Justicia Centroamericana, vol. VI, San José, 1917, 96.

¹⁰⁶ In 1991 the “Protocolo de Tegucigalpa” and the “Carta de la organización de Estados centroamericanos” (ODECA) established a court of justice under the same name as its predecessor (art. 12).

¹⁰⁷ See *supra*, subparagraph B.I.iv.

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, No. 1),¹⁰⁸ subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place” [footnote added, *A/N*].

As the provisions indicate, private parties did not have a firm legal standing before that court, since their national State party had the authority to prevent them from appearing as claimants in two ways:

- I) by excluding such a power on an opt-out basis through a reservation or;
- II) by taking the claim on the behalf of their nationals, i.e. diplomatic protection.

For the sake of completeness, it is noted that such a fragility was not present with respect to private parties having the nationality of enemy States.¹⁰⁹

Post-WWI mixed-dispute systems were based both on the Treaty of Versailles as a *chapeau* and on a bilateral treaty (a winning State on one side, a losing State on the other). Therein, private parties having the nationality of a State party to the bilateral treaty at issue could not be barred from claiming compensation against the other State party, contrary to the system provided for by the International Prize Court.

In relation to the nature of mixed tribunals, it has already briefly introduced the theme of the doctrinal dispute.¹¹⁰ Two main opposed ideas are confronted: according to the positivist classical school – in particular but not exclusively, the Italian scholars Danilo

¹⁰⁸ Art. 3, No. 1 provides that “The judgments of national prize courts may be brought before the International Prize Court: 1. when the judgment of the national prize courts affects the property of a neutral Power or individual”.

¹⁰⁹ “Art. 4. An appeal may be brought: [...] 3. by an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, No. 2, except that mentioned in paragraph (b)”. Art. 3, No. 2 provides as follows: “Art. 3. The judgments of national prize courts may be brought before the International Prize Court: [...] 2. when the judgment affects enemy property and relates to: (a) Cargo on board a neutral ship; (b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim; (c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a Convention in force between the belligerent Powers, or of an enactment issued by the belligerent captors.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.

¹¹⁰ See *supra*, subparagraph B.I.iv.

Anzilotti¹¹¹ and Giancarlo Venturini¹¹² – these tribunals lack the character of international jurisdiction, though they derive the source of their existence from public-international-law instruments, such as the treaties, and by operation of members of the international community.

Indeed, in perfect line with the dualist theory, these treaties derive their binding force within the national legal order of the State by operation of their reception by an internal act of the State itself. Moreover, according to Giancarlo Venturini, another evidence supporting the thesis which denies such an international character to mixed arbitral tribunals is given by the Permanent court of international justice: the world court refused to admit an exception of *res alibi pendens* with a mixed arbitral tribunal ruling that “les tribunaux arbitraux mixtes et la Cour permanente de justice internationale ne sont pas des juridictions du même ordre”.¹¹³

Such a doctrinal position is contrasted by those¹¹⁴ who see the problem in an evolutionary perspective, i.e. the gradual emancipation of the individual in the international legal order, at the same time proposing a distinction to be made between subjects of international law – whenever private parties are enabled to bring a claim against a foreign State, as in the case of mixed arbitral tribunals – and members of the international community (condition uniquely held by States). Two prominent Professors of international law, on the occasion of the *cours généraux* that they delivered at the Hague Academy of International law in 1930 and 1937, expressed their views on the subject with clarity. The first of the two, Sfériadès, addressing the broader theme of access of the individuals to international justice, maintained that

“La question de l'accès direct des particuliers aux juridictions internationales se pose comme un problème auquel on devrait chercher non point une solution d'occasion, mais une solution de principe”.¹¹⁵

¹¹¹ See *supra*, footnote 74, 24.

¹¹² See *supra*, footnote 63, 25.

¹¹³ Judgment No. 6, *Polish Upper Silesia case* (Germany v. Poland), Permanent court of international justice, *Publications*, serie A, no. 6, 25 August 1925, 20.

¹¹⁴ RUNDSTEIN, quoted *supra* footnote 22, 383 ff.; GUGGENHEIM, quoted *supra* footnote 51, 21.

¹¹⁵ SÉFÉRIADÈS, *Principes généraux du droit international de la paix*, Recueil des cours, Vol. no. 34, Issue 4, 1930, 483.

The second in time, Sir Hersch Lauterpacht, considering the progress of international law towards the protection of individual rights, asserted that a private person is a direct subject of international law whenever the latter directly regulates its conduct¹¹⁶ or in cases of procedural capacities in mixed disputes.¹¹⁷

Reference has also to be made to a third option: according to Blühdorn, mixed arbitral tribunals play a sort of hybrid role, i.e. in certain instances they act as international dispute settlement organs, whereas in other ones such as in the matters covered by articles 296 and 297 of the Treaty of Versailles they constitute part of the internal legal order of the State concerned.¹¹⁸ This last conception has not been followed in legal literature; in any case, it should be abandoned, since it does not give any clear indication of the respective fields and in addition it fails to take account of the abundance of common elements in both “fields”: therefore, it is respectfully submitted that it is inappropriate to properly describe the phenomenon.

The more convincing theory seems to be the internationalist one: it is easier to maintain it today in 2014 than eighty or more years ago, due to the post-Westphalian shift that may be indicated – obviously with a certain approximation, as is always the case when one tries to fix a point in time when major changes occurred – in 1948 with the Declaration of human rights as will be further discussed in the part concerning the sources.

Concerning point 2) of this subparagraph, namely the issue of the force of provisional measures issued by mixed tribunals, early doubts – later reproduced within the ICSID framework as will be seen – arose as to whether they were empowered to issue binding orders, or whether they were deprived of such power due to the respect which had to be paid to the Sovereign and its prestige.

The theme of prestige in favour of the restricted-power thesis related to the mixed tribunal as well: an hypothetical case in which an order issued by the tribunal were not complied by the addressee (more probably, by the Sovereign) may be considered a

¹¹⁶ Therefore, also as the object of international obligations, as is the case for pirates and the evolving area of international criminal law starting from the end of WW1.

¹¹⁷ LAUTERPACHT, H., *Règles générales du droit de la paix*, Recueil des cours, Vol. no. 62, Issue no. 4, 1937, 207 ff. The author mentions the International prize court (1907), the Central American court of justice (1908) and post-WW1 mixed arbitral tribunals.

¹¹⁸ BLÜHDORN, *Le fonctionnement et la jurisprudence des tribunaux arbitraux mixtes créés par les Traités de Paris*, Recueil des cours, Vol. no. 41, Issue no. 3, 1932, 144.

deminutio of the authority of the adjudicating body and therefore warranted a cautious approach in this respect.¹¹⁹

Having reviewed the case law of these mixed tribunals in relation to provisional measures, one can say that both positions find application in the relevant arbitral practice.

Upholding the idea of the binding force of these measures, the Anglo-German arbitral tribunal presided by Borel laconically ruled in 1922 that

“Le Tribunal arbitral mixte a qualité pour *ordonner* des mesures provisoires” [italics added, A/N].¹²⁰

A first series of cases had consolidated a quite consistent practice on this issue, due to the fact that the potentially high political impact of these measures was reduced by the fact that the addressee were always the States which had lost WW1¹²¹ and therefore did not enjoy a broad *marge de manoeuvre*. Curiously indeed, there had been a proliferation of provisions on these measures which found their source in the rules of procedure established by the arbitrators themselves (they were thus deprived of the direct attribution by the State(s) concerned).

Such a situation rapidly changed when these measures started being directed to the winning States or their nationals. The most famous case in this respect is constituted by the decision issued by the Hungaro-Romanian mixed tribunal presided by Mr. von Cedercrantz in the *Ungarische Erdgas S. A. c. État roumain*. The Government of Romania objected to the binding force of provisional measures for concerns of sovereignty, which the tribunal rejected noting that

“On ne saurait comprendre comment une mesure ordonnée par ce tribunal, dans les limites de ce pouvoir, puisse être qualifiée d’atteinte à la souveraineté de l’État défendeur ou de blâme envers lui; que l’on ne saurait comprendre non plus la thèse suivant laquelle une condamnation au fond

¹¹⁹ As will be further discussed, this idea is pernicious, since it unreasonably mixes up two different elements: on one side, the nature of the provisional measure; on the other, the subsequent problem of its enforceability.

¹²⁰ Anglo-German mixed tribunal, 17 January, 25 and 29 March 1922, Recueil T.A.M., Vol. no. I, 857.

¹²¹ See GUGGENHEIM, quoted *supra* footnote 51, 27.

respecterait la Souveraineté, tandis qu'une simple injonction d'avoir à maintenir un certain état de fait y porterait atteinte et constituerait même une blâme".¹²²

The argument according to which provisional measures are less intrusive in State sovereignty than judgments and therefore, if the State consented to attribute jurisdiction to an adjudicating body, there is no reason to argue that it did not attribute to it a less intrusive power such as that of provisional measures, is ever-young, recurring very often in arbitral practice. Its main weak point in arbitration dealing with a State is found in the first pages of the foundational study by Professor Guggenheim. The author, known for being an adversary of their binding force – though not based on *a priori* – distinguished between the internal legal order and the international one. The first is intrinsically founded on the idea of subordination: therefore, there is no *deminutio* of sovereignty or prestige. In a community of *entes superiorem non recognoscentes*, on the contrary, such a power would be able to affect State sovereignty and, consequently, constitute a potential threat to international peace and security. In his words,

“La vie politique interne de l'État admet très bien, et en dehors même du domaine <<technique>> de la procédure civile, des mesures provisoires destinées à sauvegarder une situation juridique actuelle ou à venir. Les sujets de droit sont habitués à ces interventions. Dans un ordre juridique reposant sur la subordination, elles n'impliquent aucune diminution de <<souveraineté>> ou de <<prestige>>”.¹²³

Furthermore, provisional measures are able to destabilise the political equilibrium of a State more than a judgment, due to lasting and modifiable effect of the former, whereas a judgment – although it may constitute a blow to its international stance – can be handled with more ease as it represents a point in time.

In addition to it, it is submitted that provisional measures can be systematised in a gradual scale in two order of respects, namely 1) type;¹²⁴ 2) class.

Point 1) is intuitive.

¹²² Hungaro-Romanian mixed tribunal presided by Mr. von Cedercrantz, *Ungarische Erdgas S. A. c. État roumain*, Recueil des décisions T.A.M., Vol. no. 5, 955.

¹²³ GUGGENHEIM, quoted *supra* footnote 51, 7 f.

¹²⁴ As will be seen, they are atypical: thus, the gradual scale can be indefinitely extended.

As far as point 2) is concerned, we may distinguish two classes of provisional measures:

- I) static (for instance, to maintain the *status quo*);
- II) dynamic (for instance, to annul the effects of a State decree which is affecting a foreign enterprise).

Arguably, the first class of provisional measures are less impacting on State sovereignty and, perhaps, they imply a minor risk for the arbitral tribunal to appear as pre-judging the merits of a case.

Turning back to case law, after the change which followed the decision of the Hungaro-Romanian mixed tribunal, subsequent tribunals tended to be more cautious, with the intention to avoid impinging on State sovereignty. For example, in the *Frauenverein Szamothlie c. État polonais* case, presided by Mr. Guex, the German-Polish mixed tribunal considered that

“Attendu qu’il suffit de constater que la solution négative de ces questions ne s’impose pas avec une telle évidence qu’il serait d’ores et déjà certain que les conclusions de la requête ne pourront pas être admises et que, d’autre part, pour le cas où lesdites questions devraient recevoir une solution affirmative, il y a un intérêt très considérable à ce que l’État défendeur ne se dessaisisse pas du bien soumis à la liquidation”.¹²⁵

The experience of the mixed arbitral tribunals exerted a particular influence on the development of international investment arbitration, both treaty-based and contractual.

B.I.viii. After the human, moral, economic and political destructions caused by WW1, time had come for the establishment of a world court having the broadest possible jurisdiction in order to constitute – within the ambit of peaceful means – a valid alternative to diplomatic instruments for the settlement of disputes between States. The intention of the drafters of the project leading to the creation of this principal judicial organ of the League of Nations was not to challenge the authority of the Permanent court of arbitration instituted in the previous generation, but rather to multilateralise

¹²⁵ German-Polish mixed tribunal, presided by Mr. Guex, *Frauenverein Szamothlie c. État polonais*, Recueil des décisions T.A.M., Vol. no. 6, 327.

judicial means through a veritable standing court and, consequently, a more consistent jurisprudence as a tool for achieving greater legal security and predictability.

Short of addressing a broad panorama of issues related to the operation of the Permanent court of international justice (established in 1922),¹²⁶ the idea is to focus on the relevant provision of its statute concerning provisional measures and the case law related thereto.¹²⁷

According to art. 41 of the Statute,

“The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council”.

“La Cour a le pouvoir d’indiquer, si elle estime que les circonstances l’exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

En attendant l’arrêt définitif, l’indication de ces mesures est immédiatement notifiée aux parties et au Conseil”.

The purpose of this synoptic presentation of the text of art. 41 in the two official versions of the statute is to show that there is a slight difference in terms of force of provisional measures.¹²⁸ Indeed, the term “ought to be taken” seems to be less compulsory than “doivent être prises”; in addition, a clearer indication of the fact that the English version was drafted in a more deferential fashion in this sense is given by the second paragraph of the article at issue, wherein reference is made to measures which are “suggested”, whereas in the French version there is no such *soft* expression. The International court of justice stated in the *LaGrand* case that the two texts were not

¹²⁶ In this sense, see HUDSON, *The Permanent Court of International Justice*, Harvard law review, Vol. no. 35, Issue no. 3, 1922, 245 ff. and – by the same author – the periodic annual reviews of the activities of the Court, published in the American journal of international law until its twenty-third year (1945), except for the first year which was published in the Harvard law review.

¹²⁷ For a detailed account of the preparation for the Permanent court of international justice and the drafting history of the relevant provisions on provisional measures, see GUGGENHEIM, quoted *supra* footnote 51, 56 ff.; ROSENNE, quoted *supra* footnote 3, 21 ff. and bibliographical references contained therein.

¹²⁸ In this sense, ROSENNE, quoted *supra*, footnote 3, 29: “[...] divergence between the French and English texts of the provision, the English-speaking world being inclined to follow the English version in which the element of obligation is less emphatically expressed”.

in “total harmony”.¹²⁹ Prior to that, the first reference thereto was made by Judge *ad hoc* Thierry in the *Arbitral Award of 31 July 1989* case.¹³⁰

Provisional measures consist of a *power* of the court, which is by no means unconditional: indeed, it does not have such power in each and every occasion, but “if it considers that the circumstances so require”. As a consequence, following the meaning of the provision, the court could exercise its discretion through consideration of its connected duty to assess whether the circumstances for granting the latter were met.

It has to be added that, since there is no express reference to any list or hint whatsoever of the type of circumstances which might have guided / limited the court, it is to be inferred that the contracting parties intended to invite the court to develop its own jurisprudence on this point, by means of the application of the provision in the specific cases which would have been filed with it. This aspect relates once again with the complex and general issue of the relationship between art. 38 (1) lett. d and art. 59 of the Statute of the World court, namely the role of judicial precedent and – more broadly – judicial law-making in combination with the absence of a *stare decisis* principle, as expressed in the latter article.

Another duty derives from the above interpretation of art. 41: in addition to the duty to assess whether the circumstances were met in the specific case, the court also had the duty to express its assessment in the decision, therefore justifying the reasons for which it considered that it had the power to issue provisional measures. Concluding on the point of the duty of the court in this aspect, it is submitted that the same applies with regards to the decision of the court to deny a request for provisional measures.

Moreover, there is no list of the type of provisional measures which can be granted, illustrating the principle of atypicalness.¹³¹

As far as the second paragraph of art. 41 is concerned, the obligation to notify the Council of the League of Nations seems to be mostly of a procedural nature and – in addition – unable to have an impact on the validity of the measures. In case of denial thereof, there is no obligation to notify such decision.

¹²⁹ *LaGrand* case (Germany v. United States), ICJ Rep. 2001, 466, 501, para. 101.

¹³⁰ *Arbitral Award of 31 July 1989* case (Guinea Bissau v. Senegal), ICJ Rep. 1990, 64, 79; see ROSENNE, quoted *supra* footnote 3, 27.

¹³¹ See next chapter, paragraph C.

It is worth noting that these considerations are maintained in relation to the subsequent International court of justice, since the text of the Statute was substantially reproduced in its integrality, except for the reference in the second paragraph of art. 41 to the Security council instead of the Council of the League of Nations, for intuitive reasons.

It has already been noted that the text of this article historically derives from art. 4 of the Bryan treaties with China, France and Sweden:¹³²

“The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council”.

“In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall, as soon as possible, indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report”.

However, the first part of the two articles differs: in art. 41 of the PCIJ Statute reference to the temporal framework in which these measures can be issued is lacking. The Bryan-treaty version was manifestly linked to the main concern for which provisional measures were provided for, namely the risk of the use of force *pendente lite*. Actually, on the occasion of the Drafting Committee’s twenty-eight meeting on 20 July 1920, Raul Fernandes, one of its members, had successfully proposed to reproduce the provision contained in the Bryan treaties in its integrality. However, later on Professor Ricci-Busatti, Italian representative thereto, finally managed to persuade the majority that the temporal limitation at issue should be removed, in order to extend the breadth of provisional measures.¹³³

Another element shall be added to the analysis of the force of provisional measures before the Permanent court of international justice, namely the reference to a passage in the *travaux préparatoires* to this article (report of the Committee) wherein the intention

¹³² See *supra*, footnote 101, at p. 34; see ROSENNE, quoted *supra* footnote 3, 24.

¹³³ PCIJ, Advisory Committee of Jurists, *Documents presented to the Committee relating to existing plans for the establishment of a Permanent court of international justice*, 1920, final text as approved by the Sub-Committee, 169.

not to attribute binding force to these measures – therefore respecting State sovereignty – is clearly expressed:

“There is no question here of a definite order, even of a temporary nature, which must be carried out at once. Great care must be exercised in any matter entailing the limitation of sovereign powers. It is sufficiently difficult to ensure compliance with a definite decision; it would be much more difficult to ensure the putting into effect of a purely temporal decision”.¹³⁴

It is respectfully submitted that a distinction shall be drawn between the nature of a decision for provisional measures and its enforceability, which the Committee apparently did not do. The above lines exerted an extremely powerful influence on the idea that these measures did not have a binding character, until the *revirement* manifested in the *LaGrand* case. Throughout the jurisprudence of the court, the leading view was that provisional measures were not binding; such a position was – except for certain relevant exceptions – reproduced in legal doctrine.¹³⁵

An analysis of the most relevant aspects concerning provisional measures before the Permanent court of international justice follows. All cases in this respect are reviewed.

In order to facilitate the fruition of the cases and the understanding of the most relevant aspects concerning these measures, such an analysis will be conducted through a schematic reference to: - **facts** (background and object of the request); - **law** (jurisdictional condition, i.e. *prima facie* jurisdiction / *fumus bonae iurisdictionis*, and substantive conditions, i.e. urgency, necessity, risk of an irreparable harm and *prima facie bonum ius* / *fumus boni iuris*) - **decision**.

However, before starting, it is deemed necessary to provide the reader with two general indications, which are valid also in relation to the analysis of the jurisprudence of the International court of justice as will be seen:

- I. As far as the abovementioned substantive condition is concerned, it has to be borne in mind that the totality of those elements is almost always lacking in the individual case; however, it is useful for didactic purposes to keep all them

¹³⁴ *Ibid.*, 735.

¹³⁵ GUGGENHEIM, quoted *supra* footnote 51, 62.

united in the title: in certain cases element A and element B will be present, in others C and D or any other possible combination of the four elements;

- II. Some fresh expressions are adopted in order to try to better describe the gradual character of each condition: in all of these cases, the adoption of “*prima facie*” means a more relaxed requirement of intensity, whereas the “*fumus*” means that the condition in the specific case had to meet a higher threshold in the interpretation given by the court.

They are quite easy to grasp, in the sense that the former is presented in the negative (“it cannot be excluded that...”), whereas the latter is presented in the positive (“it is probable that...”). Such an exercise is useful in order to describe tendencies and dominant positions.

To put it simply, let us make an example adopting the jurisdictional condition. We will refer to “*prima facie* jurisdiction” in cases in which the Court decided that the test for granting provisional measures was that the existence of its jurisdiction *could not be excluded* through an *ictu oculi* assessment (at first sight). On the contrary, we will adopt the fresh expression “*fumus bonae iurisdictionis*” in cases in which the Court decided that, instead, the test for granting provisional measures was that the existence of its jurisdiction *was probable* through an *ictu oculi* assessment (the “first-sight” requirement is unchanged due to its connection with urgency).

In line with the overall thesis maintained in the present research, the harmonisation of the presentation of the historic evolution of provisional measures in public international law, together with the comparative analysis thereof, with chapter 3 dealing with the current status of provisional measures in international investment arbitration will demonstrate the interrelatedness of these factors and thereby construe a stable architecture.

The Sino-Belgian case¹³⁶

A. Facts

Background

On 3 January 1927 the Belgian Government filed an application instituting proceedings against the Chinese Government, following denunciation by the latter of the Treaty of friendship, commerce and navigation (FCN, also known as the *genus* of “capitulation treaty”; *mutatis mutandis*, it consists of the antecedent of bilater investment treaties – BITs) concluded between the Parties on 2 November 1865.

The dispute concerned the effect of a Presidential order whereby the President of China denounced the FCN treaty, claiming that as a consequence the latter ceased to be effective. The Belgian Government, on the contrary, opposed such unilateral withdrawal from the FCN treaty, maintaining that the latter was still in force.¹³⁷

Object of the request

The object of the Belgian Government’s request for provisional measures contemplated the preservation of the *status quo ante* pending the dispute before the Permanent court of international justice in relation to the situation of Belgian nationals in China, which had been altered by the aforementioned Presidential order.¹³⁸ In the words of the adjudicating organ, “the object of the measures of interim protection to be indicated in the present case must be to prevent any rights of this nature from being prejudiced”.¹³⁹

¹³⁶ Series A – No. 8, *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium (Belgium v. China)*, Orders dated 8 January, 15 February and 18 June 1927, available at the World Court’s institutional website: <http://www.icj-cij.org>.

¹³⁷ *Ibid.*, Order dated 8 January 1927, 6.

¹³⁸ *Ibid.*, 6.

¹³⁹ *Ibid.*, 7.

B. Law

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

As a premise, undoubtedly a perfect separation between facts and law does not correspond to reality in international adjudication: therefore, reference will be made when appropriate to the facts relevant to the assessment of jurisdiction to issue provisional measures (whether *prima facie* or *fumus*).

In this case, interestingly the President, Judge Max Huber,¹⁴⁰ did not rule on the jurisdictional condition, deferring the decision on a final evaluation of jurisdiction to a later stage: “[...] indicates provisionally, pending the final decision of the Court in the case submitted by the Application of November 25th, 1926 – by which decision the Court will either declare itself to have no jurisdiction or give judgment on the merits”.¹⁴¹

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

No reference whatsoever is made in the Order to any of the abovementioned substantive conditions.

C. Decision

President Huber provisionally indicated, *pendente lite*, the specific type of protection for each of the following categories: Belgian nationals (individuals, missionaries and private persons accused of a crime), property and shipping, judicial safeguards.¹⁴²

He did not pronounce himself on the force of the provisional measure indicated.

¹⁴⁰ Before the amendment to the rules of procedure in 1929, art. 57 thereof provided that the President had the power to indicate provisional measures without the necessity to convene a meeting of the judges of the court. For obvious reasons, the President lacked the power to rule definitively on the jurisdiction of the Court to hear the case on the merits.

¹⁴¹ Order dated 8 January 1927, 7.

¹⁴² *Ibid.*, 7 f.

Mention is made, instead, to the power of the adjudicating organ to modify the content of the provisional measure (and, *arguendo*, to revoke it): “subject to any modification which it may subsequently be considered desirable to make in the present Order”.¹⁴³

It has to be noted that the President of the Court subsequently decided to revoke the provisional measure upon request of the Belgian Government, since the latter had reached an agreement with the Chinese Government.¹⁴⁴

The Chorzów Factory case (indemnities)¹⁴⁵

A. Facts

Background

On 8 February, the German Government filed an application with the Registry of the Court, claiming indemnities for certain acts allegedly attributable to Poland and for which compensation was requested, under the rules of general international law on State responsibility for injury to aliens.

In the case at stake, the dispute concerned conduct in regard to the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke (hereinafter, Bayerische).

Object of the request

There had allegedly been expropriation without compensation, for which the German Government requested the Court “to indicate to the Polish Government that they must pay to the German Government as a provisional measure the sum of thirty million of Reichsmarks within one month from the date of the Order sought”.¹⁴⁶ It is worth noting

¹⁴³ *Ibid.*, 7.

¹⁴⁴ For a comment of the Sino-Belgian case see, *inter alios*, GUGGENHEIM, quoted *supra* footnote 51, 59-61.

¹⁴⁵ Series A – No. 12, *Case Concerning the Factory at Chorzów (Indemnities) (Germany v. Poland)*, Order dated 21 November 1927, available at the World Court’s institutional website.

¹⁴⁶ Series A – No. 12, *Case Concerning the Factory at Chorzów (Indemnities) (Germany v. Poland)*, Request from Germany dated 15 November 1927, 8.

that in this case the request for provisional measure concerned a positive act, instead of the typical negative one, namely the abstention from act in a manner prejudicial to the other party, or liable to have an adverse impact on the rights of the parties or to extend the dispute: “The origin of the provisions of Article 41 of the Statute shows that not only an omission by the Parties but also a definite act was considered as the subject of a measure of protection”.¹⁴⁷

B. Law

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

The Court had already definitively established in a previous judgment that it had jurisdiction to hear the merits of the claim: “Whereas the Court, in Judgment No. 8, by which it declared itself to have jurisdiction to give judgments upon the merits in the case in question”.¹⁴⁸

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

The German Government emphasized that the time of payment of the compensation had a great impact on the prejudice caused to it, maintaining that monetary compensation would be unable to constitute a full reparation,¹⁴⁹ due to the adverse influence not only on the position of Bayerische in the international markets but also its national economic situation. In the words of the Agent for Germany, “if it were necessary to wait for this judgment, further opportunities for economic reconstruction which have meanwhile arisen could also not be made use of”.¹⁵⁰ A peculiar relationship which is frequently manifested in practice is the one between urgency and necessity: in fact, the second

¹⁴⁷ *Ibid.*, 6, referring furthermore to a change in the original draft, proposed by Prof. Ricci-Busatti in order to extend the range of measures available (see *supra*, sub art. 4 Bryan treaties with China, France and Sweden).

¹⁴⁸ Order dated 21 November 1927, quoted *supra* footnote 146, 10.

¹⁴⁹ Request from Germany dated 15 November 1927, quoted *supra* footnote 147, 5: “the prejudice caused by further delay cannot be made good in actual form”.

¹⁵⁰ *Ibid.*, 6.

requirement is to a certain extent contained within the first one. In other words, if the requirement of urgency is not met, then that of necessity is automatically subjected to the same fate.

As far as risk of an irreparable harm is concerned, the Agent for Germany addressed the issue in the following terms: “seeing that the prejudice caused by a further delay would actually be irreparable, the German Government consider that an interim measure of protection whereby the Court would indicate to the respondent Government the sum to be paid immediately, as a provisional measure and pending final judgment, is essential for the protection of the rights of the Parties, whilst the affair is *sub judice*”.¹⁵¹ In a nutshell, it referred to the fact that time was adversely impacting the very capability of Bayerische to continue being competitive in the market. For the reasons set below (decision), the Court decided not to address any substantive condition, either theoretically or in the specific case at hand.

C. Decision

The Court declined to grant the request of the German Government, since it considered that it did not relate to the indication of provisional measures, but rather to obtain an interim judgment upon a part of its claim, therefore outside the scope of art. 41 of the Statute.¹⁵² For this reason, the Court did not deem it appropriate to address the question whether the substantive conditions for provisional measures were present in the case. Furthermore, it is noted that it also decided that the principle of *contradictoire*, namely asking the Polish Government to submit its observations in that respect, was not necessary, since the request was denied.¹⁵³

¹⁵¹ *Ibid.*, 6.

¹⁵² Order dated 21 November 1927, quoted *supra* footnote 146, 10.

¹⁵³ *Ibid.*, 11.

The South-Eastern Territory of Greenland case¹⁵⁴

A. Facts

Background

On 18 July 1932, the Norwegian Government instituted proceedings against the Danish Government in relation to the legal status of certain parts of the south-eastern territory of Greenland.¹⁵⁵

The subject of the dispute was the legal validity of the occupation of certain areas proclaimed by a Norwegian Royal decree.¹⁵⁶

Object of the request

The application of the Norwegian Government requested the Court to adjudge and declare – on the merits – that the abovementioned Norwegian Royal decree was legally valid under international law (therefore recognising Norwegian sovereignty over the disputed territory); on a provisional basis, it requested that the Court order the Danish Government to abstain in that territory from conducting any coercive measure against its nationals, i.e. the classic provisional measure of a negative, protective, character.¹⁵⁷

Interestingly, the applicant added that the request could be provisionally stayed, had the Danish Government decided to provide the latter and the Court with assurances about

¹⁵⁴ Series A/B – No. 48, *Legal Status of the South-Eastern Territory of Greenland (Norway / Denmark)*, Order dated 3 August 1932.

¹⁵⁵ *Ibid.*, 13.

¹⁵⁶ *Ibid.*, 20.

¹⁵⁷ *Ibid.*, 14: “Whereas the application requests the Court, not only “to give judgment to the effect that the placing of the South-Eastern territory of Greenland between latitudes 63° 40' and 60° 30' North under the sovereignty of Norway – effected by the Royal Decree of July 12th, 1932 – is legally valid, and that accordingly the said territory is subject to the sovereignty of Norway”, but also “to decide forthwith to order the Danish Government, as an interim measure of protection, to abstain in the said territory from any coercive measure directed against Norwegian nationals”. Furthermore, at page 17 of the Order, the Court observed that “the object of the Norwegian request for the indication of interim measures of protection was to cause the Danish Government “to abstain from any measures of violence or force against Norwegian nationals” in the territory in question”.

its cooperative intentions.¹⁵⁸ Another peculiar aspect of the Norwegian request is that the latter considered that it should be applied equally to both parties.¹⁵⁹

On the other hand, the Danish Government reserved its right to request provisional measures for the protection of its rights in dispute.¹⁶⁰

The Court ruled that “the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties pending the decision of the Court, in so far, that is, as the damage threatening these rights would be irreparable in fact or in law”.¹⁶¹

B. Law¹⁶²

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

Since both Parties had filed applications instituting proceedings against each other – whereby each Party was at the same time claimant and respondent, as the Court had decided to join the proceedings – there was no doubt about the existence of the Court’s jurisdiction to rule on the merits.

It has to be noted that the court wished to express its view on the issue of its *proprio motu* power to issue provisional measures: “whereas, moreover, the Court is satisfied that it may proceed to indicate interim measures of protection both at the request of the Parties (or of one of them) and *proprio motu*”.¹⁶³

¹⁵⁸ *Ibid.*, 15: “Whereas, nevertheless, in his letter of July 18th, 1932, transmitting the application to the Court, the Norwegian Chargé d'affaires at The Hague requested the Court, in pursuance of instructions from his Government, "to defer its decision upon the request for interim measures of protection, should the Danish Government inform the Court that it will not adopt coercive measures".

¹⁵⁹ *Ibid.*, 18: “The Norwegian Government accordingly agrees that the request for the indication of interim measures of protection which it formulated in its application of July 18th, 1932, should be understood as referring equally to both Parties to the present proceedings”.

¹⁶⁰ *Ibid.*, 15: “The Danish Government reserves the right to apply to the Court, under Article 41 of the Statute and Article 57 of the Rules of Court, should circumstances require it, for the indication of interim measures for the protection of the Danish Government’s rights”.

¹⁶¹ *Ibid.*, 20.

¹⁶² For a case comment made by a specialist in the field of provisional measures in international law, see DUMBAULD, *Relief Pendente Lite in the Permanent Court of International Justice*, American journal of international law, Vol. No. 39, 1945, 391-394.

¹⁶³ *Ibid.*, 20. Finally, the Court found that the circumstances did not require any *proprio motu* provisional measure, in consideration of the conduct of the Parties and of the fact that there was no risk of irreparable harm (25).

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

On the issue of necessity, the Danish Government declared that “the Norwegian application for interim measures of protection is without any justification”;¹⁶⁴ furthermore, it indicated that its previous conduct did not justify the Norwegian concerns expressed in the request for provisional measures. In this case it is possible to see the interrelation between necessity and urgency: lacking the former, *a fortiori* the latter does not need to be explored.¹⁶⁵

On the substantive condition of irreparable harm, an agent for the Norwegian Government specified the unavailability of monetary compensation in order to restore the *status quo ante*, i.e. a basis for the claim for the substantive condition of irreparable harm: “whereas M. Sunde pointed out in his statement that the object of the Norwegian request was “to prevent regrettable events which it might be impossible to make good simply by the payment of an indemnity or by compensation or restitution in some other material form””.¹⁶⁶

In addition to it, the Danish Government maintained that the request was groundless due to the failure of the applicant to demonstrate a connection between rights in dispute and object of the request,¹⁶⁷ i.e. the substantive condition of the *fumus boni iuris* in this presentation.

The Court agreed with the Danish Government, as the applicant had not shown that the prejudice it wished to avoid through an order for provisional measures concerned the safeguard of its alleged right.¹⁶⁸

¹⁶⁴ *Ibid.*, 15. On the lack of any real danger of incidents, see the Order, 18.

¹⁶⁵ In this respect, see another application of such a relationship in the Chorzów factory case *supra*, 49.

¹⁶⁶ *Ibid.*, 17.

¹⁶⁷ *Ibid.*, 18: “Whereas, according to the statement by M. Steglich-Petersen, “the Norwegian request for provisional measures has no foundation in Article 41 of the Statute and Article 57 of the Rules” - which deal only with the preservation of the rights of one or other Party - seeing that, according to him, Norway possesses no right in the territory in question capable of forming the subject of a measure of protection”.

¹⁶⁸ *Ibid.*, 21: “Whereas, moreover, the incidents which the Norwegian Government aims at preventing cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by Norway over the territory in question, were these rights to be duly recognized by the Court in its future judgment on the merits of the dispute; and as these are the only rights which might enter into account”; “Whereas, accordingly, so far as concerns the Norwegian request for the indication of interim measures of protection, no Norwegian rights the protection of which might require the indication of such measures, are in issue”.

C. Decision

The Court dismissed the Request of the Norwegian Government, at the same time reserving its *right* – to be noted, as in early periods in which provisional measures were intended to guarantee the right of the tribunal to be able to prevent self-help – subsequently to consider anew the possible change of the circumstances, therefore stressing once again the existence of its right to issue provisional measures also on a *proprio motu* basis.¹⁶⁹

Case Concerning the Administration of the Prince von Pless¹⁷⁰

A. Facts

Background

The context in which a request for provisional measures made by Germany in relation to an allegedly unlawful act committed by Poland concerned a tax dispute. On 18 May 1932 the German Government filed an application against the Polish Government on an alleged violation by the latter of certain obligations incumbent upon it under the Geneva convention of 1922 concerning Upper Silesia.¹⁷¹ The Prince von Pless was a Polish national belonging to the German minority in Polish Upper Silesia.

Object of the request

By a document dated 2 May 1933, the Agent for the German Government requested the Court “to indicate to the Polish Government, as an interim measure of protection,

¹⁶⁹ *Ibid.*, 26: “The Court (1) dismisses the request of the Norwegian Government, dated July 18th, 1932, for the indication of interim measures of protection ; (2) reserves its right subsequently to consider whether circumstances have arisen requiring the indication of provisional measures in accordance with Article 41 of the Statute”.

¹⁷⁰ Series A/B – No. 54, *Case Concerning the Administration of the Prince von Pless (Germany v. Poland)*, Order dated 11 May 1933.

¹⁷¹ *Ibid.*, 4.

pending the delivery of judgment upon the Application of May 18th, 1932, *that it should abstain from any measure of constraint* in respect of the property of the Prince von Pless, on account of income-tax” [italics added, *A / N*].¹⁷² In fact, the Polish Taxation Office had served Prince von Pless with a warrant of payment of a certain sum of money, accompanied by the information that – had the Prince failed to pay that amount – measures of constraint would be applied. Therefore, claiming that such measures would have irremediably prejudiced the rights in dispute, the Agent for the German Government requested the classic provisional measure of a negative character, relating such request with the rights in dispute *pendente lite* before the Court.

The Polish Government informed in writing¹⁷³ the Court and its counterparty that it had annulled the abovementioned warrant and that it would stay measures of constraint in respect of the Prince von Pless for the time during which the dispute would be pending between the Parties, thus adhering to the request.¹⁷⁴

Having the German Government informed the Court that it agreed with the conduct of the opposing Party as far as the issue of provisional measures was concerned and was therefore ready for a settlement of the latter, the Court took note of that stance and concluded that, since there was an agreement for the settlement of the question, the request for provisional measures made by the Applicant had accordingly become moot.¹⁷⁵

B. Law¹⁷⁶

Jurisdictional condition - prima facie jurisdiction / fumes bonae iurisdictionis

For the reasons indicated above, the Court considered that it was not necessary to verify

¹⁷² *Ibid.*, 5.

¹⁷³ In such a declaration the Polish Government at the same time waived its right to a hearing on the request for provisional measures, arising from art. 57, paragraph 3, of the Rules of Court: see *ibid.*, 6.

¹⁷⁴ *Ibid.*, 6.

¹⁷⁵ *Ibid.*, 8: “[...] (4) declares, accordingly, that the request for the indication of interim measures of protection, formulated in the last mentioned Application of the German Government, has ceased to have any object”.

¹⁷⁶ For a concise reference to the case in doctrine, see DUMBAULD, *Relief Pendente Lite in the Permanent Court of International Justice* quoted *supra* footnote 162, 394 f.

whether it would have had competence to rule upon the request nor whether the latter would have been admissible.

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

In his application, the Agent for Germany substantiated his request for provisional measures by referring to the requirements of necessity, risk of irreparable harm and urgency. Concerning the first two elements, he maintained that “the carrying into effect of the above-mentioned measures of constraint would irremediably prejudice the rights and interests forming the subject of the dispute”, whereas concerning the third one, he underlined the fact that the warrant was accompanied by the “threat” (*sic*) that fifteen days after the date of notification of the warrant (20 April + 15 days = 5 May, i.e. 3 days after the date of the request for provisional measures), had the amount requested not been paid, measures of constraint would have been applied, thus rendering the application urgent.¹⁷⁷

For the same reasons set out above, the Court did not pronounce on the substantive conditions.

C. Decision

Having taken note of the written statements of both Parties and in particular of their agreement, the Court declared that the request ceased to have any object.¹⁷⁸

¹⁷⁷ *Ibid.*, 5.

¹⁷⁸ See *supra*, footnote 176.

Case Concerning the Polish Agrarian Reform and the German Minority¹⁷⁹

A. Facts

Background

On 1 July 1933 the German Government brought a suit¹⁸⁰ against the Polish Government concerning the agrarian reform which the latter had started to carry out since 1925 on a territory – Posnania and Pomerelia – inhabited by landowners of both Polish (the majority) and German origin (the minority).

After WW1, as part of the agreements arising out of the Treaty of Versailles – including the treaty between the Parties prohibiting discrimination against the German minority – Germany was obliged to cede those territories to Poland.

In its application, the Agent for the German Government described the subject of the dispute as follows:

“The German Government holds that the Polish Government has acted inconsistently with the obligations assumed by it under Articles 7 and 8 of the Treaty of June 28th, 1919 [i.e., the Treaty of Versailles, *A / N*] by discriminating against Polish nationals of German race of the voivodships of Posnania and Pomerelia, in the carrying out of its agrarian reform”.¹⁸¹

The German principal claim is reported below in its formulation, since its interpretation constituted a fundamental element for the decision of the Court on the indication of interim measures:

“The German Government requests the Permanent Court of International Justice to declare that violations of the Treaty of June 28th, 1919, have been committed to the detriment of Polish nationals of German race and to order reparation to be made”.¹⁸²

Indeed, the German Government alleged that the Polish Government, in carrying out its

¹⁷⁹ Series A/B – No. 54, *Case Concerning the Polish Agrarian Reform and the German Minority (Germany v. Poland)*, Order dated 29 July 1933.

¹⁸⁰ *Ibid.*, 4.

¹⁸¹ *Ibid.*, 5.

¹⁸² *Ibid.*, 5.

program of agrarian reform, had committed acts of discrimination against the German minority by conducting an unproportionate rate of expropriations in their respects, as compared to those conducted in relation to property owned by the Polish majority.¹⁸³

Object of the request

Together with the abovementioned application instituting proceedings, the Agent for the German Government filed an application for provisional measures, requesting the Court “to indicate interim measures of protection in order to preserve the *status quo* until the Court has delivered final judgment in the suit submitted by the Application”.¹⁸⁴

Subsequently, at the hearing held on 19 July 1933, he specified the content of the measure requested: the Polish Government should abstain itself from I) including members of the German minority in the lists for expropriation; II) proceeding with the expropriations of members of the German minority already included in the lists; III) transfer estates taken from members of the German minority to other persons, or establish settlers upon such estates (as by doing so, the Polish Government would have been in the position to technically circumvent the prohibition to expropriate properties owned by members of the German minority).¹⁸⁵

¹⁸³ For a detailed account of the evaluations related thereto, namely the findings of the Nagaoka Committee, see Judges Schücking and Van Heysinga’s joint dissenting opinion on the Order for provisional measures, p. 12 through 16.

¹⁸⁴ *Ibid.*, 5.

¹⁸⁵ *Ibid.*, 7: “Whereas, in accordance with the verbal explanation given by the Agent for the German Government at the hearing on July 19th, 1933, the German Government, by the request for interim measures, asks the Court to indicate to the Polish Government that it should not include other members of the German minority in the nominal lists for expropriation, that it should not proceed with the expropriation of the estates of members of the German minority included in nominal lists already published and that it should not transfer to other persons estates taken from members of the German minority, or establish settlers upon such estates”.

B. Law¹⁸⁶

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

On the principle of *contradictoire*, it is worth noting in this case the following series of events:

- the Acting-President of the Court convened, according to art. 57 of the Rules of Court, a hearing for 11 July;
- the Polish Government asked the Court to postpone the hearing until the end of the month;
- the Court denied the request;
- the Polish Government stated that – notwithstanding its intention – it was unable to present its observations at the hearing;
- The Court, at the hearing of 11 July, merely adjourned until 19 July the hearing on the request for provisional measures;
- A hearing on provisional measures took place on 19 July.

Therefore, the Court finally had to accede, though partially and at a later stage, to the Respondent's request to be granted additional time to present its defense on its opponent's request for provisional measures.¹⁸⁷

¹⁸⁶ For a comment in doctrine see, *inter alios*, DUMBAULD, *Relief Pendente Lite in the Permanent Court of International Justice* quoted *supra* footnote 162, 395-399.

¹⁸⁷ *Ibid.*, 5 f.: "Whereas, on July 4th, 1933, the Polish Government informed the Court that it intended to present observations in accordance with Article 57 of the Rules of Court, but asked for a postponement of the hearing arranged for July 11th until the end of the month;

Whereas, on July 5th, 1933, the Agent of the German Government informed the Court that that Government desired to present observations, in accordance with Article 57, paragraph 3, of the Rules; Whereas the postponement sought by the Polish Government was not granted; and as the Polish Government stated, by letter of July 9th, 1933, delivered to the Registrar on the 10th of that month, that, notwithstanding the intention it had previously expressed, it was unable to present its observations at the hearing of the Court fixed for July 11th;

Whereas, in these circumstances, the Court, at the hearing on July 11th, merely adjourned until July 19th the hearings on the request of the German Government for the indication of interim measures of protection".

As far as competence to decide on provisional measures, the present case gives an additional indication that the question shall be considered only if the conditions for the granting thereof are met: in this case, as will be seen below, the substantive condition – which the Court termed as *essential* – absorbed any other issue concerning provisional measures, including the jurisdictional condition: “without in any way pre-judging the question of its own jurisdiction to adjudicate upon the German Government’s Application instituting proceedings, or the admissibility of that Application [...]”.¹⁸⁸

The same was stated for the issue of *proprio motu* provisional measures: “irrespective of the question whether it may be expedient for the Court in other cases to exercise its power to act *proprio motu*”.¹⁸⁹

It is worth noting that Judges Schücking and van Heysinga expressed their disagreement with such a statement: “They are even of opinion that, if no Member of the Council had made a request for interim measures of protection, the Court should have indicated such measures *proprio motu*, availing itself of the powers conferred upon it by Article 41 of the Statute (see also Art. 57 of the Rules of Court)”¹⁹⁰. Interestingly, they argued that the power to order provisional measures also consists of a duty for the Court (“the Court should have indicated such measures *proprio motu*”): this duty is construed as a declination of the more general duty of any adjudicating body to guarantee the good administration of justice.

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

On the connection between the rights in dispute and the object of the request for provisional measures, the Court stated that “the *essential condition* which must necessarily be fulfilled in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court” [italics added, *A / N*].

¹⁸⁸ *Ibid.*, 7 f.

¹⁸⁹ *Ibid.*, 7 f.

¹⁹⁰ Judges Schücking and Van Heysinga’s joint dissenting opinion on the Order for provisional measures quoted *supra* footnote 183, 16.

Thus, it is of utmost relevance to define: 1) the rights in dispute; 2) the object of the request for provisional measures.

The Court understood that 1) concerned German Government allegation that the Polish Government had acted in violation of the Treaty of Versailles by discriminating against Polish nationals of German origin and – consequently – asked reparation *for the acts committed* (italics added on purpose, for the reasons set out below).¹⁹¹

On the other hand, as far as 2) is concerned, the provisional measures requested related to future acts, namely violations – however allegedly – that the Polish Government had not committed yet.¹⁹²

The Court noted that the effect of upholding such a request “would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim, as submitted to the Court by the Application instituting proceedings”.¹⁹³ Thus, in the understanding of the Court, 1) and 2) were unrelated.

For this single reason, namely the lack of connection between the rights in dispute (acts already committed and directed to specific individuals) and the object of the request for provisional measures (i.e. a general abstention from future acts in the application of the agrarian reform), the Court dismissed the German Government’s request for provisional measures.¹⁹⁴

¹⁹¹ *Ibid.*, 6 f.: “Whereas, according to the terms of the Application instituting proceedings which have been quoted above, the subject of the dispute is the contention of the German Government that the latter Government has acted inconsistently with the obligations assumed by it under Articles 7 and 8 of the Treaty of June 28th, 1919, by discriminating against the Polish nationals of German race in the voivodeships of Posnania and Pomerelia, in the carrying out of its agrarian reform, particularly in the application of the Polish agrarian law of December 25th, 1925, and other supplementary acts; Whereas, on the basis of this contention, which is not admitted by the Polish Government, the German Government has requested the Court to declare that violations of the Treaty of June 28th, 1919, have been committed to the detriment of Polish nationals of German race and to order reparation to be made”.

¹⁹² See *supra*, 58 and footnote 185.

¹⁹³ Order, 7.

¹⁹⁴ *Ibid.*, 7 f.: “Whereas, whilst the suit brought by the German Government is presented as having for its object to obtain a declaration confirming that, as alleged by it, infractions have been committed in certain individual cases where the measures in question have already been applied, and, if necessary, reparation in respect of such infractions, the request for interim measures covers all future cases of the application of the Polish agrarian reform law to the Polish nationals of German race and aims at securing an immediate indication to the effect that henceforth, and until judgment has been pronounced, the said Polish law shall not be applied in respect of the said nationals;

Therefore, through the adoption of such expressions, the Court established a hierarchy – or, at least, an order of priority – between the connection “rights in dispute – provisional measures requested” (at the top) and the other conditions, namely necessity, urgency, risk of an irreparable harm and *prima facie bonum ius – fumus boni iuris* (for the sake of clarity, the four are not presented in a hierarchical order between themselves, but only in relation to the first one). This submission is confirmed by the fact that, after finding that the essential condition was not met, the Court did not deem it opportune to make any reference whatsoever to the other conditions.

It has to be underlined, however, that there was disagreement on the content of the essential condition in practice: Judge Rolin Jaequemyns was favourable to an order for provisional measures, since he estimated that, by so doing, reparation – so far as it was necessary – would have been facilitated. He appended a dissenting opinion in this respect.¹⁹⁵

More significantly, Judge Anzilotti explained in greater detail the reasons for the decision of the Court as they have been reported above. (It is noted incidentally that we are here dealing with a dissenting opinion, though in our days it would be called a concurring opinion, since Judge Anzilotti finally agreed with the decision of the Court not to grant the measures requested, though for other reasons than those of the majority.)¹⁹⁶

He firstly noted that the expression in which the German claim was drafted was quite unclear, namely on the question whether the claimant was asking for a declaration – and a reparation connected thereto – limited to acts already committed (as strongly contended by the Agent for Poland), or instead a broader one, in the sense that it concerned the legality under international law of the Polish act enabling the agrarian

Whereas, accordingly, the interim measures asked for would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim, as submitted to the Court by the Application instituting proceedings ;

Whereas, in these circumstances, the Court [...] confines itself to the statement that the request for interim measures now before it is not in conformity with the provisions of Article 41 of its Statute, Dismisses the request of the German Government for the indication of interim measures of protection.

¹⁹⁵ Judge Baron Rolin-Jaequemyns’ dissenting opinion on the Order for provisional measures, 9.

¹⁹⁶ Judge Anzilotti’s dissenting opinion on the Order for provisional measures, 10.

“Though I have reached the same conclusion as that at which the Court has arrived, I find myself unable to subscribe to the reasons on which the Order is based”.

reform at stake and thus encompassing also future acts. In this second, broader sense, according to Judge Anzilotti the request would have been granted. He further added that his observations, and in general the procedural situation of the Parties, did not prevent Germany from broadening its claim accordingly and making a fresh request for provisional measures.¹⁹⁷

Furthermore, Judges Schücking and van Heysinga appended a joint dissenting opinion, contending that, since the agrarian reform was pursued through a continuous

¹⁹⁷ *Ibid.*, 10 f.: “The only reason which, in my view, made it impossible for the Court to grant the German Government's request, in the present state of the proceedings, was the uncertainty which the Application instituting the main proceedings allows to subsist as to what the said Government seeks to obtain from the Court, and, in consequence, as to the extent of any right; which the interim measures would have to protect.

In the opinion of the Court, the proceedings instituted by the German Government were designed to obtain a declaration that certain alleged infractions of the Treaty had been committed in individual cases, in applying the agrarian reform law, and, further, to obtain reparation for the said infractions; such is indeed the impression conveyed - at any rate, at first sight - by the wording used in the Application to indicate the object of the claim: "to declare that violations of the Treaty of June 28th, 1919, have been committed to the detriment of Polish nationals of German race, and to order reparation to be made". If that is really so, it is manifest that the interim measures applied for would go far beyond the limits of the right that is in dispute. Interim measures of protection would certainly have been possible and expedient; but they would need to have been confined to the individual cases which the German Government had in mind. And since neither the Application, nor the request for the indication of interim measures, made it possible to ascertain which were these cases, the Court found itself unable, in practice, to indicate the measures as requested.

But was that really the meaning of the German Application? Was not its intention rather to obtain from the Court a declaratory judgment, to the effect that the Polish Government's conduct in the application of the agrarian reform law was not consistent with its obligations under the Treaty of June 28th, 1919? In other words, the issue is not - or is not only - this or that violation of the Treaty committed to the detriment of this or of that Polish citizen of German race; the issue is the whole body of acts by which the Polish authorities have applied the agrarian reform law ; and it is the inconsistency of the attitude, resulting from this whole body of acts, with the Treaty of June 28th, 1919, that the Court is asked to declare. If such was the object of the claim in the German Government's Application, it is quite comprehensible that it should have asked - as an interim measure of protection - that the application of the agrarian reform to Polish citizens of German race, in general, should be suspended.

I am inclined to think that that is really the meaning of the Application; more especially, because it would seem incomprehensible that the Court should be asked to declare that violations of a treaty had been committed, without the violations being specified: such an application would moreover be null and void, owing to the complete absence of certainty as to the object of the claim.

But I must admit that the German Government's Application is open to different interpretations, and this in regard to a point on which perfect clarity is essential. As it is only fair that a government should bear the consequences of the wording of a document for which it is responsible, I could readily understand that the Court should, on that ground, refuse to grant the request for interim measures of protection. This, however, should not prejudice the German Government's right to submit a fresh application indicating the subject of the suit with the necessary clearness and precisions, and to follow it up by a fresh request for the indication of interim measures appropriate to the rights claimed”.

administrative act, it was not correct to draw such a restrictive interpretation, thereby denying the provisional measures sought by Germany on the ground that the latter were not related with the rights in dispute.¹⁹⁸

Finally, there is a hint of the substantive condition concerning the possibility / probability of the effective existence of the right in issue (*prima facie bonum ius / fumus boni iuris* i.e. the fourth substantive condition in my scheme) which shall not remain unnoticed, also because of the fact that it has been pronounced by an authoritative voice.¹⁹⁹ Indeed, in the first part of his dissenting opinion in the present case, the eminent international lawyer stated that “If the *summaria cognitio*, which is characteristic of a procedure of this kind, enabled us to take into account the *possibility* of the right claimed by the German Government, and the *possibility* of the danger to which that right was exposed, I should find it difficult to imagine any request for the indication of interim measures more just, more opportune or more appropriate than the one which we are considering”. As indicated above, he agreed with the majority on the denial to grant the measure because the German Government’s claim was unclear.²⁰⁰ Apart from this consideration, he advanced an indication of the degree to be regarded as the minimum threshold for establishing that the *bonum ius* substantive condition (the fourth in this scheme) is met: in one word, *possibility*. “Possibility of the right claimed” means that the condition at issue has a negative character: indeed, *if it cannot be excluded* that the right claimed may possibly exist, then the condition is met. In the

¹⁹⁸ Judges Schücking and van Heysinga joint dissenting opinion on the Order on provisional measures quoted *supra* footnote 183, 15: “The effect of the interim measures would be, *inter alia*, to prevent any expropriations which may have been previously initiated by entries in a nominal list, from being made definitive - a contingency which is by no means hypothetical, as is shown by the cases instanced by the German Government's Agent.

This conception of the subject of the dispute cannot be upset by deducing an interpretation of the Application instituting proceedings - as the Polish Government's Agent has done - from the emphasis he has placed on the past tense in the word "committed". Having regard to the continuous character of the acts impeached, the undersigned consider that any attempt to read into the words formulating the object of the dispute, in the Application instituting proceedings, a definite distinction between acts which have already been accomplished and those which belong to the future, would be an utter distortion of the clear meaning of the application. It would also be entirely inadmissible to construe the Application instituting proceedings as meaning that it was the intention of the Member of the Council, who was impelled to draw the Court's attention to the illegal character of certain *previous entries* in the nominal lists, to refrain from contending that any action taken *in the future* to give effect to the expropriation already initiated was also illegal”.

¹⁹⁹ Judge Anzilotti’s dissenting opinion on the Order for provisional measures quoted *supra* footnote 197, 10.

²⁰⁰ *Supra* footnote 198.

words that I chose above to express such a lower threshold – as compared with the *probability* that the right claimed exists²⁰¹ – it is a *prima facie bonum ius*.²⁰²

C. Decision

For the reasons set out above, the Court decided – though with the dissenting opinions appended by four judges – to dismiss the German Government’s request for provisional measures.²⁰³

The Electricity company of Sofia and Bulgaria²⁰⁴

A. Facts

Background

On 26 January 1938 the Belgian Government instituted proceedings against the Bulgarian Government in order to protect the legal position of a Belgian company of electricity against measures of constraint arising out of sums which the Municipality of Sofia requested from the latter.

On 4 July 1938 the Belgian Government made the first request for provisional measures, which it subsequently withdrew.²⁰⁵

On 17 October 1939 the Belgian Government filed a new request for the indication of provisional measures.

²⁰¹ Which would be termed *fumus boni iuris*.

²⁰² See *supra*.

²⁰³ *Ibid.*, 8.

²⁰⁴ Series A/B – No. 79, *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order on provisional measures dated 5 December 1939.

²⁰⁵ *Ibid.*, 5.

Object of the request

The request concerned an indication to the Bulgarian Government whereby new proceedings pending at that time in the Bulgarian courts against the Belgian company be suspended *pendente lite* before the Permanent court of international justice.²⁰⁶ As a matter of fact, the Municipality of Sofia had brought a petitory action against the Belgian company.

B. Law²⁰⁷

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

The Court made no reference to the jurisdictional condition for a decision on provisional measures.

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

The substantive conditions of the present case were only briefly outlined by the Agent for the Belgian Government. On the issue of necessity, he claimed that “whereas the measures of execution with which the Belgian Company is threatened are such as would not only seriously prejudice the Company's position but also impede the restoration of its rights by the Municipality, if the Court were to uphold the Belgian Government's claim”,²⁰⁸ adding that he had tried to persuade the Bulgarian Agent to intervene with a view of suspending the Bulgarian courts' proceedings.

On the issue of urgency, he made reference to the international situation – i.e. WW2 had just begun – and to the conduct of Bulgaria (asking additional time for the filing of its

²⁰⁶ *Ibid.*, 6: “to indicate as an interim measure of protection that the new proceedings in the Bulgarian courts shall be suspended until the Permanent Court of International Justice has delivered judgment on the merits”.

²⁰⁷ See, *inter alios*, DUMBAULD, quoted *supra* footnote 162, 399-401.

²⁰⁸ Belgian Agent's request for provisional measures, reported in the Order, 6.

counter-memorial) in order to prove the temporal priority of the order for execution to be applied by the Municipality of Sofia with respect to a decision on the merits before the PCIJ, had no provisional measure of protection been issued.²⁰⁹

The Court agreed with the applicant and ruled that the indication of provisional measures aimed at preventing prejudice to the rights of the latter.²¹⁰

C. Decision

Exercising its power provided for by art. 61, paragraph 4, of the Rules of Court to indicate provisional measures other than those requested by the applicant, as another manifestation of its power to issue *proprio motu* provisional measures, the Court indicated that “pending the final judgment of the Court in the suit submitted by the Belgian Application on January 26th, 1938,

the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court”.²¹¹

Such a decision is undoubtedly more deferential to the Sovereign than the indication to suspend the proceedings in the Bulgarian courts, as requested by the Agent for the Belgian Government.

The indication is composed of two poles, a positive one and a negative one:

P) the Government is invited – nothing more than that, in the present case – to actively monitor the situation in order to intervene if necessary;

N) the Government is invited to prevent prejudices and aggravations of the dispute from occurring.

²⁰⁹ *Ibid.*, 6: “whereas the Bulgarian Government, having regard to the international situation, has asked the Court for an extension of the time granted for the filing of its Counter-Memorial, and there is thus reason to fear that a decision on the merits will not be given before the order for execution applied for by the Municipality of Sofia”.

²¹⁰ *Ibid.*, 9: “Whereas, in this case, present conditions and the successive postponements and resulting delays and, finally, the action as demandant above mentioned, justify in the view of the Court the indication of interim measures calculated to prevent, for the duration of the proceedings before the Court, the performance of acts likely to prejudice, for either of the Parties to the case or for the interests concerned, the respective rights which may result from the impending judgment”.

²¹¹ *Ibid.*, 9.

It is deemed appropriate to underline that it was the first time since its creation that the Court – unlike the President of the Court alone as in a previous case,²¹² before the amendment to the Rules of Court in 1931 – had granted a request for provisional measures.

B.I.ix. After the end of WW1, the Government of the United States created the conditions for a new Convention between Central American States, in an effort to continue the pan-american process, theorised by Simon Bolivar, of judicial settlement of disputes started in 1907.²¹³ A conference to this end was held in 1923 in Washington, in order to re-establish the Central American court of justice;²¹⁴ however, the approach of the negotiators and their goals were more of a more limited scope: competence was not attributed to rule on an essential core of sovereign issues, individuals were not granted access before the Court (i.e., a purely inter-State system was established) and, finally, the Court was not a permanent body (it was more similar to an arbitral tribunal).

In this framework, a *right* to issue provisional measures was provided for by art. XXI of the Washington convention, according to which

“From the moment when in conformity with the provisions of Article VIII, a complaint has been lodged against one or more of the contracting parties the tribunal shall have the right to determine, at the request of any of the parties, the status in which the litigants must remain, to avoid an aggravation of the dispute, and to maintain the case *in statu quo* until the final award is pronounced.

For this purpose, the Tribunal shall have the right, if it should deem necessary, to make any investigations, to order examinations by experts, to conduct personal inspections and to receive any evidence”.²¹⁵

The attribution of a right to the Court to issue provisional measures²¹⁶ has already been explored,²¹⁷ as well as the classic – provided in earlier treaties and in art. 41 of the

²¹² See President Huber’s indication for provisional measures in the Sino-Belgian case, *supra*, 47

²¹³ See *supra*, B.I.iv, 23 ff.

²¹⁴ For a detailed account see FINCH, *The Central American Conference*, American Journal of International Law, Vol. No. 17, Issue No. 2, 1923, 313 ff.

²¹⁵ Conference on Central American Affairs, Washington, 4 December 1922 – 7 February 1923, 4.

Statute of the Permanent court of international justice – necessity of the existence of a dispute already pending before the adjudicating organ (“from the moment when [...] a complaint has been lodged”).

In addition, the provision contains a reference to an activity by one or more of the Parties relating to provisional measures, namely a request; as a consequence, a question arises as to the interpretation of this expression in combination with the right of the Court thereupon: it is submitted that the answer to it is – according to the textual meaning – that no *de officio* power is attributed to the Court, since the request by one or more parties constitutes a condition for the Court to exercise its (limited) right to issue provisional measures.

Furthermore, art. XXI of the Washington convention expressly indicates the object of such measures (arguably excluding atypicalness in this instance): the classic measure of a negative character, whereby the *status quo ante* is maintained until a final award is rendered on the merits.

Finally, on the force of these measures, the text states that the Parties *must* abide by the latter, therefore indicating their binding nature.

In the second paragraph of the article there is the first connection in the history of provisional measures in international adjudication between these measures and the administration of evidence,²¹⁸ in order to protect each Party’s right to a just final decision.

B.I.x. On 3 May 1923 an international agreement for the peaceful settlement of disputes between american states was elaborated and ratified in the following years (though with some exceptions), establishing the compulsory commission-of-inquiry procedure. According to its article 1, paragraph 2,

“les parties s’engagent en cas de conflit à ne pas commencer les mobilisations et concentrations de troupes sur les frontières, et à n’exécuter aucun acte hostile ni faire aucun préparatif

²¹⁶ It is noted that according to VENTURINI (GIANCARLO), quoted *supra* footnote 63, 28, this provision does not pertain to the group of provisional measures.

²¹⁷ It may just be added that a right is so if the one who owns it is under no obligation to use it: therefore, the Court is by no means compelled to issue provisional measures, even in cases in which the latter may be appropriate, or even necessary.

²¹⁸ GUGGENHEIM, quoted *supra* footnote 51, 49.

d'hostilité à partir du moment où sera faite la convocation de la Commission d'enquête jusqu'après l'établissement de son rapport où passait le délai fixé à l'article VII".²¹⁹

It has to be noted that this provision reminds us of the international self-provisional measures contained in the Corinto peace system.²²⁰

B.I.xi. The Geneva protocol, dated 1924, contained a similar provision of the kind of self-provisional measure in its art. 7,²²¹ aimed at the primary function of preventing the use of force. Intending to group all these provisions, we may consider them – *grosso modo* – measures of *contra bellum* character.²²² Their main aspect is constituted by their binding nature, contrary to those contained in art. 11 of the Pact of the League of Nations, which could indicate recommendations.

B.I.xii. In the arbitration treaties of Locarno, dated 1924, the Council of the League of Nations was expressly given the power to order provisional measures: “dans tous les cas et notamment si la question, au sujet de laquelle les Parties sont divisées, résulte d'actes déjà effectués, ou sur le point de l'être, la Commission de conciliation ou, si celle-ci ne s'en trouvait pas saisie, le Tribunal arbitral ou la Cour permanente de justice internationale statuant conformément à l'article 41 de son statut, indiqueront dans le plus bref délai possible, quelles mesures provisoires doivent être prises. Il appartiendra au Conseil de la Société des Nations, s'il est saisi de la question, de pourvoir de même à des mesures provisoires appropriées”.

It is worth noting that the text resembles that of art. 4 of the Bryan treaties with China, France and Sweden – and, as showed above, to the early draft of art. 41 of the Statute of the Permanent court of international justice – as far as the temporal indication is concerned.

²¹⁹ Recueil des traités de la Société des Nations, 1925, Vol. No. 33, 37 ff.

²²⁰ See *supra*, B.I.iii.

²²¹ See more extensively GUGGENHEIM, quoted *supra* footnote 51, 108.

²²² Short of meaning thereby that the measures not included in this group cannot have a clear *contra bellum* character, it is simply indicated that such a purpose is *in nuce* in these provisions.

B.I.xiii. Lastly, before analysing in the following section the static part of provisional measures before the International court of justice and so forth, it is deemed appropriate to refer – though briefly – to art. 33 of the General Act of arbitration and conciliation dated 26 September 1928, whereby in any case of disputes submitted to a judicial or arbitral procedure and in particular when the latter arises out of acts already committed or about to be committed, the Permanent court of international justice, acting under art. 41 of its Statute, or the arbitral tribunal having competence therein, will indicate the provisional measures which ought to be taken. The addressee shall abide by them.

Contrary to art. 19 of the Locarno treaty, the Council of the League of Nations was not attributed the power to issue provisional measures. One may wonder, however – following Guggenheim²²³ - whether and, if so, to what extent rights and obligations arising out of this instrument may have been modified for the Parties who were members of the League of Nations; arguably, the addressee may have found itself bound by both notwithstanding the juxtaposition, therefore it may have had to harmonise the obligations deriving therefrom.

²²³ GUGGENHEIM, quoted *supra* footnote 51, 133.

B.II. Comparative analysis of the sources concerning provisional measures in contemporary public international law

1) i. Multilateral treaties. – ii. Regional treaties. – iii. Sectoral treaties. – iv. Bilateral investment treaties. – v. Model bilateral investment treaties. – vi. Treatification and contractualisation concerning provisional measures. – 2) vii. Institutional arbitration. – vii. *Ad hoc* arbitration rules.

After the historical analysis conducted in the previous paragraph, our differentiated approach now turns to the comparative perspective, expressed through the image of the circle.²²⁴ Actually, the idea of the circle is not that of a static and complete picture concerning provisional measures in public-international-law adjudication: on the contrary, the aim of this inquiry and its main achievement would be the construction of a dynamic framework, as it is submitted that the latter better corresponds to reality. To this end, it is deemed appropriate to present this special type of incidental proceeding adopting a broad and reasonable radius.

In order to address both law and practice, this presentation of the sources is divided into three main areas: 1) treaty law; 2) arbitration rules²²⁵; 3) general principles of law recognised by civilised nations, as a mere ancillary basis from which relevant elements can be drawn.

Short of maintaining that art. 38 of the Statute of the International court of justice enumerates a complete list of the sources in public international law (for instance, but of course not exclusively, unilateral acts are not contained therein), it is nonetheless argued that this list can be adopted *cum grano salis* for the purposes of this inquiry on provisional measures. In this sense, the first area corresponds to lett. a of art. 38 (1), whereas the third one corresponds to lett. c thereof.²²⁶ Then, a question may arise: given that art. 38 (1) is constituted by four areas, only two of which are represented above, what about the other two? As far as lett. b is concerned – i.e. rules of customary international law –, since we are dealing with rules of procedure which are constantly applied by the pertinent adjudicating bodies, there is no place for custom. Concerning lett. d, instead – i.e. judicial decisions and doctrine – the issue is more complex. Indeed,

²²⁴ *Supra*, 53.

²²⁵ It has to be noted that when arbitration rules are enshrined in a treaty – as is the case for the ICSID convention – they are described within the treaty-law area.

²²⁶ The second area is not comprised in art. 38.

judicial decisions play a fundamental role in this field: in addition to what has already been sketched in paragraph A of this chapter, it is anticipated that the best way to adequately consider such a source of law consists in making reference thereto in relation to each of the three areas, as the judicial law-making throughout the interpretation and application of, say, treaty law constitutes the dynamic side which upgrades the static treaty text. At this stage of the presentation, the same can be said about the role of doctrine.

1)

B.II.i. This part of the first area – treaty law – pertaining to provisional measures concerns multilateral treaties. It is divided into three facets, namely the Statute of the International court of justice, the United nations convention on the law of the sea and the framework of the ICSID convention and arbitration rules.

The reason for the choice to focus on these facets is easily explained: regarding the first two, they constitute the only existing adjudicating bodies having permanent stance in public international law. The same cannot be said in relation to the Permanent court of arbitration, which is not a *permanent court*, insofar as it is composed of facilities for the appointment of arbitrators on an *ad hoc* basis.²²⁷

a) The Statute of the International court of justice is annexed to the Charter of the United Nations, of which it forms an integral part. This is the reason for its inclusion within the static part relating to the analysis of multilateral treaties influencing the current status of provisional measures in international investment law.

The relevant provision of the Statute in this respect is constituted by its art. 41, under whose terms

“1. The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

²²⁷ See *supra*, B.I.ii.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council”.

This statutory provision is integrated and developed by the ancillary norms contained in a specific subsection²²⁸ in the rules of court expressly dedicated to provisional measures, namely its articles 73 through 78, stating as follows:

“Article 73

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

Article 74

1. A request for the indication of provisional measures shall have priority over all other cases.

2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.

3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.

4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

Article 75

²²⁸ Subsection 1 (“Interim Protection”) in section D (“Incidental proceedings”). It has to be noted that the expression “interim protection” can be understood as a broader term comprising both the nature – provisional – and the purpose – conservative – of the measures at issue.

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1. The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

Article 76

1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.

2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject.

Article 77

Any measures indicated by the Court under Articles 73 and 75 of these Rules, and any decision taken by the Court under Article 76, paragraph 1, of these Rules, shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2, of the Statute.

Article 78

The Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated”.

As will be seen below, a significant part of these articles of the rules of Court are nothing but the crystallisation of a sufficiently consolidated judicial practice of the World Court.

Short of drawing an in-depth exegesis of the meaning of these provisions, it is deemed more appropriate to show how the latter are interpreted and applied in the judicial practice of the International court of justice. To this end, it is of utmost relevance to

conduct such an analysis through the adoption of a thematic guide expressing the elements which are reiterated, combined and sometimes subjected to *revirements* by the Court.

In line with the structure and the overall thesis which is advanced in the present inquiry, the same scheme which has served the purpose of explaining the salient aspects concerning provisional measures before the Permanent court of international justice²²⁹ is adopted herewith.

However, as far as the case analysis is concerned, it has to be anticipated that there is a difference in the discussion of the two courts: indeed, while in the former – i.e. the six contentious cases before the Permanent court of international justice – the scheme was applied on each individual case, in the latter the scheme will be used as a means to group the key elements of our procedural mechanism in the assessment of the contribution of all the cases analysed herewith altogether.

In other words, while in relation to the PCIJ each case was analysed from the beginning to the end as separate from the other – of course, underlining the connections and divergences with one another – regarding the ICJ each element of the scheme constitutes a passage wherein all the cases analysed directly play with each other.

The reason for such a difference is, once again, two-fold: on one hand, if the same approach was followed, the more abundant amount of cases would unduly distance each element thereof and consequently render both the explanation and the understanding of connections and divergences dramatically more difficult; on the other hand, the purpose of thus singling out each of the relevant cases before the Permanent court of international justice is to shed light to cases which are unjustly neglected in current legal doctrine in this field.

For intuitive reasons, the subsection “background” of section A of the scheme will be omitted; therefore, that section will be limited to “object of the request”. Undoubtedly, specific factual indications of the background of the dispute at stake will be made whenever appropriate for didactic purposes. In the same sense, section C (“decision”) will only contain reference to the issue whether the measure sought by the applicant was granted or not.

²²⁹ *Supra*, B.I.viii.

A. Facts

Object of the request

As we have already seen, atypicalness of provisional measures is a characteristic procedural feature of the World Court, which was subsequently reproduced in the ICSID framework. Its basis is contained in art. 41 (1)²³⁰ of the Statute, whereby the Court shall indicate *any* provisional measures.

One of the most significant *ratione materiae* limitations – or instructions, on the basis of the perspective – is provided for by the necessary connection between the rights in dispute and the provisional measure(s) sought.

This constitutes a clear example of the phenomenon of crystallisation of a sufficiently consolidated judicial practice in the World Court: indeed, said principle was firstly expressed – as we have seen – by the Permanent court of international justice in the *Case Concerning the Polish Agrarian Reform and the German Minority*, in which the Court ruled that “the *essential condition* which must necessarily be fulfilled in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court” [italics added, *A / N*];²³¹ such a condition was so essential that it was subsequently inscribed in art. 73 (1) of the Rules of Court²³² of the ICJ, which in its current version states that “a written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made”.²³³

The first case²³⁴ under consideration in the present study arises from an application instituting proceedings filed by the Government of Timor-Leste against Australia on 17

²³⁰ See *supra*, 73.

²³¹ See *supra*, 61.

²³² See *supra*, 73.

²³³ Emphasis added.

²³⁴ Unless otherwise specified, a chronological order is followed herewith, starting from the most recent case before the ICJ.

December 2013; that same day, the claimant also filed an application requesting provisional measures for the preservation of its rights.²³⁵

The dispute arose out of intelligence activities conducted by agents for the Government of Australia who attended an office of a counsel for Timor-Leste involved in a treaty arbitration with Australia and seized documents from that premise. The seized documents contained, *inter alia*, correspondence between the Government of the Applicant and its counsel relating to the conduct of the abovementioned arbitration, namely under the Timor Sea Treaty.

On the other side, the Government of Australia did not deny that such facts had occurred. However, it contended that the seized documents did not belong to Timor-Leste and added that, even assuming that the documents removed belonged to the Applicant, there is no general principle of immunity or inviolability of State property and that consequently the rights asserted were not plausible. Thirdly, it maintained that even if such a principle existed in international law, it would not be absolute, not applying were the communications constitute a threat to national security or to the higher public interests of a State.²³⁶

The Government of Timor-Leste circumscribed the object of its request for provisional measures in two times (general / specific): firstly, it stated that they were (i) to protect the rights of Timor-Leste in the documents and data seized; (ii) to prevent their use by Australia contrary to the rights and interests of Timor-Leste and (iii) to end the impediment to the Applicant to properly defend its case before the treaty tribunal.²³⁷

Further, more specifically, it requested that the Court indicate to respondent (a) to immediately seal and deliver the documents to the custody of the Court; (b) to immediately deliver to claimant and the Court a list providing information as to the documents disclosed or transmitted and the identities of those persons who may have inspected those documents; (c) to deliver a list of the copies that it has made of any

²³⁵ General list No. 156, *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, request for the indication of provisional measures dated 17 December 2013, para. 1: “I have the honour [...] to submit [...] an urgent request that the Court indicate provisional measures to preserve the rights of Timor-Leste under international law pending the determination of the issues raised by the Application”. The request – not yet available in hardback copy – can be found at the World court’s institutional website: <http://www.icj-cij.org/docket/files/156/17964.pdf>

²³⁶ *Timor-Leste v. Australia* quoted *supra* footnote 239, order on provisional measures dated 3 March 2014, 6 f.

²³⁷ *Ibid.*, para. 5.

seized document and data; (d) to destroy the copies, to make efforts to secure destruction of the copies possibly transmitted to third parties and inform the Applicant and the Court and (e) to give an assurance that it would not intercept either directly or indirectly any communication between claimant and its legal advisers.²³⁸

In addition, it has to be noted that the Applicant made a further request to the Court, of a measure that may be called “pre-provisional”: indeed, according to art. 74, paragraph 4, of the Rules of Court, “pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects”. In other words, the President of the ICJ is empowered to “recommend” (a binding nature has to be excluded in this regard) the parties to carry out acts or omissions (abstaining from) in order to prevent the potential provisional measures from being stultified by a certain situation. It is deemed appropriate to underline that in the ordinary version of the Rules of Court in 1921 the President of the Court was attributed a power to issue provisional measures in urgent cases and when the Court was not sitting; however, in 1931 the Rules were amended, excluding such a power which, to a certain extent, re-emerged – though in a softer form – in the 1978 version of the Rules.

In such a request for pre-provisional measures – in consideration of the fact the request was contemporary to the application – claimant essentially reinstated the measures requested in the ordinary form, namely as far as the list, seals and delivery are concerned; it only excluded the more time-consuming requests, such as those concerning data and destruction of copies possibly at the disposal of third parties.

In the case concerning the obligation to prosecute or extradite between Belgium and Senegal, claimant alleged that respondent was under an obligation to abide by the *aut dedere aut iudicare* principle in relation to Hissène Habré, former President of Chad who at that time was living in Senegal. Belgium based its claims on the 1984 United Nations convention against torture. On 19 February 2009, Belgium submitted a request for provisional measures asking the Court “to indicate, pending a final judgment on the merits, provisional measures requiring Senegal to take all the steps within its power to

²³⁸ *Ibid.*, para. 10.

keep Mr. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied”.²³⁹ As a matter of fact, Belgium argued that, had Hissène Habré left the country, this would have caused prejudice to the rights claimed by Belgium in the proceeding before the Court.

In the *Pulp Mills* case,²⁴⁰ instituted by Argentina against Uruguay concerning the construction of a factory – as a shared project of enterprise – along part of the river Uruguay constituting the common boundary and the risk of environmental prejudices connected thereto for the Argentinian population living on the other bank of the river,²⁴¹ two requests for provisional measures were requested, in different periods, firstly by Argentina and subsequently by Uruguay.

Argentina requested the Court to safeguard its right to ensure that Uruguay complied with its environmental obligations governing the construction of any enterprise along the river Uruguay and to prevent Uruguay from causing damage to the river and to the riparian population.²⁴²

Subsequent to a period during which Argentinian citizens blockaded an international bridge over the river Uruguay in order to boycott commercial and tourist activities in Uruguay, the latter requested the Court to indicate provisional measures whereby Argentina would have had to remove the causes of the blockade and, in general, abstain from any conduct or omission able to aggravate or extend the dispute.²⁴³ At the same

²³⁹ General list no. 144, *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, order on provisional measures dated 28 May 2009, ICJ Report 2009, also available at <http://www.icj-cij.org/docket/files/144/15149.pdf>, para. 15.

²⁴⁰ General list no. 135, *Case concerning pulp mills on the river Uruguay (Argentina v. Uruguay)*, judgment dated 20 April 2010, ICJ Reports 2010, also available at <http://www.icj-cij.org/docket/files/135/15877.pdf>

²⁴¹ Indeed, Argentina alleged that Uruguay did not follow the appropriate environmental procedure: see the order on Argentina’s request for provisional measures, paragraph 6.

²⁴² *Ibid.*, para. 14.

²⁴³ Order on provisional measures requested by Uruguay dated 23 January 2007, ICJ Reports 2007, para. 13: “13. Whereas at the conclusion of its request Uruguay asked the Court to indicate the following provisional measures:

“While awaiting the final judgment of the Court, Argentina

- (i) shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two States;
- (ii) shall abstain from any measure that might aggravate, extend or make more difficult the settlement of this dispute; and

time, it expressed its wish to settle the matter amicably, suggesting that it would have withdrawn its request in case of cooperation in that sense by Argentina.²⁴⁴

In the *LaGrand* case,²⁴⁵ opposing Germany to the United States on the interpretation and application of the obligation to notify a foreign detainee of its right to seek consular assistance guaranteed by the Vienna Convention on consular relations, two German nationals had been sentenced to the death penalty and – while one of them had already been executed – the other one could still have his life saved by: 1) an order for provisional measures to be issued by the Court and 2) compliance therewith by U.S. authorities. Thus, in its request for provisional measures, Germany asked that, pending final judgment on the merits, the Court indicate that “the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order”.²⁴⁶

In the *Hostages* case,²⁴⁷ the United States requested the following provisional measures against Iran: “(a) That the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances; (b) That the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate of all persons whose presence is not authorized by the United States Chargé d’Affaires in Iran, and restore the premises to United States control; (c) That the Government of Iran ensure that all persons attached to the United

(iii) shall abstain from any other measure that might prejudice the rights of Uruguay in dispute before the Court”. The order is also available at <http://www.icj-cij.org/docket/files/135/13615.pdf>

²⁴⁴ *Ibid.*, para. 14: “14. Whereas the last paragraph of Uruguay’s request reads as follows: “It is Uruguay’s strong preference that this matter be resolved diplomatically and amicably between the two Parties. What Uruguay seeks is Argentina’s agreement to end the current blockade and prevent any further blockades, and its fulfilment of that agreement. If Argentina will make such a commitment, Uruguay will accept it in good faith and will no longer have a need for judicial intervention, or for the provisional measures requested herein. In such circumstances, Uruguay would be pleased to withdraw this request”.

²⁴⁵ Quoted *supra* footnote 129.

²⁴⁶ Order on provisional measures dated 3 March 1999, ICJ Reports 1999, para. 9, also available at <http://www.icj-cij.org/docket/files/104/7726.pdf>

²⁴⁷ General list no. 64, *Case concerning United States diplomatic and consular staff in Tehran (United States v. Iran)*, Judgment dated 24 May 1980, ICJ Reports 1980, also available at <http://www.icj-cij.org/docket/files/64/6291.pdf>

States Embassy and Consulate should be accorded, and protected in, full freedom within the Embassy and Chancery premises, and the freedom of movement within Iran necessary to carry out their diplomatic and consular functions; (d) That the Government of Iran not place on trial any person attached to the Embassy and Consulate of the United States and refrain from any action to implement any such trial; (e) That the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of the carrying out of any decision which the Court may render on the merits, and in particular neither take nor permit action that would threaten the lives, safety, or well-being of the hostages”.²⁴⁸

In the *Nuclear tests* case,²⁴⁹ New Zealand and Australia separately instituted proceedings against France in order to put an end to nuclear tests conducted in the Pacific, causing significant prejudice to the environment and the population of the two countries.²⁵⁰ To this end, the Government of New Zealand made a general reference to the request for provisional measures, directly linking it to the rights to be protected (i.e. the rights in dispute) which constitute the essential condition for those measures to be decided upon. In paragraph 2 of its request, New Zealand made a specific reference to the following rights: “The rights to be protected are: (i) the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radio-active fall-out be conducted; (ii) that the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radio-active contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated; (iii) the right of New Zealand that no radio-active material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing; (iv) the right of New Zealand that no radio-active material, having entered the territory of New Zealand, the Cook Islands,

²⁴⁸ Request for the indication of provisional measures dated 29 November 1979, ICJ Reports 1980, para. 5 also available at <http://www.icj-cij.org/docket/files/64/10663.pdf>

²⁴⁹ Due to the analogous character of the two proceedings, reference is made only to the New Zealand v. France case in this respect. General list no. 59, *Nuclear tests (New Zealand v. France)*, Judgment dated 20 December 1974, ICJ Reports 1975, also available at <http://www.icj-cij.org/docket/files/59/6159.pdf>

²⁵⁰ Judgment, para. 460.

Niue or the Tokelau Islands, including their airspace and territorial waters, as a result of nuclear testing, cause harm, including apprehension, anxiety and concern to the people and Government of New Zealand, and of the Cook Islands, Niue and the Tokelau Islands; (v) the right of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and the sea-bed, without interference or detriment resulting from nuclear testing”.²⁵¹

In the *Anglo-Iranian Oil Co.* case,²⁵² the United Kingdom formulated a request for provisional measures whereby the Court was urged to indicate that the Government of Iran should permit the company for which diplomatic protection was exercised by the United Kingdom to continue its activities without any legislative, judicial or executive disturbances; in addition, no acts of expropriation should be carried out, as well as any other act inconsistent with the protection of foreign property rights, nor should the Government impair the activities of the company by inflaming the public opinion against the latter; finally, the United Kingdom requested a general provisional measure to which it purported to subject itself together with respondent, namely to ensure that no steps would be taken that would aggravate or extend the dispute between the parties.²⁵³

²⁵¹ Request for provisional measures by New Zealand dated 14 May 1973, ICJ Reports 1973, also available at <http://www.icj-cij.org/docket/files/59/10731.pdf>.

²⁵² General list no. 16, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Judgment on the preliminary objection, raised by Iran, dated 22 July 1952, ICJ Reports 1952, also available at <http://www.icj-cij.org/docket/files/16/1997.pdf>.

²⁵³ Order on interim measures of protection requested by the United Kingdom, dated 5 July 1951, ICJ Reports 1951, 90 f.: “(a) The Imperial Government of Iran should permit the Anglo-Iranian Oil Company, Limited, its servants and agents, to search for and extract petroleum and to transport, refine or treat in any other manner and render suitable for commerce and to sell or export the petroleum obtained by it, and generally, to continue to carry on the operations which it was carrying on prior to the 1st May, 1951, free from interference calculated to impede or endanger the operations of the Company, by the Imperial Government of Iran, their servants or agents, or any Board, Commission, Committee, or other body nominated by them. (b) The Imperial Government of Iran should not by any executive or legislative act or judicial process hinder or prevent or attempt to hinder or prevent the Anglo-Iranian Oil Company, Limited, its servants or agents, in or from continuing to carry on its operations as aforesaid. (c) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize or otherwise interfere with any property of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any property which the Imperial Government of Iran have already purported to nationalize or otherwise to expropriate. (d) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize any monies earned by the Anglo-Iranian Oil Company, Limited, or otherwise in the possession or power of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any monies which the Imperial Government of Iran have purported to nationalize or otherwise to expropriate or any monies earned by means of property which they have purported so to nationalize, or otherwise to expropriate. (e) The Imperial

B. Law

Jurisdictional condition - prima facie jurisdiction / fumus bonae iurisdictionis

Pursuing the analysis of the selected case law of the International court of justice concerning provisional measures, the first logic step on which a decision thereupon has to be construed is constituted as we have seen by an *ictu oculi* assessment on jurisdiction to issue a judgment on the merits of the case.

In the recent *Seizure and Detention of Documents* case, it is noted that the Applicant briefly referred to art. 36 of the ICJ Statute in relation to the existence of jurisdiction of the Court, without any further comment thereupon.²⁵⁴

The Court found that the jurisdictional condition has to be verified in a positive perspective: if it appears that there is a basis on which its jurisdiction *could be founded*, though not in a definitive manner, then the condition is met. Therefore, in the terminology adopted here, the Court opted for a *fumus bonae iurisdictionis* condition, though it is acknowledged that the expression *prima facie jurisdiction* has so far met with success.

The Court referred to its order on provisional measures in the case *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*²⁵⁵ in which the same positive perspective was upheld.²⁵⁶ The same approach can be found in the case concerning the obligation to prosecute or extradite between Belgium and Senegal.²⁵⁷

Government of Iran should not by any executive or legislative act or judicial process require or attempt to require the Anglo-Iranian Oil Company, Limited, to dispose of the monies referred to in sub-paragraph (d) above otherwise than in accordance with the terms of the Convention of 1933 or of any measure to be indicated by the Court. (f) The Imperial Government of Iran should ensure that no other steps of any kind are taken capable of prejudicing the right of the Government of the United Kingdom to have a decision of the Court in its favour on the merits of the case executed, should the Court render such a decision. (g) The Imperial Government of Iran and the Government of the United Kingdom should ensure that no step of any kind is taken capable of aggravating or extending the dispute submitted to the Court, and in particular, the Imperial Government of Iran should abstain from all propaganda calculated to inflame opinion in Iran against the Anglo-Iranian Oil Company, Limited, and the United Kingdom". The order is also available at <http://www.icj-cij.org/docket/files/16/2013.pdf>.

²⁵⁴ Request for provisional measures filed by Timor-Leste, para. 1.

²⁵⁵ General list no. 150, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order on provisional measures dated 8 March 2011, ICJ Reports 2011, para. 49. The Order is also available at <http://www.icj-cij.org/docket/files/150/16324.pdf>.

²⁵⁶ *Timor-Leste v. Australia*, Order, para. 18.

²⁵⁷ Order, para. 40.

In the *Pulp Mills* case instead, pronouncing on the request made by Argentina, the Court – though expressing it in positive terms – had adopted a slightly different terminology, a lower threshold for the jurisdictional condition to be met, i.e. that it has to appear that such a basis *might be established*.²⁵⁸

In the *LaGrand* case a similar expression, once again expressing a lower threshold, namely that it is necessary and sufficient that jurisdiction *might be founded*.²⁵⁹ However, it is submitted that, due to the peculiar characteristic of the case, where the application for provisional measures was evaluated *inaudita altera parte*, thus without the respect of the *contradictoire*, which is the cornerstone of the consensual system of adjudicating organs between equal sovereign States, a higher threshold would have been warranted. Undoubtedly, the particularly urgent situation led the Court to satisfy itself of said jurisdictional basis. *Might be founded* is the expression also adopted in the *Hostages* case.²⁶⁰ The same positive expression is adopted in the *Nuclear Tests* case.²⁶¹

In the *Anglo-Iranian Oil Co.* case, on the contrary, the Court upheld a negative perspective, finding that “whereas it cannot be accepted *a priori* that a claim based on such a complaint [i.e., the exercise by the United Kingdom of the right of diplomatic protection against denial of justice, *A / N*] falls completely outside the scope of international jurisdiction”.²⁶² It must be noted that the case at issue is the only one in the case law of the International court of justice in which provisional measures were issued and thereafter the Court found that it lacked jurisdiction to rule on the merits.²⁶³

Concluding on this point concerning the jurisdictional threshold, from the above analysis of the tendencies of the Court it can be argued that the positive perspective corresponds to the current status of the condition: being higher than the negative one, it has the advantage of protecting the Court from the delicate situation of indicating

²⁵⁸ Order, 57. In this paragraph, the Court refers to the order on provisional measures issued in the *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v. Rwanda)*, dated 10 July 2002, ICJ Reports 2002, para. 58.

²⁵⁹ Order, para. 13.

²⁶⁰ Order, para. 15.

²⁶¹ Order, para. 22: “Whereas it follows that the Court in the present case cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, *prima facie*, appear to fall within the purview of the Court’s jurisdiction”.

²⁶² Order, 93.

²⁶³ In this sense, admitting that the jurisdictional condition was wrongly found to have been met.

provisional measures which inevitably affect the addressee and thereafter finding that these measures should have never been indicated, as in the *Anglo-Iranian Oil Co.* case.

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

First of all, it has to be anticipated that, to a certain extent, the four substantive conditions presented here are related. As a general remark, for example, the requirements of urgency and necessity are intertwined, in the sense that one cannot exist without the other: they are implied and justified by each other, since for a certain would-be provisional measure to be urgent, it has to be necessary; for the same measure to be necessary, it has to be urgent.

Another example is provided by the conditions of urgency and risk of irreparable harm: if it is demonstrated that a certain situation constitutes a risk that a damage which cannot be balanced with monetary compensation will happen, then the condition of urgency is equally satisfied.²⁶⁴

In a nutshell, the risk of irreparable harm can be associated to the condition wherein the *status quo ante* cannot be reverted subsequent to an act which the request for provisional measures seeks to avoid.

A practical manifestation of this combination is given by the *Seizure and Detention of Documents* case, both in the order and in the request made by the Government of Timor-Leste. Indeed, the Court explained the meaning of the term “urgency” exactly by making reference to the risk of irreparable prejudice: “the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision”.²⁶⁵ The same connection between urgency and risk of irreparable harm in the very definition of the former had been advanced in the

²⁶⁴ Undoubtedly, the term “risk” in and of itself does not give a clear clue of the degree of intensity required. The latter has to be assessed by a reference to the relevant case law.

²⁶⁵ Order, para. 32. In this respect as well, the Court confirmed its previous assessment on this point in the case *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* quoted *supra* footnote 259, para. 64.

Passage through the Great Belt (Finland v. Denmark) case²⁶⁶, *Pulp Mills* case²⁶⁷ and in the case concerning the obligation to prosecute or extradite between Belgium and Senegal.²⁶⁸

It is noted, however, that this connection is not always present in the case law of the ICJ: in this respect, an autonomous evaluation was carried out in the *LaGrand*,²⁶⁹ *Hostages*²⁷⁰ and *Nuclear Tests*²⁷¹ cases.

It is worth noting that in the *Seizure and Detention of Documents* case the Court decided not to make any reference to the condition of necessity, arguably absorbed by that of the risk of irreparable harm.²⁷²

Concerning the fourth condition, namely the *prima facie bonum ius / fumus boni iuris* binomial – where the former constitutes the negative perspective, while the latter constitutes the positive and higher threshold – the case at issue is explanatory: the Court found that this substantive condition is met if the Court is satisfied that the rights asserted in the claim by the applicant “are at least plausible”.²⁷³ Therefore, the Court in its most recent decision on provisional measures indicates a positive perspective for this condition. The same approach was followed in the case concerning the obligation to prosecute or extradite.²⁷⁴ Interestingly, in this case the Court went further in the explanation of the term “plausible”: “whereas the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible”.²⁷⁵

Finally, as far as the effect of provisional measures is concerned, in the *Seizure and Detention of Documents* case the Court reaffirms the binding effect – expressed for the

²⁶⁶ General list no. 86, *Passage through the Great Belt (Finland v. Denmark)*, order dated 29 July 1991, ICJ Reports 1991, para. 23. The order is also available at <http://www.icj-cij.org/docket/files/86/6969.pdf>

²⁶⁷ Order, para. 62.

²⁶⁸ Order, para. 62.

²⁶⁹ Order, para. 23.

²⁷⁰ Order, para. 36.

²⁷¹ General list no. 58, *Nuclear Tests (Australia v. France)*, Order on provisional measures dated 22 June 1973, 8. The Order is also available at <http://www.icj-cij.org/docket/files/58/6049.pdf>

²⁷² See in particular para. 48 of the Order.

²⁷³ Order, para. 22. Once again, the Court confirms its previous decision on this aspect in the case *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* quoted *supra* footnote 259, para. 53.

²⁷⁴ Order, para. 57: “whereas the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible”.

²⁷⁵ Order, 60.

first time in its case law in the famous *LaGrand* case – of its orders on provisional measures.²⁷⁶

C. Decision

In the *Seizure and Detention of Documents* case, the Court – acting under art. 75, para. 2, of the Rules of Court – exercised one of the manifestations of its *motu proprio* power, namely that of granting issues other than those requested by the applicant: the milder provisional measures ordered required Australia to keep custody under seal of the seized documents and avoid interfering in the communications between the applicant and its legal advisers in connection with the arbitration pending between them.²⁷⁷

In the case concerning the obligation to prosecute or extradite, the Court decided not to grant the measures requested due to the lack of urgency, as the Government of Senegal had given formal assurances during the hearings that it would not allow Hissène Habré to leave its territory before the final decision of the ICJ.²⁷⁸

In the *Pulp Mills* case, the Court denied the request due to the fact that the conditions did not seem to have been fulfilled. In particular, since Uruguay had taken certain commitments and demonstrated a significantly cooperative attitude towards Argentina,²⁷⁹ it is submitted that the Court deemed it appropriate to exercise its high degree of judicial discretion in denying the measures requested.

In the *LaGrand* case, on the contrary, the Court acceded to the request of the German Government,²⁸⁰ though with no substantial effect since the measures were not complied with by the United States. The Court had unanimously voted in favour of the request; however, this was probably due to the humanitarian reasons, as was the case for Judge Shigeru Oda.²⁸¹

In the *Hostages* case, the Court unanimously voted in favour of provisional measures aimed at protecting the personnel and more broadly to abstain from any action likely to

²⁷⁶ Order, para. 53.

²⁷⁷ Order, para. 55.

²⁷⁸ Order, para. 71.

²⁷⁹ Order, para. 84.

²⁸⁰ Order, para. 29.

²⁸¹ Declaration by Judge Oda, para. 7.

further aggravate or extend the dispute and ensure that no action was committed by third parties in this regard.²⁸²

Undoubtedly, provisional measures of a negative character (i.e., orders of abstention) are the most frequently requested and granted, as the *Nuclear Tests*²⁸³ and the *Anglo-Iranian Oil Co.*²⁸⁴ cases show.

b) Before presenting the provisions concerning provisional measures and addressing their contribution to the development of the institution of provisional measures in public-international-law adjudication, it is deemed appropriate to briefly introduce the kind of dispute settlement mechanism designed by the 1982 UNCLOS Convention, namely its Part XV, articles 279 through 299.²⁸⁵

To begin with, it has to be underlined that the provisions contained in the convention come into play if the condition of the existence of a legal dispute is met. At the outset of the creation of the first world court, the notion of legal dispute was highly controversial.²⁸⁶ In the leading view, expressed by the Permanent court of international justice in the *Mavrommatis Concessions* case and still applicable today, it is

“A disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.²⁸⁷

²⁸² Order, para. 47.

²⁸³ Order, para. 36: “The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which may aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands”.

²⁸⁴ Order, 8: “For these reasons, the Court, indicates [...] 1. That the Iranian Government and the United Kingdom Government should ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision on the merits which the Court may subsequently render; 2. That the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court; 3. That the Iranian Government and the United Kingdom Government should each ensure that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, Limited, as they were carried on prior to May Ist, 1951”.

²⁸⁵ The text of the UNCLOS Convention is available at the UN institutional website: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

²⁸⁶ For a detailed account of the topic see SCHREUER, *What is a Legal Dispute?*, Investor-State Disputes - International Investment Law, Transnational dispute management (TDM), 1, 2009.

²⁸⁷ Series A – No. 2, *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, Publications, 1924, 11.

In addition thereto, a *ratione materiae* requirement shall be complied with for jurisdiction to be established under the convention: the party to a dispute shall be either a State party to the convention, or an entity other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

Furthermore, as a *ratione materiae* condition, according to article 287 (1) and 288 (1) UNCLOS, the dispute shall concern the interpretation and/or application of the Law of the Sea Convention.

Once these requirements are met, the parties to the convention may exercise their discretion as to the choice of the adjudicating organ for the settlement of their dispute.

The UNCLOS architecture provides for the incidental proceeding at issue in its art. 290, which reads as follows:

“Provisional measures

1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for

the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article”.

Several issues were discussed during the sessions of the Conference, particularly the nature of provisional measures – whether they should be binding or merely recommendatory – and the kind of authority which the adjudicating organ should be entitled to exercise as far as the *proprio motu* power in its broader sense²⁸⁸ is concerned.²⁸⁹

The activities of the sessions at the Conference were influenced by the law and practice of the International court of justice and in particular the interpretation and application of art. 41 of the ICJ Statute, but finally the wording differed in some relevant respects from that of the latter: the clearest example thereof is represented by the decision to adopt the term *prescribe*, undoubtedly more indicative of a compulsory nature than the term *indicate* as adopted in art. 41 of the ICJ Statute.

It is relevant to note a peculiar feature of “maritime provisional measures”: the latter may not only be granted in order to preserve the rights of either party, but also to prevent serious harm to the marine environment, therefore including a common concern which broadens the positive impact of these measures.

Art. 290 UNCLOS provides for a dual procedure to decide on the prescription of provisional measures. The first is constituted by the case in which a standing court or tribunal agreed upon by the parties has jurisdiction to decide the case on the merits: it may, as a consequence, prescribe provisional measures (paragraph 1). The second concerns the instance where the merits of the case shall be heard by an *ad hoc* arbitral

²⁸⁸ I.e., including the issue of the power to issue measures other than those requested by either party.

²⁸⁹ ROSENNE, SOHN (eds.), *United Nations Convention on the Law of the Sea 1982: a Commentary – Volume 5: Articles 279 to 320, Annexes V, VI, VII, VIII and IX, Final Act, Annex 1, Resolutions I, II, III and IV*, Dordrecht, Boston and London, 1989, 53.

tribunal: in such a case, interim protection may be granted, pending the constitution of the *ad hoc* tribunal, either by the adjudicating organ agreed upon by the parties or, if agreement in this sense is not reached, by the International tribunal for the law of the sea (paragraph 5).

Furthermore, it has to be noted that the power to prescribe provisional measures under art. 290 UNCLOS is discretionary, as is the case before the International court of justice.

The most recent decision concerning provisional measures under the United Nations convention on the law of the sea is the “*Arctic Sunrise*” case.²⁹⁰

A. Facts

Background

On 4 October 2013, the Netherlands filed a claim instituting arbitral proceedings under Annex VII to the UNCLOS.

The dispute concerns the boarding and detention of the vessel “*Arctic Sunrise*” in the exclusive economic zone of the Russian Federation and the detention of the persons on board the vessel by the authorities of the Russian Federation.

On 21 October 2013, the Government of the Netherlands filed with the ITLOS a request for the prescription of provisional measures under art. 290, paragraph 5, pending the constitution of an Annex VII arbitral tribunal.

It has to be noted that throughout the proceedings, the Russian Government decided not to appear before the Tribunal. This procedural conduct, however, is unable to prevent a prescription for provisional measures from being granted.²⁹¹

²⁹⁰ The “*Arctic Sunrise*” case (*The Netherlands v. Russia*), order on the request for the prescription of provisional measures dated 22 November 2013, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

²⁹¹ Order, para. 48: “Considering that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional

Object of the request

The Netherlands requested the Tribunal to prescribe the following provisional measures: to release the “Arctic Sunrise” and its crew, to suspend all judicial and administrative proceedings and to refrain from initiating any other proceedings and, finally, to ensure that no further action is taken that may extend or aggravate the dispute, as a general clause.²⁹²

B. Law

Jurisdictional condition - prima facie jurisdiction / fumes bonae iurisdictionis

The Netherlands contended that the Tribunal had *prima facie* jurisdiction, i.e. jurisdiction to rule on provisional measures.²⁹³

Concerning the jurisdictional condition, the Tribunal indicated a positive perspective in its evaluation: “the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral

measures, provided that the parties have been given an opportunity of presenting their observations on the subject (see Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p. 12, at p. 15, para. 11; Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p. 30, at pp. 32-33, para. 11; Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 99, at p. 101, para. 11; Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 135, at p. 137, para. 12; Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, p. 3, at p. 6, para. 13; United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 7, at pp. 11-12, para. 9, and at p. 13, para. 13).

²⁹² Order, para. 34: “For the reasons set out above, the Kingdom of the Netherlands requests that the Tribunal prescribe as provisional measures that the Russian Federation: (i) Immediately enable the ‘Arctic Sunrise’ to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation; (ii) Immediately release the crew members of the ‘Arctic Sunrise’, and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation; (iii) Suspend all judicial and administrative proceedings, and refrain from initiating any further proceedings, in connection with the incidents leading to the boarding and detention of the ‘Arctic Sunrise’, and refrain from taking or enforcing any judicial or administrative measures against the ‘Arctic Sunrise’, its crew members, its owners and its operators; and (iv) Ensure that no other action is taken which might aggravate or extend the dispute;

²⁹³ Order, para. 35.

tribunal would have jurisdiction”²⁹⁴ and “in the view of the Tribunal, the provisions of the Convention invoked by the Netherlands appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded”.²⁹⁵

Substantive conditions - urgency, necessity, risk of an irreparable harm and prima facie bonum ius / fumus boni iuris

After having read art. 290, para. 5, in conjunction with art. 290, para. 1, of the Convention, the Tribunal referred to urgency as a condition which is determined by the the period during which the Annex VII arbitral tribunal is not yet in a position to “modify, revoke or affirm those provisional measures”.²⁹⁶

C. Decision

The Tribunal, exercising a conjugation of its *motu proprio* power, found that it was appropriate to prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained.²⁹⁷ As a consequence, it ordered that the vessel and all the persons detained be released upon the posting of a bond in the form of a bank guarantee, issued by a bank in Russia or having corresponding arrangements with a Russian bank.²⁹⁸

The Tribunal also deemed it appropriate to issue a *soft* provisional measure directed to both Parties; *soft*, since thereby it simply reminded the Parties of their obligations not to aggravate or extend the dispute *pendente lite*.²⁹⁹

²⁹⁴ Order, para. 58.

²⁹⁵ Order, para. 70.

²⁹⁶ Order, para. 84. The Tribunal referred to a previous decision, namely on the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, para. 68.

²⁹⁷ Order, para. 95: “Considering that, pursuant to article 290, paragraph 5, of the Convention, the Tribunal considers it appropriate to order that the vessel Arctic Sunrise and all persons who have been detained in connection with the present dispute be released upon the posting of a bond or other financial security by the Netherlands, and that the vessel and the persons be allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation”.

²⁹⁸ Order, para. 105.

²⁹⁹ Order, para. 98: “Considering that the Netherlands and the Russian Federation shall each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral

It is worth noting that it also decided to reaffirm the binding force of its orders.³⁰⁰

A peculiar feature of *maritime* provisional measures which can be found in the Order under examination consists in the obligation to submit to the Tribunal a report on compliance with any provisional measures prescribed.³⁰¹

c) For proceedings that are conducted under the ICSID Convention, provisions on interim relief are to be found both in the ICSID Convention and in the ICSID Arbitration Rules.³⁰²

The sources of international investment law are interrelated in a manner which is not strictly hierarchical: however, for the purposes of the present study at this stage it is sufficient to point to the fact that, except in the instances indicated herein, provisional measures are seldom addressed in MITs, BITs, investor-State contracts and national legislation. Still, the issue is very complex both theoretically and in practice, but a reliable picture of the panorama can be drawn even without analysing each and every tree or cloud therein.

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

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party”.

As already discussed in chapter 1, the exclusivity of an ICSID tribunal’s power to issue provisional measures is a unique feature of the ICSID framework.³⁰³

tribunal, or might prejudice the carrying out of any decision on the merits which the Annex VII arbitral tribunal may render”.

³⁰⁰ Order, para. 101: “Considering the binding force of the measures prescribed”.

³⁰¹ Order, para. 102.

³⁰² The literature on the scope of art. 47 of the ICSID Convention is vast: see, *ex multis*, MALINTOPPI, *Art. 47 ICSID Convention*, in SCHREUER *et al.* (eds.), *The ICSID Convention. A Commentary*, second edition, Cambridge, 2009, 757 ff.; for a broader perspective, BISMUTH, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, *Journal of international arbitration*, Vol. no. 26, Issue no. 6, 773 ff.; ZIADÉ, R., *Mesures conservatoires (tribunal arbitral et tribunal étatique)*, in LEBEN (dir.), *La procédure arbitrale relative aux investissements internationaux*, Paris, 2010, 192 ff.

³⁰³ FORTIER, *Interim Measures: an Arbitrator’s Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation, New York, 16 June 2008, 4.

The opt-out provision allocates flexibility and generality to art. 47 of the ICSID convention as a *chapeau* and permitting either to strengthen the force and effects of these measures or to limit the latter, as is the case with the 2012 US Model BIT, art. 1134 of NAFTA Chapter 11 and art. 10.20.8 of the CAFTA Chapter 10.

Once again, the arbitral tribunal is given wide discretion as far as the decision to grant or not provisional measures is concerned (“may”). Thus, the latter has to be construed as a power, not as a duty; however, if a request for provisional measures is filed with the arbitral tribunal, it has to rule thereupon, otherwise it would violate the principle of the good administration of justice.

The requirement of the existence of certain circumstances – in this study, the jurisdictional and substantive conditions – play an essential role in tempering the relevant limitations on sovereignty likely to be produced by ensuring that provisional measures are not issued lightly. This aspect is further developed by the ancillary provision contained in art. 39 of the Arbitration rules, whereby the applicant is under an obligation – if he wishes to have its request granted – to specify:

- the rights to be preserved (i.e. link between the right(s) in dispute and the object of the request for provisional measures, referred to as the *essential condition* in the German minority case handed down by the PCIJ);
- the measures requested (which however does not limit the power of the arbitral tribunal to make use of its power to issue measures other than those requested);
- the circumstances that require such measures (i.e., the substantive conditions of urgency and necessity).

Furthermore, these measures are atypical (“any”).

The soft wording of the text in relation to the force of the procedural decision is showed by the combination of “recommend” and “should be taken”.

The fundamental conservatory purpose of these measures is highlighted by the adoption of the term “preserve”.

This article, inspired by article 41 of the Statute of the International Court of Justice, thus justifying the comparative approach which is adopted in this study, shows that the parties can opt out of the power of the arbitral tribunal to grant interim relief, or can restrict such power, as is the case for art. 1134 of the NAFTA Chapter 11,³⁰⁴ art. 10.20.8. of the CAFTA³⁰⁵ Chapter 10 and art. 28(8) of the 2012 US Model BIT.³⁰⁶ More details are found in ICSID Arbitration Rule 39 on Provisional Measures, which reads:

- “(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
- (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
- (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests”.

These rules, adopted by the ICSID Administrative council, are relevant in order to describe their application:

³⁰⁴ *Infra*, B.II.i lett. d).

³⁰⁵ *Infra*, B.II.i lett. e).

³⁰⁶ *Infra*, B.II.iv.

- reference to para. 1 has already been made; however, it has to be added that provisional measures can be requested – and, in case, granted – only after the institution of the proceeding, thereby barring for the time being any form of pre-provisional measure, pre-arbitral procedure or emergency-arbitrator provision like that provided for by art. 29 of the 2012 ICC arbitration rules;
- para. 2: the request is given priority, coherently with the substantive condition of urgency;
- para. 3: three conjugations of the ICSID arbitral tribunal's *proprio motu* power;
- para. 4: the power to issue *ex parte* interim relief is excluded, due to compliance with the *contradictoire* principle;
- para. 5: such an innovation serves the purpose of speeding up the evaluation and decision on a request for provisional measures made when the arbitral tribunal is not sitting yet. This provision resembles the practice of the PCIJ – after the 1931 revision of the Rules of Court – and of the ICJ thereupon.
- para. 6: this interesting provision allows the application of the principle of concurrent jurisdiction to rule on provisional measures, provided that the parties have opted out of the exclusivity principle, which constitutes the general rule. With this amendment dated 2006, the procedure conducted under the ICSID convention becomes similar in this respect to art. 46 of the ICSID AF rules and art. 26 of the UNCITRAL arbitration rules. These brief remarks will be supplemented by the analysis conducted in Chapter 3 of this inquiry dealing with the arbitral interpretation and application of these norms.

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

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

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

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

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

It is worth noting that the force of these measures is expressed in clearer terms, in the sense that they can be either binding or recommendatory according to the appropriate discretion of the adjudicating body.³⁰⁷

The tribunal's power under the AF Arbitration Rules is also subject to potential restrictions or extensions agreed by the parties, on an opt-out basis. Except for differences that will specifically be addressed in the following discussion, the application of interim relief under the AF Arbitration Rules follows that of the ICSID Arbitration Rules. For example, in the case of *Metalclad v. Mexico*, governed by the AF Rules and AF Arbitration Rules, the tribunal considered that the reasoning applicable under Article 47 of the ICSID Convention was relevant in the context of these AF proceedings and, more particularly, said that it was "no less applicable to the wording of Article 1134 of the NAFTA".³⁰⁸

Art. 46(4) provides for the principle of concurrent jurisdiction to issue provisional measures.

The procedural and substantive powers of an arbitral tribunal under the AF Rules are

³⁰⁷ See paras. 1 and 3.

³⁰⁸ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision on a request by the respondent for an order prohibiting the claimant from revealing information regarding ICSID Case No. ARB(AF)/97/1, October 27, 1997, para. 8. Example reported in KAUFMANN-KOHLER, ANTONIETTI, *Interim Relief in International Investments Agreements*, in YANNACA-SMALL (ed.), *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues*, Oxford, 2010, 510.

subject to mandatory rules of the law of the seat of arbitration, like in the first representation (mono-localising) in Professor Gaillard's theory.³⁰⁹ This process – typical of international commercial arbitration in general and of investment arbitration under the UNCITRAL rules – is due to the fact that, according to art. 1 of the AF Arbitration Rules, the latter will not apply when “in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate”.

e) On January 1, 1994, the North American Free Trade Agreement between the United States, Canada, and Mexico (NAFTA) entered into force.³¹⁰ It is divided into various chapters, of which chapter 11 is devoted to investment provisions. It has been suggested that NAFTA Chapter 11 represents a sort of equilibrium between the 1994 US Model BIT and the 2004 US Model BIT.³¹¹ It is well known that between the 1994 version – which may be called ultra-deregulative – and the 2004 one, many more common public concerns were taken into account, also due to the debate concerning the *Loewen* case.

Article 1134 of the NAFTA³¹² contains a regulation of the power to decide upon requests for provisional measures:

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

³⁰⁹ GAILLARD, *Aspects philosophiques de l'arbitrage international*, Recueil 2007, Vol. no. 329, also available in pocketbook series, Leiden, Boston, 2008, 34: “Les représentations de l'arbitrage commercial international les plus structurantes nous paraissent être aujourd'hui au nombre de trois. La première réduit l'arbitrage international à une composante d'un ordre juridique donné, la seconde en trouve le fondement dans une pluralité d'ordres juridiques étatiques, et la troisième, qui est celle de l'auteur du présent cours, est celle de l'ordre juridique arbitral”.

³¹⁰ North American Free Trade Agreement, signed on 17 December 1992, entered into force on 1 January 1994.

³¹¹ BJORKLUND, *NAFTA Chapter 11*, in Brown [ed.], in BROWN [ed.], *Commentaries on Selected Model Investment Treaties*, Oxford, 2013, 473.

³¹² On this art. see the comments made by BJORKLUND, quoted *supra* footnote 311, 522.

(investment)]. For purposes of this paragraph, an order includes a recommendation”.³¹³

The provision therefore prohibits attachment orders and orders that enjoin the application of the challenged measures. This limit is coherent with that of art. 1135, attributing to the arbitral tribunal the authority to award only monetary damages.

NAFTA Chapter 11 arbitration can be conducted under:

- ICSID arbitration;³¹⁴
- ICSID Additional Facility (AF) rules;³¹⁵
- UNCITRAL Arbitration rules.³¹⁶

Consequently, the authority of the arbitral tribunal applying NAFTA Chapter 11 rules in the framework of one of the three arbitration rules is modified by the former, particularly on the prohibition of attachment orders and orders that enjoin the application of the challenged measures.

It can be noted at the outset that certain common features of this procedural mechanism are reproduced herewith, namely the discretion to rule thereupon (“may”), the power/right to issue such an order so as to preserve the *status quo ante* while the dispute is pending before the adjudicating body expressed through the most frequently applied measures.³¹⁷ But the most significant innovation is represented by the last sentence in the article: “for purposes of this paragraph, an order includes a recommendation”. This means that the adjudicator has the power to issue either type of measures, i.e. binding or recommendatory, or even both in the same order: indeed, since express reference is made to the inclusion of recommendations, it is implicitly assumed that an order may be given binding force, when the tribunal deems it appropriate.

In addition, it is necessary to note that in cases brought under the ICSID AF and the

³¹³ See the NAFTA Secretariat’s institutional website: <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US#A1134>

³¹⁴ Concerning provisional measures, the relevant articles which have to be combined with art. 1134 NAFTA are art. 47 ICSID Convention and art. 39 Arbitration rules.

³¹⁵ In this regard, see art. 46.

³¹⁶ In this regard, see art. 26.

³¹⁷ Such a list does not seem to be exhaustive (“including”).

UNCITRAL rules a fundamental principle concerning provisional measures consists in that of concurrent jurisdiction for the request and granting thereof, i.e. the applicant is able to seek the latter from either the tribunal or from the domestic courts in the *lex loci arbitri* or in the disputing NAFTA party.³¹⁸

f) The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) is a multilateral treaty entered into between the United States, the Dominican Republic and five Central American States, namely Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.³¹⁹ To a certain extent it constitutes a manifestation of the pan-american sentiment already discussed above in the historical section dedicated to the Corinto treaty and the project – and realisation – relating to a Central American court of justice. It has taken part in the global phenomenon of regional integration. It is a broad free trade framework, containing an investment chapter (ten). Art. 10.20.8 of the CAFTA provides for the power to issue provisional measures, reading as follows:

“A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation”.

As can be seen, it substantially reproduces the homologous provision contained in the NAFTA,³²⁰ thus it does not constitute an innovation in this respect, but rather an element towards the assessment of a certain degree of consolidation of a *consensus* in the region.

³¹⁸ GAILLARD, SAVAGE (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, den Haag, 1999, paras. 1307 through 1309.

³¹⁹ The agreement entered into force for the United States and El Salvador, Guatemala, Honduras, and Nicaragua during 2006, for the Dominican Republic on March 1, 2007, and for Costa Rica on January 1, 2009. With the addition of Costa Rica, the CAFTA-DR is in force for all seven countries that signed the agreement: sources and treaty text can be found in the institutional website of the Office of the United States Trade Representative: http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf.

³²⁰ Art. 1134, see above, lett. d).

B.II.ii. As far as sectoral treaties are concerned, it is worth mentioning the Energy Charter Treaty (ECT). The ECT is a multilateral convention which entered into force in April 1998.³²¹ It was created to encourage and protect investments and trade in the energy field and to ensure reliable transit and efficient energy use. It is binding on over fifty parties, including all the members of the European Union and many energy-rich countries of Eastern Europe.³²² The ECT also provides for binding investor-State arbitration as a dispute resolution mechanism to allow investors to enforce their rights under the Treaty. The arbitrations are being administered by the Permanent Court of Arbitration (PCA) in The Hague, under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The provisions concerning the dispute settlement mechanism are contained in Part V of the ECT (articles 26 through 28). Although provisional measures are not provided for in the ECT, the latter constitutes a sort of *chapeau*, whereby such incidental proceedings are indirectly included through the reference thereto in the applicable multilateral and bilateral investment treaties. In chapter three, all the cases dealing with such a procedural feature in the energy sector will be analysed and discussed, in order to ascertain whether the specific sector at issue plays a role – and if so, to what extent – in the conditions for their granting, in comparison with general investment law of procedure.

B.II.iii. A significant majority of investor-state arbitrations are initiated today on the basis of an investment arbitration agreement (IAA), either a bilateral investment treaty (BIT) or a multilateral investment treaty (MIT), such as the regional system provided for by the North American Free Trade Agreement (NAFTA).³²³ These arbitrations are most often governed by the Arbitration Rules of ICSID, the ICSID Additional Facility,

³²¹ Energy Charter Treaty, December 17, 1991, 2080 UNTS. 100, 34 ILM, 360.

³²² Members of the Energy Charter Conference are: Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community (now part of the European Union) and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan; see the ECT institutional website – last visited 30 October 2014 – at <http://www.encharter.org>.

³²³ For the text of the Treaty see: North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 1993, 19 USC, 3301 ff., also available at NAFTA's institutional website at <https://www.nafta-sec-alena.org>.

or UNCITRAL. Some BITs or MITs also refer to arbitration under the auspices of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Stockholm Chamber of Commerce (SCC).

However, there is no doubt that provisional measures are most frequently decided upon in the context of proceedings governed by the ICSID Arbitration Rules, the ICSID Additional Facility Arbitration Rules (both referred to as the ICSID system) and the UNCITRAL Arbitration Rules, because these are the arbitration rules most commonly used in the context of investor-state disputes.

In this connection, bilateral investment treaties play a fundamental role in the creation of a link between the *chapeau*, say, of the ICSID convention, whereby the Parties to the multilateral treaty express their favour for that dispute settlement mechanism – however without attributing jurisdiction to the Centre – and the specific investor-State agreement, through the famous setting of arbitration without privity.³²⁴ Indeed, jurisdiction of the ICSID Centre and competence of the arbitral tribunal established thereby is triggered by the double gateway of art. 25 of the ICSID Convention and the relevant bilateral investment treaty.

In general terms, bilateral investment treaties contain provisions regarding substantive-law issues, given that – by referring to a series of optional dispute settlement mechanisms in the arbitration clause – the treaty is thus completed. However, it has to be noted that this dualism is gradually being overcome by recent trends in BIT practice: indeed, some States are beginning to include procedural provisions in their treaties, short of limiting to a general reference to an arbitral mechanism. Such a treatification of provisional measures – with all its consequences in terms of being able to become an instrument of bargain between the parties and furthermore opening the way for a development which will be introduced below – can be identified, for instance, in the United States-Peru Trade Promotion Agreement signed on 12 April 2006, as well as in general article 28 of the U.S. Model BIT dated 2004, both of which contain wording similar to the NAFTA provision referred to above.³²⁵ Art. 10.20.8 of the U.S. – Peru BIT reads as follows:

“A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to

³²⁴ PAULSSON, *Arbitration without Privity*, ICSID Review, 1995, 232 ff.

³²⁵ See *supra*, lett. d).

preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation".

It can be noted that the provision is identical to their homologous norms in the NAFTA Chapter 11 and the CAFTA Chapter 10.

B.II.iv. As will be seen hereafter, the American continent is the cradle of the new conception to insert specific provisions on interim measures of protection, thereby derogating as *leges speciales* the general terms contained in the architecture of a multilateral treaty such as, for instance, the ICSID convention. As already mentioned, art. 47 of the latter expressly provides for a specific provision on an opt-out basis ("except as the Parties otherwise agree").

One further example of this phenomenon is given by the Canadian Model BIT. Canadian investment policy is developing through a web of substantially identical BITs which spread all over the world – as this is the very purpose of creating a model treaty – under Canada's Foreign Investment Promotion and Protection Agreements (FIPAs).³²⁶ Art. 43 of the Canadian Model FIPA deals with interim measures of protection:

"A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 22 (Claim by an Investor of a Party on its Own Behalf) or 23 (Claim by an Investor of a Party on Behalf of an Enterprise). For purposes of this paragraph, an order includes a recommendation".

Art. 43 confirms that a tribunal may not enjoin the application of a measure over which a dispute has arisen between the parties. Considering the identity of article 43 with the homologous provisions in the NAFTA, CAFTA and art. (8) of the 2004 U.S. Model BIT, the reader is referred to the appropriate sections of this inquiry.

³²⁶ For an appraisal, see LÉVESQUE, NEWCOMBE, *Canada*, in BROWN (ed.), *Commentaries* quoted *supra* footnote 311, 53 ff.

It is worth noting, however, that – contrary to what has been asserted by Lévesque and Newcombe commenting on this article³²⁷ – the last sentence which includes a recommendation within the range of measures which can be issued does not seem to simply “recognize” the existence of art. 47 of the ICSID convention (containing the expression “recommend”, whose evolutionary interpretation is disputed in the literature), but rather to specify that where the treaty is applicable both orders and recommendations can be granted.

Another Model Investment treaty – though it is not bilateral but trilateral – is constituted by NAFTA Chapter 11, with its art. 1134 on interim measures of protection.³²⁸

Finally, the 2012 US Model BIT,³²⁹ constituting to a certain extent the consolidation of the progress towards a more balanced approach to foreign direct investments,³³⁰ is relevant for this inquiry due to its art. 28(8), which reads as follows:

“A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation”.³³¹

The provision at issue, identical to the NAFTA Chapter 11 and the CAFTA Chapter 10 homologous norms on provisional measures, is nothing but another evidence of the political power exerted by the United States when negotiating, *inter alia*, these

³²⁷ See *supra* footnote 326, 123.

³²⁸ For a comment see *supra*, B.II.i. lett. d)

³²⁹ For a detailed comment on the 2012 Model BIT and description of the general framework, see CAPLAN, SHARPE, *United States*, in BROWN (ed.), quoted *supra* footnote 311, 755 and, particularly on the relevant provision on provisional measures, 831 ff.

³³⁰ Such a change in the 2004 US Model BIT, confirmed and consolidated in its 2012 version, was undoubtedly due to the new perspective of the United States appearing as respondents in investment treaty arbitration. For an outstanding account given by the chief US negotiator of investment agreements in the 80’s and 90’s, see VANDEVELDE, *United States International Investments Agreements*, Oxford, 2009, 25 ff.

³³¹ The 2012 US Model BIT is available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last accessed 30 October 2014).

international investments agreements. Due to said homogeneity, the reader is referred to the relevant sections of this inquiry.

B.II.v. On the issue concerning treatification / contractualisation, many facets can be put under scrutiny, as it constitutes a general phenomenon in international investment law and arbitration. However, though some common features will not be neglected here, it is deemed more appropriate to focus on their impact on provisional measures.

It has been seen above³³² that in the last twenty years the tendency to include procedural mechanisms and, in particular, norms on provisional measures in bilateral as well as multilateral treaties (derogating from the broader *chapeau* of the ICSID convention, art. 47 and art. 39 of the Arbitration rules) has started to increase in a certain area of the world. Such an area has contributed significantly to the evolution and consolidation of the field.

One may call such a tendency “treatification” of these measures, which acquire a significant bargaining power when the relevant treaty text is being discussed: generally speaking, capital-exporting countries shall tend to be more interested in the inclusion of extensive, binding and effective provisional measures, due to the fact that – with the significant exception of the *cautio iudicatum solvi* measure – the majority of provisional measures are requested by the claimant (i.e., the foreign private investor) against the respondent, i.e. the Sovereign; on the contrary, capital-importing countries – i.e., those which risk to become respondents in one of the disputes possibly arising out of the treaty at issue, have an interest in restricting its scope and effects.

The same opposition – negotiation is likely to manifest itself when a contract is being entered into between a private investor of a country which has ratified a BIT with its would-be host State and that host State: if provisional measures have not been addressed, treatified, in the BIT, there is still room for bargaining between the parties to an investor-State contract whose potential jurisdiction is already covered by the relevant BIT.

A question then arises: is contractualisation envisageable as far as provisional measures are concerned? The mere fact that so far practice have shown that parties to an

³³² B.II.iv.

investment contract generally do not address provisional measures specifically, preferring to refer to institutional rules or to those provided for by UNCITRAL, does not seem – at this provisional stage – to exclude theoretically such a development towards contractualisation. This theme will be further addressed in the following chapter.

2)

B.II.vi. Undoubtedly, institutional arbitration – i.e. international arbitration which is administered and conducted under the auspices of an arbitral centre, following the rules of procedure established thereby – constitutes an unconventional source in the framework of public international law. The reason for that lies in the nature and practice of these centres, which were created in order to meet the needs of international commercial operators in a rapidly more interconnected business world, namely the following:

- to seek an impartial dispute settlement mechanism, providing them with more guarantees than national courts potentially biased in favour of the company established in that national market;
- taking advantage of the power to determine the constitution of the adjudicating organ, to benefit from the specific knowledge of arbitrators of their choice;
- to have their disputes settled within a reasonable time;
- to avoid the public awareness – also known under the latin expression *strepitus fori* – of the existence of the dispute and the negative consequences thereof: in one word, confidentiality;
- as a consequence, to reduce the costs connected to an uncertain legal situation;
- considering the successful system created, *inter alia*, by the New York convention on the recognition and enforcement of foreign arbitral awards of 1958 – successful because of the great number of ratifications by which it was blessed – commercial operators realised that it was easier and more cost-efficient to have awards enforced than national

judgments. Thus, this reason is closely related to the second one in the complete process of the administration of justice.³³³

Therefore, international arbitration between two or more private parties is classified under the name of international commercial arbitration. This category shall be kept distinct from international investment arbitration which, as it has been demonstrated, is inscribed within the realm of public international law, whereas the former derives its nature from the area of private international law, with all the theoretical and practical consequences connected thereto.

Once again, short of desiring to justify and erect a wall of separation between public international law and private international law, it is nonetheless essential to distinguish the two areas due to the peculiarities of their essence and features. In relation to this inquiry, it is submitted that the comparative analysis that is conducted here as part of the two-fold differentiated approach shall not extend to the investigation on provisional measures in international commercial arbitration.³³⁴

At this point, given that institutional arbitration *mainly* serves the purpose of adjudicating disputes between private parties, that as a consequence it constitutes part of private international law and consequently that provisional measures adopted within this framework cannot be considered for comparative purposes with public-international-law settings, the question may arise as to why are they nonetheless comprised in this inquiry.

³³³ These reasons – which are listed herewith in the comparison international arbitrators / national courts – are constitute common features of arbitration *tout court*, both international and national. For a concise and clear example of this latter adoption see FUMAGALLI, *Le Emergency Arbitration Rules nel nuovo Regolamento di Arbitrato della Camera di Commercio Internazionale*, *Rivista dell'arbitrato*, Vol. 23, n. 3, 2013, 654: “Sotto il profilo della << critica >> del meccanismo arbitrale, infine, questo viene misurato, soprattutto in termini di efficacia, sulla scala di raffronto offerta dalla giurisdizione ordinaria. Infatti, proprio dal confronto con l'ordinario strumento di tutela dei diritti si giunge a riconoscere le peculiari caratteristiche che, normalmente, sono ricollegate alla messa in opera dell'arbitrato: neutralità, specializzazione, confidenzialità, flessibilità, rapidità”.

³³⁴ For an evaluation of the issue of provisional measures in international commercial arbitration I particularly benefited from the following studies: CARLEVARIS, *La tutela cautelare nell'arbitrato internazionale*, Padova, 2006; YESILIRMAK, *Provisional Measures in International Commercial Arbitration*, Leiden, 2005. However, their results, as well as the relevant case law, indicate that it does not seem to be appropriate to compare these two areas of international arbitration, given the peculiarities of the investment framework and the quality of the Sovereign, with all the implications which are further described here.

The reason lies in the adverb *mainly*, as the most successful institutions for administered international commercial arbitration are gradually becoming attractive *fora* also for State-private party arbitration: in this respect, distinguishing between arbitration based on commercial State contracts (which are outside the scope of the present inquiry for the reasons above stated) and investment treaty arbitration, it is noted that the latter shall be part of a comparative analysis as it is inscribed in public international law.

This group of institutional arbitrations finds its basis in arbitration clauses contained in a bilateral investment treaty, whereby the latter are presented as options. Such a phenomenon, by no means a novel one, is still minority in practice and to my knowledge cases of application of provisional measures in relation thereto have not come to surface yet; however, since the theoretical basis has been founded, it is deemed appropriate to take it into consideration, at least on the interpretation of the normative level.

Such an endeavour is here limited to the three main organs which are representative of this trend, in the idea that under these auspices arbitral case law will likely manifest itself in due course. Finally, it is submitted that the following arbitration rules on provisional measures, designed for international commercial disputes, may be subject to interpretation through slightly more deferential lenses when a mixed dispute is at play, at the same time abiding by a genuine principle of equality of the parties. This is made possible – as will be indicated – by the broad and flexible terms adopted.

Concluding on this point, it is deemed appropriate to argue that these sets of institutional arbitration may be considered as sources for the interpretation and application of provisional measures in public international law, insofar as the latter is limited to a deferential version in a comparative perspective.

a) The first arbitration rules under investigation in this respect are those of the International Chamber of Commerce (ICC) International Court of Arbitration.³³⁵

Art. 28 of the 2012 ICC arbitration rules³³⁶ provides that

“1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.

The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof”.

This provision substantially reproduces the terms of its antecedent, namely art. 23 of the rules. As it has already been underlined, no case law concerning the interpretation and application of this article has so far emerged in investor-State arbitration.³³⁷

The ICC framework adopts, as far as provisional measures are concerned, the principle of concurrent jurisdiction to issue these measures between the arbitral tribunal and the competent national court. In brief, this means that parties may choose to request interim protection either before the arbitral tribunal – if the *lex loci arbitri* allows the latter to

³³⁵ The literature commenting on the law and practice of the ICC is vast and highly qualified: see, *ex multis*, CRAIG, PARK, PAULSSON, *Annotated Guide to the 1998 ICC Arbitration Rules*, New York, 1998; BÜHLER, WEBSTER, *Handbook of ICC Arbitration*, London, 2008; for publications by the institution, GRIERSON, VAN HOOFT [eds.], *Arbitrating under the 2012 ICC Rules*, Alphen aan den Rijn, 2012; FRY, GREENBERG, MAZZA [eds.], *The Secretariat's Guide to ICC Arbitration*, Paris, 2012.

³³⁶ On 1 January 2012 a new set of ICC arbitration rules (available at the ICC institutional website: www.iccwbo.org) entered into force and substituted the 1998 arbitration rules. For comments to the new rules, see MAYER, SILVA ROMERO, *Le nouveau règlement d'arbitrage de la Chambre de commerce internationale*, *Revue de l'arbitrage*, 2011, 897 ss.

³³⁷ See, e.g., its lack of reference in the ICC International Court of Arbitration Bulletin, Vol. No. 22/Special supplement, 2011, Paris.

rule thereupon – or before the competent State court, namely that of the place in which the measure shall be enforced or that of the place which would be competent to decide the main claim in the absence of the arbitration agreement.

Various reasons may warrant a request from the latter, in particular when the arbitral tribunal is not yet constituted and the would-be applicant does not wish to have recourse to the pre-arbitral referee procedure, or in any other case in which the *imperium* of the State court seems to guarantee a better result in terms of effectiveness.

Concurrent jurisdiction is a common feature – as will be discussed more in detail hereafter – in institutional arbitration: ICC, LCIA, SCC and UNCITRAL all have such an element in common. ICSID arbitration – with its exclusive-jurisdiction principle, in combination with art. 26 of the convention, are an exception thereto, constituting – in this as in other respects – a clearly distinctive factor.

Turning back to ICC arbitration and the concurrent-jurisdiction principle and application, it has to be underlined that the latter has significant implications in connection with the way they are handled by the arbitral tribunal: indeed, it has to consider if it has the power to issue such measures. In this respect, it firstly assesses whether the agreement of the parties provides for this power to be exercised.

However, generally that agreement attributing or denying such power is silent thereupon.³³⁸ If this is the case, it takes into consideration the applicable ICC arbitration rules. According, to art. 24, paragraph 1 of the rules, the arbitral tribunal is attributed such power; however, in order to finally determine if it has the power in the specific case, the arbitral tribunal has also to consider the *lex loci arbitri*, which may deny it. Indeed, under some national legislations – namely, Argentina, China, Greece, Italy and Québec – the power to issue provisional and conservatory measures is reserved to national courts. At this point, the arbitral tribunal is confronted with a dilemma, which has been clearly described and discussed by Prof. Emmanuel Gaillard in the famous course that he delivered at the Hague Academy of International law in 2007, when he referred to three representations of international arbitration, of which the mono-

³³⁸ YESILIRMAK, *Interim and Conservatory Measures in ICC Arbitral Practice, 1999 – 2008*, 2011 ICC Bulletin quoted *supra* footnote 337, 7.

localising is on one side, the pluri-localising and the arbitral order on the other side in this respect.³³⁹

Para. 1 provides for the possibility to opt out of provisional measures in the agreement of the parties and contains a general reference to atypicalness of the measures (“any”). The second part of the paragraph gives discretion to the arbitral tribunal to require a security in order to cover the measure(s) granted.

Para. 2 contains the principle of concurrent jurisdiction, clearly distinguishing between the period in which the file has not yet been transmitted to the arbitral tribunal (when provisional measures can be more easily requested from the competent State court) and the subsequent period, wherein “appropriate circumstances” have to call for such a request.

It has to be noted that the 2012 ICC Arbitration Rules introduce a new instrument relating to provisional measures, when the arbitral tribunal has not yet been constituted and the circumstances require that provisional measures be decided upon on an urgent basis, namely the *Emergency Arbitrator Rules*. Art. 29 sets the characteristics of such a proceeding, whereby the ICC followed the general trend towards a more effective protection of the rights of the parties, a need which was strongly felt by the international business community. Its para. 5 provides that such a procedure is applicable only in regard to parties signatory, or successors thereto, of the arbitration agreement indicating that ICC arbitration rules shall govern the procedure. Professor Fumagalli explained that such a limitation produces the effect of excluding the applicability of such a procedure in investment treaty arbitration, precisely due to the lack of direct derivation of the power of the arbitral tribunal from the contractual agreement between the parties.³⁴⁰

³³⁹ Referring to anti-suit injunctions, GAILLARD, *Aspects philosophiques de l'arbitrage international* quoted *supra* footnote 309, 106 ff.

³⁴⁰ FUMAGALLI, *Le Emergency Arbitration Rules nel nuovo Regolamento di Arbitrato della Camera di Commercio Internazionale* quoted *supra* footnote 333, 660 f.: “In primo luogo, si prevede che la procedura si applichi solo nei rapporti tra soggetti che sono firmatari, o successori di firmatari, della clausola compromissoria per arbitrato CCI (art. 29, comma 5). Con tale limitazione si intende impedire il coinvolgimento nella fase pre-arbitrale di soggetti formalmente terzi rispetto all'accordo arbitrale, di cui si possa discutere (a vario titolo, quale il coinvolgimento nei negoziati o nell'attuazione del rapporto cui la clausola accede) l'attrazione in arbitrato, e dunque la qualità di parte dello stesso, e ciò per impedire che le complesse valutazioni che tale estensione richiede possano inficiare la pronta messa in opera delle regole sull'arbitrato di emergenza. Inoltre, per effetto di siffatta limitazione, rimane esclusa la possibilità che la procedura speciale possa essere messa in opera per tutti quegli arbitrati, soprattutto per gli arbitrati *treaty-based* in materia di investimenti, in cui il potere di giudizio degli arbitri non deriva direttamente da una clausola contrattuale che le parti abbiano sottoscritto”.

For this reason, the *Emergency Arbitrator Rules* fall outside of the scope of the present inquiry.

b) The LCIA is the oldest known continuously established international arbitration institution in the world.³⁴¹ It was created in 1892 as the “London Chamber of Arbitration” in order to solve business disputes between commercial operators desiring to continue their transactions, as in the traditional view of arbitration which no more constitutes an automatic feature in international arbitration today. In the words of Reynolds,

“Arbitration has to be perceived in the light of an amicable means of resolving the dispute. It is not to be treated in the strict adversarial battle sense which may have its place in the common law courts where the judges have considerable statutory and common law powers, whereas in arbitrations, to an extent, the arbitrator is at the mercy of the parties [...]. Success, therefore, for arbitration lies in the notion that the practical mechanism which neutralises the adversarial nature or tendency towards an adversarial entrenchment is the best means by which real arbitration can be utilised”.³⁴²

The LCIA framework differs in many respects from the International Court of Arbitration of the ICC. In particular, the LCIA Arbitration Court does not scrutinize draft awards before they are served with the parties thereto. Indeed, such a scrutiny, together with the Terms of Reference provided for by the ICC rules constitutes a peculiar feature of the ICC’s procedure.

The 1998 LCIA rules substituted those of 1985. The reason for such a general amendment was due to the entry into force of the 1996 English Arbitration Act.³⁴³

As a general remark, it has to be noted that parties, in practice, rarely determine in express terms the procedural rules they wish to have for regulating their potential dispute: normally, they refer to the institutional rules of an arbitral centre. Considering

³⁴¹ The International Court of Arbitration (until 1989 the Court of Arbitration) of the International Chamber of Commerce was created in 1923. See TURNER, MOHTASHAMI, *A Guide to the LCIA Arbitration Rules*, Oxford, 2009, 1.

³⁴² REYNOLDS, *Arbitration*, Lloyd’s of London, 1993, preface, vii f.

³⁴³ VEEDER, V. V., *London Court of International Arbitration – The New 1998 LCIA Rules*, YCA, 1998, 366.

the above, the drafters of rules for arbitral procedure may follow one of two paths: either they set a procedural rule – as, in our topic, concerning provisional measures – through a broad reference whose content will be conjugated and developed by the arbitrators in their practice (as is the case, for example, in the ICC), or instead set out a prescriptive list of types of measures and steps to be observed in order to give a guidance – and limitation – to the arbitral tribunal. In the absence of party agreement to the contrary, these provisions will be followed by the adjudicating organ. This second approach is followed by the LCIA rules,³⁴⁴ namely in article 25, which reads as follows:

“25.1 The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

(a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;

(b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and

(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

25.2 The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or counterclaimant in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards. In the event that a claiming or

³⁴⁴ The 2010 UNCITRAL rules follow – as far as *ad hoc* arbitration is concerned – a similar approach, influenced therein by the 2006 amendments to the UNCITRAL Model Law.

counterclaiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or counterclaims or dismiss them in an award.

25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2".³⁴⁵

As anticipated, it consists of a lengthy list of specific types of measures, steps and requirements to be observed. The power of the arbitral tribunal to issue interim and conservatory measures can be excluded; however, failing an agreement in this respect, they will be part of the prerogatives thereof. Undoubtedly, the exercise of such power will depend on the arbitration provisions contained in the *lex loci arbitri*.

The expression “on the application of any party” in paras. 1 and 2 seems to bar *proprio motu* measures.

Let. a) expressly provides for security for costs (*cautio iudicatum solvi*), lett. b) for orders aimed at preserving evidence and / or property related to the rights in dispute, lett. c) opens to atypical provisional measures and to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, adopting the same terms as section 39 of the 1996 English Arbitration Act.³⁴⁶

The relationship between art. 25 LCIA arbitration rules and section 39 of the 1996 English Arbitration Act lies in the fact that the latter confers to an arbitral tribunal having its seat in England the power to order these measures only if the parties have so agreed (opt-in), whereas through reference to the LCIA rules the parties indirectly manifest their agreement to opt-in, stating that such power is attributed except the parties agree otherwise (opt-out).

³⁴⁵ The LCIA Arbitration rules are available at <http://www.lcia.org>.

³⁴⁶ for a detailed account of the specific type of measure that can be granted, see KONRAD, HUNTER, *The International Comparative Legal Guide to International Arbitration*, eighth edition, Wien, 2011, 481 ff.

Art. 25, para. 3, expresses the principle of concurrent jurisdiction between the arbitral tribunal and State courts.

Concerning the enforceability of arbitral interim and conservatory measures, as distinguished from the more effective mechanism afforded by State courts which have *imperium*, this is limited to the drawing of adverse inferences.³⁴⁷

It has to be underlined that – as is the case for the ICC rules – the LCIA rules do not set any requirement for the issuance of provisional measures, leaving broad discretion upon the arbitral tribunal. Guidelines can be derived from art. 17 of the UNCITRAL Model Law or rather, as the thesis defended here, through reference (relating to investment treaty arbitration) to the trends in the overall jurisprudence in public-international-law adjudication, in particular, though of course not exclusively, to ICSID arbitration. The latter will be analysed in detail in the following chapter, which draws on the conditions, purposes and atypical measures issued under those auspices.

c) The 2010 Stockholm Chamber of Commerce Arbitration rules³⁴⁸ contain a provision on interim measures in art. 32, which reads as follows:

“(1) The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.

(2) The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.

(3) An interim measure shall take the form of an order or an award.

(4) Provisions with respect to interim measures requested before arbitration has been commenced or a case has been referred to an Arbitral Tribunal are set out in Appendix II.

(5) A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules”.

As in the LCIA rules, a *proprio motu* power seems to be excluded by para. 1 (“at the request of a party”). As in art. 28 of the 2012 ICC rules, the drafters of the SCC rules in para. 1 decided to provide for atypicalness in its broadest sense, i.e. in the second option referred to above.

³⁴⁷ TURNER, MOHTASHAMI, *A Guide to the LCIA Arbitration Rules* quoted *supra* footnote 341, 170.

³⁴⁸ Available at <http://www.sccinstitute.com/skiljedomsregler-4.aspx>.

Para. 2 refers to the power to order a *cautio iudicatum solvi* to be deposited by the applicant, with the purpose of covering the expenses related to interim measures which later may manifestly appear as not appropriate. The arbitral tribunal has wide discretion to order any interim measure and – *le cas échéant* – the appropriate security.

As to the force of the measures issued by the arbitral tribunal, the term “order” in para. 3 manifestly indicates their binding nature.

Finally, para. 5 concludes with the principle of concurrent jurisdiction between the arbitral tribunal and State courts of the place where the measures sought shall be enforced or of the place where the arbitral tribunal has its seat.

B.II.vii. The original 1976 UNCITRAL Arbitration Rules were revised in 2010, following the 2006 revision of the 1985 UNCITRAL Model Law.³⁴⁹ The 2006 revision replaced former Article 17 on interim measures with a new Chapter IV bis, establishing a comprehensive legal regime on interim measures in support of arbitration.

The UNCITRAL Working Group on Arbitration and Conciliation had drafted a revised version of the interim measures provision of the UNCITRAL Arbitration Rules, article 26.6., which represents a significant departure from the original UNCITRAL Rules. The 2010 rules are applicable to arbitration agreements concluded after the date of adoption of the revised version of the Rules; whereas the 1976 Arbitration Rules continue to apply to pending cases and, if the parties so wish, to cases initiated after the entry into force of the new Rules. The two sets of Rules are presented here since they are applicable to investor-State proceedings as long as no new set of rules specifically designed for this type of arbitration is elaborated. Article 26 of the 1976 UNCITRAL Arbitration Rules, entitled “Interim Measures of Protection”, reads:

“1. At the request of either party, the arbitral tribunal may take any interim measures it deems

³⁴⁹ The Working Group considered that the UNCITRAL Arbitration Rules were to be harmonized with the corresponding provisions of the Model Law only where appropriate and not as a matter of course (Report of Working Group II (Arbitration and Conciliation) on the work of its 45th Session, September 11–15, 2006, Vienna, A/CN.9/614, para. 104). Although it was generally of the view that a revision of Article 26 was needed to take into account the new provisions of the Model Law, the view was also expressed that the controversial provisions of Chapter IV should not be included in the Arbitration Rules, in order not to endanger their acceptability (*ibid.*). All the Working Group’s documents are available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

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

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

Article 26 of the 2010 UNCITRAL Arbitration rules reads as follows:

“1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied;
or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

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

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

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

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

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”³⁵⁰

As in the LCIA and SCC Arbitration rules, a *proprio motu* power of the arbitral tribunal to grant interim measures is excluded by the expression “at the request of a party” contained in para. 1. Furthermore, such a power is discretionary (“may”).

Para. 2 indicates the atypicalness of such measures (“for example and without limitation”, [emphasis added, *A / N*]).

³⁵⁰ The text of the 2010 UNCITRAL Arbitration rules are available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

In relation to the majority of the types of measures contained in the list, para. 3 provides for the substantive³⁵¹ conditions for the granting thereof, namely:

- risk of irreparable harm, with the addition of the balancing condition (proportionality);
- reasonable possibility of success on the merits, i.e. a high threshold of *fumus boni iuris*, as compared with the “plausible” test in ICJ jurisprudence.

A little, timid indication of *proprio motu* measures is provided for in para. 5 concerning the modification, suspension and termination of the measures already granted – though in exceptional circumstances – and in this sense it is submitted that the arbitral tribunal cannot exercise such a power when it deems it “appropriate”, but rather when it deems it “necessary”, due to the need to combine such choice with the exceptional circumstance (which is exceptional insofar as it makes it necessary for the organ to change the measures already granted).

The authority of a tribunal to order interim relief under the UNCITRAL Rules is subject to any mandatory rules of the national law applicable to the arbitration. Thus, the power of a tribunal to grant interim relief depends on the *lex arbitri* which as we have seen in few jurisdictions is reserved to State courts.

Like art. 32(2) of the SCC rules, para. 6 provides for the power to require that a *cautio iudicatum solvi* be borne by the applicant in order to cover the interim measure granted.

Para. 8 provides for the obligation incumbent upon both parties to cooperate and exchange information regarding the measure(s) granted for a potential change thereof.

Finally, para. 9 specifies the principle of concurrent jurisdiction to issue interim measures.

³⁵¹ Apparently, the jurisdictional condition of *prima facie* jurisdiction is not expressed in the text.

CHAPTER THREE

THE CURRENT STATE OF PROVISIONAL MEASURES IN INTERNATIONAL INVESTMENT ARBITRATION

Introduction. – Section one: specific features of provisional measures in international investment arbitration. A. Differences between ICSID and other investment arbitration *fora*: focus on the binding force of provisional measures. – B. Comparing ICSID with UNCITRAL investment arbitration: *exclusive v. concurring* jurisdiction between State court and arbitral tribunal in relation to norms and case law. – Section two: general features of provisional measures in investment treaty arbitration. A. Conditions. – B. Purposes. – C. Atypicalness. – Section three: looking beyond the current status. Treatification and contractualisation of provisional measures in international investment arbitration.

Introduction. The function of an introduction is, generally, to present the content of a given analysis. These lines are not an exception thereto: in brief, this chapter analyses the core of the whole doctoral thesis, namely the nature, practice and impact of provisional measures on international investment arbitration.

Before explaining the process, the additional preliminary exercise required here is to justify what may appear a rather irrational choice: indeed, while section one is devoted to two specific elements of said procedural instrument, the following section draws on its general features, thus creating a dynamic from specific to general. The reason behind this choice is to address at the outset legal force and jurisdiction to rule thereupon for their capacity to shed light on conditions, purposes and atypicalness: one may better understand the practical relevance of the latter after focusing on the value of the former. Section three addresses special situations related to provisional measures, meaning that in certain cases they are external to arbitration, as for instance anti-arbitration injunctions and court-ordered provisional measures entailing discriminatory treatment. Section four attempts at introducing future developments of this procedural instrument.

The absence – to date – of monographic studies on the topic under examination, coupled with the fact that it constitutes a ‘moving target’, makes the whole process more complex and stimulating.

In recent years we have witnessed a dramatic increase in investor-State claims under a plethora of international, national and transnational instruments: quite unsurprisingly, the number of requests for provisional measures has increased at an even higher rate, due to more lengthy and costly proceedings.¹

All such a huge, variable and – at times – inconsistent set of data had to be organised in order to attempt at drawing hypothetical lines of development and consolidation. It has to be said at the outset that these data have not been drawn into statistics, due to the doubtfulness and arbitrariness to which such an exercise would have risked to lead: indeed, very rare are the cases in which arbitral tribunals acceded to 100% of the requesting party’s claim (and equally rare are the opposite, i.e. 0%), since, in the striking majority of cases, arbitral tribunals accepted some requests while they rejected other ones and/or issued provisional measures different from those requested, but in many cases similar, ... and so forth.

Then, a question arises: if the requesting party files a request containing four different points and the arbitral tribunal grants only one out of four, should this request be considered as accepted? If yes, why? Or not? Again, if not, why? Should it be attributed 0,25 points or some other witchcraft? Can the value of a provisional measure be quantified? I have to disclose my deepest reservations about certain lines of research consisting in testing international investment arbitration awards and in deriving data from quantitative studies, such as the ratio of cases won/lost in relation to the total of cases filed (for example, in order to see whether ICSID arbitration is more favourable to host States or investors) and more refined studies which in any manner will fail to grasp the *nuance*, the hidden variable. These studies, craftily overdressed as “empirical”,²

¹ The relevance of this procedural instrument within the framework of international investment arbitration had been underlined by the chief counsel for claimant in the first ICSID case, namely Professor Pierre LALIVE, *The First ‘World Bank’ Arbitration* (Holiday Inns v. Morocco) – *Some Legal Problems*, 1 ICSID Reports, Cambridge, 1993, 654: “The magnitude and complexity of most international disputes, involving inescapably long periods of time before any decision or amicable settlement can be reached, give the question of provisional measures considerable significance”.

² See, for an example of this approach, FRANCK, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, Virginia Journal of International Law, Vol. No. 48, Issue No. 4, 2008, 767 ff.

seem to be inevitably oversimplistic, and still they are focused on awards! It would be even more misleading to apply the same type of doubtful method to such a fluid object as provisional measures.

Anyway, this analysis has been conducted through continuous tests on the ‘differentiated approach’ described in the previous chapter. However, it has been necessary to adapt the tool to a different environment, where history plays a less significant role and comparison is made in the same area, namely public international law. Indeed, the main structural thesis advanced in this study, the most significant empirical result of my provisional analysis – as far as the general framework is concerned – is that international investment arbitration is inscribed in public international law.

Short of addressing the topic of fragmentation / proliferation, which is outside of its purpose, it is nonetheless deemed appropriate to at least mention the necessity to refuse considering this branch as a *self-contained régime* and – more importantly – to continue testing the differentiated approach, so as to avoid normative dogmas. The enterprise shall not be taken for granted, since the unity of international law is experiencing many challenges at various levels,³ due to the activity of international organisations, regionalism, unilateralism and bilateralism. However, some studies are indicating that proliferation of adjudicatory organs in international law tends to a certain extent to lead to the apparently counterintuitive phenomenon of de-fragmentation.⁴

For the sake of clarity, it has to be noted that the notion of *self-contained régime* constitutes a valid description of ICSID arbitration only when referred to the integrity of the proceedings⁵ (for instance, as we will explore below, in relation to the exclusive jurisdiction enjoyed by arbitral tribunals to rule upon provisional measures) and other

³ See in particular SIMMA, PULKOWSKI, *Of Planets and the Universe: Self-contained Regimes in International Law*, European Journal of International Law, 2006, 483.

⁴ FAUCHALD, NOLLKAEMPER (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Oxford, 2014, 3 ff.

⁵ See Art. 26 of the ICSID Convention: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”. The text of the Convention and the relevant provisions related thereto are available at the ICSID institutional website: <https://icsid.worldbank.org>.

peri-arbitral issues⁶ characterising it as a delocalised mechanism. In any manner, this shall be distinguished from its theoretical foundation in the global sphere. In the words of Paul Friedland:

“All the same, ICSID arbitration is a self-contained system, established by treaty by the member States, and the Convention’s exclusive remedy rule reflects the need shared by both host states and foreign investors for international adjudication of potentially politically-tinged investments disputes without interference from the courts of the nation of either party (or of any other nation)”.⁷

Indeed, such attribution is nothing more and nothing less than an expression of the sovereign renunciation to have recourse to the institution of diplomatic protection⁸ and, to a more general extent, to reduce the impact of politically-oriented interference.

The theoretical purpose of this study is to explore the existing interrelationships between adjudicatory organs and their jurisprudences in the public-international-law framework – including investor-State dispute settlement – regarding provisional measures.

These measures constitute a significant indicator of the degree of jurisdictionalisation⁹ acquired by the ICSID framework, wherein it is more advanced than in international

⁶ On the contrary, post-arbitral issues, namely recognition and enforcement of the award, inescapably fall within the jurisdiction of State courts, i.e. those in which enforcement is sought by the winning party, due to the general lack of *imperium* of arbitral tribunals. However, the ICSID framework contains significant advancements towards effectiveness also in this regard, enshrined in Art. 54 of the Convention.

⁷ FRIEDLAND, *Provisional Measures and ICSID Arbitration*, Arbitration International, 1988, 342. See also VAN HOUTTE, BRUNETTI, *Investment Arbitration – Ten Areas of Caution for Commercial Arbitrators*, Arbitration International, Issue no. 4, 2013, 556.

⁸ According to Art. 27, para. 1, of the ICSID Convention, “(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute”.

⁹ The nexus between the power to rule upon provisional measures and the jurisdictionalisation of the arbitral tribunal as a construction in international commercial arbitration was illustrated by Professor Philippe Fouchard in the monograph resulting from his doctoral thesis, *L’arbitrage commercial international*, Paris, 1965, 121 f.: “Si un certain nombre d’institutions arbitrales, poussant fort loin leur << juridictionnalisation >> autorisent les arbitres à prendre eux-mêmes les mesures provisoires et conservatoires qui leur paraissent s’imposer, d’autres, parmi lesquelles il faut signaler la Chambre de commerce internationale, certaines institutions de l’Est, la Fédération internationale du commerce des semences et les *Règles de Copenhague* et l’*International Law Association* renvoient expressément les parties devant les tribunaux de l’ordre judiciaire pour toute mesure conservatoire ou provisoire” [footnotes omitted, A/N].

commercial arbitration and investment arbitration under non-ICSID *fora*, due to the treaty source upon which it is based. A manifestation of such increased jurisdictionalisation is given by the *exclusive-jurisdiction v. concurrent-jurisdiction* binomial, dealt with below.¹⁰

As a matter of fact, they constitute quite a new phenomenon in this area of arbitration. If we divide it chronologically into two periods, namely the “classical period” – from the 1930s until the ICSID and UNCITRAL started to blossom – and the contemporary one – running therefrom onwards, i.e. the last fifteen years –, we notice that in the first phase they are almost absent. One explanation may be that the possibility for a private investor to file an international claim against the host State, without the necessity of a “protector”,¹¹ yet constituted a significant step in the new conception of State sovereignty. Thus, the implementation¹² of provisional measures would have been an excessively audacious step forward.

Short of addressing in these lines such a complex issue as that of the proper formula for the transnational government and protection of outward investments, I nonetheless deem it appropriate to mention one of the most authoritative XIX-century publicists, Carlos Calvo. Indeed, he warned contemporary and future generations against the trend towards a differentiated protection of aliens in investment matters. Moreover, he strongly advocated national treatment of both foreign and national investors – the so-called *Calvo clause* – and adjudication by host State courts. The Argentinian scholar maintained that, in the absence of national treatment, two enormous inequalities and corresponding privileges would be perpetuated: an interior one, namely privilege for foreign investors, coupled with an exterior one, i.e. that of the powerful State upon the weak.¹³

¹⁰ See Section one, B.

¹¹ Reference is made to the institution of diplomatic protection, which accompanied the treatment of aliens since the inception of the modern era of international law.

¹² The very existence of the instrument may not be questioned even in relation to this early period, if it is accepted under the inherent-power theory as a normal attribution of any adjudicative organ.

¹³ CALVO, *Derecho internacional teórico y práctico de Europa y América*, Vol. 1, Paris, 1868, 387 f.: “Una de las cuestiones mas importantes de derecho internacional discutida en los tiempos modernos, es la referente á la responsabilidad que incumbe á los gobiernos por los daños y perjuicios que causen las facciones á los extranjeros. Es tal la importancia de este asunto, que su desenlace puede afectar no solo á los derechos internacionales de los Estados, sino tambien á la legislacion propia, exclusiva, particular de cada pueblo. Si se establece que lo son, se llegará bien pronto en la práctica á crear un privilegio absurdo y funestísimo á favor de los Estados mas poderosos y en contra de los débiles, ó que por circunstancias

This sovereigntist conception of FDIs contributes to the explanation of such a long resistance¹⁴ to employ provisional measures and to attribute them binding force, as we will see in this chapter, moving from a deferential attitude to a new conception of the relationship between the individual and the Sovereign.

Under this light, compliance with provisional measures can be considered, from a *macro* perspective, a thermometer of the state of health of international investment arbitration as an effective and respected dispute settlement mechanism, in the manichean struggle between communitarianism and individualism. Moreover, this procedural instrument constitutes a test bench of investor-State dispute settlement (ISDS) as it addresses and, at the same time, exacerbates the asymmetries of international investment arbitration in our times, in two respects:

- it attempts to limit State sovereignty on a provisional basis, since arbitrators are empowered to order the defendant State to freeze the impact of its own legislation on the claimant, its criminal or bankruptcy proceedings and other regulatory measures deemed – instrumentally or not – to serve the public interest;
- it shows its weakness in the necessity – lacking an advanced system of enforcement – of State’s own compliance for the engine to function, or at least all the set of liquid constraints, as we will see in the final chapter (IV).

especiales no hayan podido consolidar su situación política: y no escucharían nunca las reclamaciones que bajo este respecto les hicieran los segundos teniendo estos, en cambio, que atender y cumplir las suyas, como ha sucedido en más de una ocasión con las indemnizaciones pedidas por algunos gobiernos de Europa a los Estados suramericanos. Mas no supondría solamente lo que acabamos de decir, sino que equivaldría a conceder un privilegio injustificable a favor de los extranjeros y contrario a los naturales. Si estos no tienen derecho alguno a exigir que se les resarza de los daños y perjuicios que hayan sufrido, cómo han de tenerse los demás? La consecuencia inmediata, ineludible, de reconocer semejante principio sería el sostenimiento de dos grandes desigualdades y dos enormes privilegios: una interior, privilegio de los extranjeros, y otra exterior, que lo sería del Estado más fuerte”.

¹⁴ The resistance to enter this “new” era of mixed dispute settlement had two facets, procedural and substantive: as sketched in the first chapter, while the first one was overcome through the general adoption of the ICSID framework from 1965 onwards, agreement on the substantive regulations of foreign investment is still lacking, despite numerous attempts to embody it in a multilateral convention, such as in recent years the “Multilateral Agreement on Investments” (MAI). Quite curiously indeed, this acronym reads “never” in the Italian language: perhaps it gives an indication of the feasibility of such an agreement.

Furthermore, recourse to provisional measures gives relevant indications also from a *micro* perspective: indeed, the outcome of the request for these measures allows the parties to better realise elements of strength and weakness of their respective cases as provisionally evaluated by the arbitral tribunal. Therefore, it influences their strategy for the next moves.¹⁵

Another hint of the accrued relevance of provisional measures is the geographical enlargement of international investment arbitration as a dispute settlement mechanism regarding FDIs to regions which were traditionally cold in this respect. As an example, I refer here to MERCOSUR member States, namely Argentina, Brazil, Paraguay, Uruguay and Venezuela. Indeed, recently MERCOSUR Common Market Council adopted Decision No. 30/10 providing the premise for an upcoming agreement on investments.¹⁶ The text highlights the relevance of two frameworks – one concerning intra-regional investments, the other relating to extra-regional investments – for the development of the internal common market in the region, in line with the purposes of MERCOSUR since the adoption of its founding instrument, namely the Treaty of Asunción in 1991.¹⁷ Specialised legal literature has indicated the path which will likely be followed in this process, namely basing the new model on the investment chapter of NAFTA – Chapter 11 – or the model BITs implemented by the United States and Canada.¹⁸ These instruments, and in particular the special place they attribute to provisional measures, contributing to the recent phenomenon of treatification thereof,¹⁹ showcase the vitality of our topic and provide avenues for development which are worth mentioning.²⁰

¹⁵ A similar point, though more broadly referred to the whole adjudicating process, was made by Professor Pierre LALIVE, *The First 'World Bank' Arbitration* quoted *supra* footnote 1, 645 f., when he stated that international arbitration “normally enables the parties to obtain, in the course of time, a clearer perception of the merits and demerits of their respective cases and arguments”.

¹⁶ CMC, Dec. No. 30/10, Preamble, paras. 1-2, 16 December 2010. On international investment law in the framework of MERCOSUR, see – *ex multis* – SUÑÉ, CARVALHO DE VASCONCELOS, *O direito dos investimentos no MERCOSUL: realidade e possibilidades*, in ROSADO DE SÁ RIBEIRO (org.), *Direito internacional dos investimentos*, Rio de Janeiro, 2014, 159 ff.

¹⁷ Treaty of Asunción, 26 March 1991, 30 ILM 1041 (1991).

¹⁸ See FRY, STAMPALJA, *Towards an Agreement on Investment in Mercosur: Conflict and Complementarity of International Investment Law and International Trade-in-Services Law*, *Journal of World Investment and Trade*, Vol. No. 13, 2012, 557 f.

¹⁹ See *supra*, chapter two.

²⁰ See *infra*, Section three.

Paraphrasing Professor Gaillard, who aptly says that “arbitration is a mechanism with teeth”,²¹ I venture to submit – and try to demonstrate in this chapter and the following one – that provisional measures are its *front teeth*.

Short of adopting a definitive position on the role of arbitral tribunals²² and the use of precedents in international investment law,²³ I shall try to contain my research to the analysis of the current status of provisional measures in this field; at the same time, I feel compelled to observe that it contains each and every tension that international law is going through in this period. Arguably, it gives an even stronger indication that this area of law is inscribed within the public-international-law framework. I refer in particular to the dualism between autonomy and community in the international legal project, considering that international law constitutes a structure that expresses the victorious social demands at a given moment of the world order. Martti Koskenniemi made this point very clearly in a passage of his masterpiece *From Apology to Utopia*, reading as follows:

“It [the international legal project, *A/N*] describes social life among States alternatively in terms of community and autonomy. These descriptions support conflicting demands for freedom and order. In the one case, community is interpreted as negative collectivism and autonomy (independence, self-determination) is presented as the normative goal. In the other, autonomy is interpreted as negative egoism and community (integration, solidarity) as what the law should

²¹ Economist, *Now Try Collecting*, article on this summer’s 50bln-award in the *Yukos* case, published on 2 August 2014, whose first lines read as follows: “Russia breached its obligations under an energy treaty when it seized the assets of Yukos in 2006; so it must pay the former oil giant’s majority shareholders \$50 billion. The award, made on July 28th by an international arbitration court in The Hague, was 20 times the previous record for such a case. The investors’ lead lawyer, Emmanuel Gaillard of Shearman & Sterling, says it shows that arbitration is “a mechanism with teeth””.

²² It is worth recalling here the advice to commercial arbitrators venturing in the investment field, which is characterised by a stronger necessity to build up its framework, whereby “the prudent commercial arbitrator venturing into investment arbitration territory should never lose sight of the public-order aspect of this type of arbitration”, in VAN HOUTTE, BRUNETTI, quoted *supra* footnote 7, 574; see also STONE SWEET, *Investor-State Arbitration: Proportionality’s New Frontier*, Yale Law Faculty Scholarship Series - Paper 69, 2010, 9: “If the arbitrator is not merely the Agent of two contracting Principals, but an Agent of the greater community, then one might ask if (or assume that) the arbitrator has a responsibility to take into account the community’s interests in decisions. There exists a great deal of evidence showing that this is, in fact, happening. More and more decisions are being published, and certain kinds of decisions are treated by subsequent litigators as having precedential value. Scholars refer to the emergence of an “arbitral common law,” tailored to the needs of specific categories of traders, built as the common law has traditionally been built, through reasons given that subsequently congeal as precedent”.

²³ On the *de facto* doctrine of precedents in international investment arbitration see, *ex multis*, DI PIETRO, *The Use of Precedents in ICSID Arbitration: Regularity or Certainty?*, International Arbitration Law review, Vol. no. 10, 2007, 96.

aim at. Neither community nor autonomy can be exclusive goals. To think of community as the ultimate goal seems utopian: as there is no agreement on the character of a desirable community, attempts to impose it seem like imperialism in disguise. To think of autonomy as the normative aim seems apologist: it strengthens the absolutist claims of national power-elites and supports their pursuits at international dominance”.²⁴

The autonomy/community opposition, reminiscent of the *ius positum / ius naturale* confrontation of mindsets, throughout the second half of the XIX century and the first half of the XX century, finds its way within the international investment framework: such a global law setting seems to be precisely at a crossroads between the two systems, the Charter system and the Westphalian system. The opposition between the two models in the investment arena guarantees their mutual legitimacy: the horizontal, Westphalian-system, sovereignist, case-by-case approach exists and perpetuates itself precisely as a reaction to the vertical, Charter-system, solidarist, general-framework one. And every arbitral panel may constitute the theoretical battlefield between these two representations.

²⁴ KOSKENNIEMI, *From Apology to Utopia*, Cambridge, 2005, 476.

Section one: specific features of provisional measures
in ICSID arbitration

A. Differences between ICSID and other investment arbitration *fora*: focus on the binding force of provisional measures

I. ICSID arbitration. – II. Other investment arbitration *fora*.

A.I. The binding *versus* recommendatory force of provisional measures constitutes the *noyau dur* of our topic, as the impact of such instrument on the arbitral procedure depends thereupon.

It shall be said that a clear-cut distinction will be drawn between the analysis of the force of such measures and their enforceability.²⁵ Indeed, one thing is to evaluate that they may lack binding force, whereas quite another is to affirm that such measures are not enforceable without voluntary compliance of the State (incidentally, I do not share either of the two assumptions, for the reasons presented in this chapter): the two analytical plans shall not be mixed up.²⁶ My point is that the deepest fallacies and obstacles to the evolution of provisional measures, in contexts where *imperium* is

²⁵ See, in this sense, BOSCO LEE, ALVES, *Arbitraje y medidas cautelares en Latinoamérica*, in GAILLARD, FERNÁNDEZ ARROYO (dir.), *Cuestiones claves del arbitraje internacional*, Bogotá y D.C., 2013, 113: “El poder de conceder medidas cautelares proviene del propio poder de jurisdicción del árbitro. Sin embargo, como el árbitro está desprovisto del poder de *imperium*, durante mucho tiempo se entendió que el tribunal arbitral no podía ordenar medidas cautelares. Ese razonamiento es totalmente equivocado pues la falta de *imperium* implica la imposibilidad del tribunal arbitral de ejecutar las medidas cautelares, pero no excluye su competencia para conocer sobre el pedido de urgencia, que está directamente conectado a su poder de conducción del procedimiento y de juzgar el fondo de la controversia” [footnotes omitted, A/N]; ORREGO VICUÑA, *The Evolving Nature of Provisional Measures*, in FERNÁNDEZ BALLESTEROS, ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, Madrid, 2010, 950: “[...] it is appropriate to make the distinction between the question of the binding nature of the measures adopted and that of their enforceability”.

²⁶ For an example of mixing up of the two analytical plans, see *RSM v. Saint Lucia*, Decision on Saint Lucia’s request for security for costs dated 13 August 2014, paras. 49-50: “Despite the wording of the cited provision that indicates that the Tribunal may (only) “*recommend*” provisional measures, it is well settled among ICSID tribunals that such decisions are binding. Accordingly, the term “*recommend*” is to be understood as meaning “*order*”. 50. However, the distinction between a “*recommendation*” and an “*order*” in connection with provisional measures remains a theoretical rather than a practical issue. Irrespective of this distinction, provisional measures issued by an ICSID tribunal do not have a binding effect in terms of being enforceable (*e contrario* Article 54(1) ICSID Convention). Hence, the question whether the Tribunal “*recommends*” or “*orders*” provisional measures is in any case irrelevant for the nature and effect of the respective measure. However, a tribunal can draw negative inferences from the non-compliance with provisional measures” [footnotes omitted, A/N].

lacking, consist precisely in the confusion between said two plans. This attitude may be due to excess of realism – bordering nihilism – and in any case shall be avoided.

Undoubtedly, there exists a connection between the two plans, since only binding measures can be enforced; indeed, the fallacy consists precisely in the adoption of plan two (enforcement) to describe plan one (legal authority). Besides, measures to enforce provisional orders are available, as will be indicated in the last chapter of this study.²⁷

The case law of ICSID tribunals has been evolving from a deferential attitude towards the parties – in particular towards the State, for obvious reasons – to a more assertive and firm stance, as its jurisdictionalisation has gradually been achieved. The first ICSID case, *Holiday Inns v. Morocco*, was characterised by a particularly cautious approach. In 1966, an agreement was entered into between the Government of Morocco and the American group Holiday Inns for the construction of four hotels in order to contribute to the development of organized tourism and group travel in the country. Some conflicts arose in relation to the implementation of the project due to alleged delays and cessation of payments and, on 22 December 1971, the Claimant filed a request for arbitration under the arbitral clause contained in the investor-State contract, providing for ICSID arbitration.²⁸ The issue of provisional measures appeared on the ICSID stage at its very first act, namely the first session of the first arbitral proceeding:²⁹ counsel for Claimant made an oral request and was invited by the arbitral tribunal to make a written submission. On 12 May 1972, Claimant submitted a request for provisional measures asking the tribunal to direct Respondent to discontinue local proceedings the latter had instituted in January that year for the appointment of a judicial administrator to maintain the hotels under operation. The request aimed at safeguarding the integrity of the proceedings, according to Art. 26 of the ICSID Convention which provides for the rule of exclusivity, failing a written agreement to the contrary between the parties. It relied on

²⁷ Concern about the risk of mixing up the two plans warranted keeping the division between issuance and enforcement of provisional measures in two distinct chapters.

²⁸ No data are available in the ICSID institutional website, therefore all relevant pieces of information about the proceedings are drawn from Professor Lalive's account in his article *The First 'World Bank Arbitration'* quoted *supra* footnote 1.

²⁹ For an account of the first session see LALIVE, P., quoted *supra* footnote 1, 655.

“The principle universally admitted 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 may aggravate or extend the dispute”.³⁰

It shall be noted that the classic provisional measures directing one or more parties to abstain from measures likely to aggravate or extend the dispute aims at two goals, in favour of two different actors in the arbitral scene: 1) the requesting party, which would otherwise be affected by the conduct of its opponent and 2) the arbitral tribunal itself, whose authority risks being undermined and its adjudicative task complicated if said conduct keeps on being carried out.

On 2 July 1972, the arbitral tribunal handed down its decision, described as “a strong one on the legal principles involved while *in concreto* extremely prudent (some would even say timid)”.³¹ Indeed, it firmly asserted its jurisdiction to issue provisional measures in principle, whereas in that particular case it appeared reluctant to affirm its authority with regard to a Sovereign State, inviting the parties to abstain from acting in a manner incompatible with the upholding of the contract, to exchange information concerning the activities of the hotels and to consult each other in order to maintain the character of the overall enterprise.³²

Subsequent cases of ICSID’s early period confirmed such a deferential attitude concerning the legal authority of provisional measures.³³

³⁰ *Ibid.*, 656. The author also referred in this respect to two cases analysed in chapter two, namely *Electricity Company of Sofia and Bulgaria* case before the PCIJ and the *Case concerning US Diplomatic and Consular Staff in Teheran* before the ICJ.

³¹ *Ibid.*, 658. Professor Lalive cited in full the decision, reported here: “The Parties were in agreement to recognize before the Tribunal that at the date of this Decision contractual relations remain in existence between them based on a series of commitments the foundation of which apparently is the Contract of December 5, 1966. It follows that the Parties are under an obligation to abstain from all measures likely to prevent definitely the execution of their obligations. The Tribunal therefore considers that it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute”. It is noted that the arbitral tribunal upheld a very low threshold as far as the jurisdictional requirement to issue provisional measures is concerned (an implicit one), even lower than the one adopted in the ICJ *Anglo-Iranian Oil Co.* case.

³² *Ibid.*, 658 f.

³³ See, e.g., *Vacuum Salt v. Ghana*, Decision on provisional measures dated 14 June 1993.

In order to address this point, it is necessary to start from the conventional text. As already indicated, the term “recommend” is adopted in art. 47 of the ICSID Convention, which reads as follows:

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party”.

Following the objective interpretation of the ordinary meaning of the treaty text pursuant to Art. 31, para. 1, of the VCLT, one may be inclined to dismiss *in limine* the issue, concluding that ICSID arbitral tribunals are not empowered to issue binding provisional measures. Additionally, may I refer to the *travaux préparatoires* of the Convention:³⁴ indeed, the Working Paper, the Preliminary Draft and the First Draft provided for the arbitrators’ authority to *prescribe*³⁵ provisional measures.³⁶ As noted in Professor Schreuer’s Commentary, the delegate from China opposed such an extended power, due to the concern that the State party to the dispute might be unable to abide by the provisional measures prescribed for reasons of “necessity on national policy”.³⁷ Following a vote thereupon, the term “recommend” substituted the term “prescribe” by a large majority.³⁸

Under these circumstances, *le débat est clos*. Indeed, one may fail to understand a departure from such a clear meaning of the treaty text and its drafting history: consequently, any decision issued by an ICSID arbitral tribunal whereby provisional measures are *ordered* would be dismissed as having manifestly exceeded its power. However, despite the aforesaid limitation, ICSID arbitral tribunals developed a very interesting jurisprudence in this regard.

³⁴ For a thorough analysis of the drafting history of the Convention in relation with provisional measures, see BROWER, GOODMAN, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings*, ICSID Review – FILJ, 1991, 440 ff.

³⁵ It has been indicated in Chapter two that the term “prescribe” was adopted – and still applies – in Art. 290 of the UNCLOS.

³⁶ World Bank Publication, *History of the ICSID Convention*, Vol. No. 1, D.C., 1970, 206.

³⁷ SCHREUER *et al.*, *The ICSID Convention. A Commentary*, second edition, Oxford, 2009, 764 (referring to the *History* quoted *supra*, footnote 22, Vol. No. 2, 515, 518, 655, 813).

³⁸ *History* quoted *supra* footnote 22, Vol. No. 2, 814 ff.

The first case in the ICSID framework where the word “recommend” was explicitly deemed to be of equivalent value to the word “order” was *Maffezini v. Spain*.³⁹ It can tentatively be affirmed that the nature of the party requesting a provisional measure – the State – and the type of measure requested – security for costs⁴⁰ – may have had an impact on the arbitral tribunal’s decision to increase its legal authority, in relation to the then prevailing jurisprudence. This decision was harshly criticised: indeed, one of its most delicate comments was that the *Maffezini* case evidenced that “this concern of the drafters of the Convention [i.e., to avoid attributing binding force to ICSID arbitrators’ provisional measures, *A/N*] was set aside by less respectful ICSID tribunals”.⁴¹

However, it has to be inserted in a broader context, in which dates and the temporal succession of events play a significant role. One year before said decision, the ICJ developed its jurisprudence in the same respect, delivering an indication of provisional measures whereby the United States were ordered to halt the procedure which would lead to the execution of a Paraguayan citizen named Breard.⁴²

It is noted that the Court was induced to increase the degree of its power due to obvious humanitarian reasons, since in this case – followed within a period of less than five years by the *La Grand*⁴³ and *Avena*⁴⁴ cases – human life was at stake.⁴⁵ This episode

³⁹ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID case No. ARB/97/7, Decision on Provisional Measures dated 28 October 1999, para. 9 (reported in Spanish, as it is the only official version): “9. Si bien existe una diferencia semántica entre la expresión “recomendar” empleada en la Regla 39 y la expresión “dictar” utilizada en otras partes de las Reglas para describir la facultad del Tribunal para exigir a una parte que realice una acción determinada, dicha diferencia es más aparente que real. Incluso debe observarse que el texto de esa Regla en castellano utiliza, además, la expresión “dictación”. El Tribunal no considera que las partes en el Convenio hayan querido establecer una diferencia substancial en el efecto de estas dos palabras. La autoridad del Tribunal para decidir sobre la adopción de medidas provisionales no es menos obligatoria que la de un laudo arbitral definitivo. Por consiguiente, para los efectos de la presente Resolución Procesal, el Tribunal estima que la palabra “recomendar” tiene un valor equivalente al de la palabra “dictar” (italics added, *A/N*). In its most relevant part, the unofficial English version reads: “[...] the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order’”. As already indicated, all references to the text of the ICSID cases are available at the ICSID institutional website.

⁴⁰ *Ibid.*, para. 2: “2. Concretamente, el Demandado ha solicitado al Tribunal que exija al Demandante que constituya una garantía o caución o suscriba otro instrumento con similar finalidad, por el monto de las costas en que se prevé que incurrirá el Demandado para su defensa ante esta acción”.

⁴¹ FORTIER, *Interim Measures: An Arbitrator’s Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation dated 16 June 2008, New York, 6.

⁴² *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Provisional Measures, Order of 9 April 1998*, *ICJ Reports 1998*, 248 ff., (see in particular paras. 36 and 41).

⁴³ *La Grand* case (Germany v. United States), *ICJ Reports 2001*, 466, 501, para. 101.

⁴⁴ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Provisional Measures, Order of 5 February 2003*, *ICJ Reports 2003*, 77 ff., para. 59.

⁴⁵ See *supra* chapter two, B.I.viii.

manifests that ICSID arbitral tribunals are constantly – and to an increasing pace – influenced by the construction of public international law as interpreted and applied by the ICJ. Such a judicial borrowing, so far unilateral,⁴⁶ contributes to giving evidence – if need be – that the two “systems” constitute a single legal order, wherein the investment framework differs *ratione materiae*, on the adjudication mechanism and so forth, but still within the same set of applicable rules and procedural settings. The analysis of such cross-fertilisations contributes to a better understanding of the special features of international investment arbitration – as distinguished from international commercial arbitration – in three steps:

- the mixed system of dispute settlement as far as parties are concerned (private / public; private / private) alters the normative setting;
- exclusive and contractualistic adherence to the treaty text is unable to properly address such variances;
- investment arbitration is inscribed in the public-international-law framework.

In addition, the precise meaning of the *travaux préparatoires* has to be explained in more details. Indeed, the debate about the binding or recommendatory force of provisional measures was determined by an external factor, namely the opportunity to incorporate decisions granting provisional measures in the form of an interim award, for the purpose of enforcement. Eventually, the latter option was rejected and the legal authority of said decisions reduced.⁴⁷ It is easily to perceive once again the confusion between the plan of the legal authority of provisional measures and that of their enforcement. Curiously indeed, the same dynamic occurred in the debate upon the establishment of the PCIJ, where eventually the term “indicate” substituted the term

⁴⁶ On the issue of one-way reference by ICSID tribunals to the jurisprudence of the ICJ, see PELLET, *The Case Law of the ICJ in Investment Arbitration*, The 2013 Lalive Lecture, ICSID review, Vol. no. 28, Issue no. 2, 2013, 223 ff.

⁴⁷ *History* quoted *supra* footnote 22, Vol. No. 2, 338 ff. See also FRIEDLAND, *ICSID and Court-Ordered Provisional Remedies: An Update*, *Arbitration International*, Vol. No. 4, 1988, 163; SCHREUER, quoted *supra* footnote 37, 765 f.; ORREGO VICUÑA, quoted *supra* footnote 25, 950.

“order”.⁴⁸ Therefore, the drafting history of the *recommend – order* binomial is to be read as favouring the interpretation of the binding legal authority of provisional measures, to which nobody within the Drafting Committee had objected.

Other references are contained in its ancillary instrument, namely the Arbitration Rules, adopted by the Administrative Council of the Centre according to Art. 6, para. 1 lett. c of the ICSID Convention: Art. 39 provides that

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

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

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

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

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

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

⁴⁸ See *Documents concerning the Works of the Committee of Jurists*, 1920, 278, referred to in Chapter two, B.II.i lett. a).

In this regard, it has to be noted that the term *recommend* is contained in paragraphs 1, 3 and 4, i.e. in the early provisions; instead, in the other two paragraphs (paragraph 5, inserted in 2006; paragraph 6, inserted in 1985) there is no such reference. On the contrary, paragraph 6 adopts the term *order* in relation to domestic courts, to which the parties may have recourse with requests for provisional measures (provided the existence of an earlier written agreement to that effect). I consider such insertions as a further evidence of the evolution towards the binding force of ICSID provisional measures, for the following reason: the different quality of *imperium* may otherwise produce a harmful effect to the general framework of this dispute settlement mechanism.

If taken at its face value, it would imply that in the context of concurrent jurisdiction, the ICSID arbitral tribunal would lack the power to order a modification or cessation of court-ordered provisional measures; consequently, a serious threat to the integrity of proceedings and to the very adjudicatory function of the arbitral tribunal would arise: the arbitral tribunal would be subordinated to the authority of domestic courts in relation to fundamental aspects of fair administration of justice, such as the handling of evidence, security for costs, and so forth. This would manifestly run contrary to the necessity of ICSID tribunals to avoid external, potentially politically-biased, interference, namely the purpose for which the ICSID dispute settlement mechanism was created. It would lead to an absurdity and, consequently, allows a harmonising interpretation: at least since the moment when the rule was introduced, twenty years after the Convention and the original Arbitration Rules, ICSID arbitral tribunals are empowered to order provisional measures.

Furthermore, it is relevant to consider art. 47 of the ICSID Additional Facility (AF) Arbitration Rules,⁴⁹ providing for both orders and recommendations:

⁴⁹ On 27 September 1978, the Administrative Council of the Centre authorized the Secretariat to administer at the request of the parties concerned certain proceedings between States and nationals of other States falling outside the scope of the ICSID Convention. It concerns three groups of proceedings: 1- conciliation or arbitration proceedings for the settlement of investment disputes arising between parties one of which is not a Contracting State or a national of a Contracting State; 2- conciliation or arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not directly arise out of an investment; 3- fact-finding proceedings.

- (1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.
- (2) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.
- (4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

The origin of these Rules prevents an automatically analogic reading of its text in combination with the ICSID Convention and Arbitration Rules; however, it constitutes a relevant element in the appropriate construction of the evolving nature of arbitrators' interim powers. These indications shall be inserted in the broader context of public-international-law adjudication, comprising the practice of the ICJ, ITLOS, ECtHR and Iran-US Claims tribunals. Moreover, so far parties to ICSID arbitration have never raised on this aspect the issue of manifest excess of powers as a ground for annulment pursuant to Art. 52, para. 1, lett. b, which may be considered as a further element of acceptance of arbitrators' binding power.

Arbitral tribunals in recent cases do not even feel the necessity to refer in detail to earlier cases in order to establish their binding power: for example, the ICSID tribunal in *Tethyan Copper v. Pakistan*, immediately after quoting Art. 47 ICSID Convention, affirms in the same paragraph that “thus, there is no question that the Tribunal has the authority to order provisional measures to preserve a party's right”;⁵⁰ however, it is worth mentioning that the tribunal in *Perenco v. Ecuador* referred to ICSID tribunals'

⁵⁰ *Tethyan Copper v. Pakistan*, ICSID case no. ARB/12/1, Decision on Claimant's request for provisional measures dated 13 December 2012, para. 114 (see also para. 120, on the fact that the power to order provisional measures is *generally recognized*); see also *Tokios Tokeles*, ICSID case no. ARB/02/18, Order no. 1 on Claimant's request for provisional measures dated 1 July 2003, para. 4.

inherent power, coupled with a vast collection of precedents in public-international-law adjudication.⁵¹

A.II. Art. 26 of the 2010 UNCITRAL Arbitration Rules provides for interim measures, an expression analogous to that of *provisional measures* in the ICSID framework. This version has been significantly expanded in comparison to the corresponding article in the 1976 UNCITRAL Arbitration Rules. James Castello, who actively participated in both working groups that carried out the reform of the UNCITRAL Arbitration Rules and the Model Law,⁵² explained that the main reason consisted in the necessity to seek cooperation from domestic courts where said measures had to be decided upon and/or enforced and to their idiosyncrasy to do so if the scope of the arbitrator's power was broad (since they read it as unclear).⁵³

Conditions, purposes and atypicalness of provisional measures are contained, respectively, in paragraph 3,⁵⁴ paragraph 2 letters (a)-(b)-(c)-(d)⁵⁵ and paragraph 2, alinea 1.⁵⁶

The binding force of interim measures is not expressly affirmed in the first paragraph in a clear form: indeed, the arbitral tribunal may *grant* interim measures; however, paragraph two contains a description of what an interim measure is, specifying that the tribunal *orders* said measure. The form in which the measure is granted – be it an award

⁵¹ *Perenco v. Ecuador*, ICSID case no. ARB/08/6, Decision on provisional measures dated 8 May 2009, paras. 67-77.

⁵² Art. 17 of the Model Law deals with interim measures.

⁵³ CASTELLO, *Generalizing about the Virtues of Specificity: The Surprising Evolution of the Longest Article in the UNCITRAL Model Law*, *World Arbitration and Mediation Review*, 2012, 7; CASTELLO, *Unveiling the 2010 UNCITRAL Arbitration Rules*, *Dispute Resolution Journal*, 2010, 21.

⁵⁴ “The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

⁵⁵ “(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute”.

⁵⁶ “2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, *for example and without limitation*, to: [...]” [italics added, A/N].

or an order – may have an impact on its enforceability, not – it is worth repeating the point – on its binding force, which appears to be stronger than its counterpart in the ICSID framework.⁵⁷

The form containing a decision on interim measures is not provided for in Article 26. Undoubtedly, interim measures issued in the form of awards are more likely to be enforceable than orders, since the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards only refers to “awards”.⁵⁸ A reason for such a reticence with regard to the form of the decision on interim measures was due to the fact that, since awards are final, this element would run contrary to the typical provisional and modifiable character of interim measures, able to lead to some confusion in connection with Art. 26, para. 5.⁵⁹ According to Caron and Caplan, such a view is “overly formalistic”, since there is no discussion on the fact that interim measures can be granted in the form of an award.⁶⁰

In some cases, the text of the applicable treaty can shed some light on the point of the binding force: it constitutes one of the manifestations of the phenomenon called *treatification* of provisional measures, where the treaty plays the role of *lex specialis* in relation to the relevant arbitration rules (ICSID, UNCITRAL, and so forth); said phenomenon will arguably become increasingly relevant in future treaty negotiations and, consequently, arbitrations. An example in this sense has been given by the *EnCana Corp. v. Government of Ecuador* case.⁶¹ Claimant sought interim measures to prevent freezing of assets of EnCana subsidiaries and its legal representative pending arbitration. Two different provisions dealt with interim measures: the UNCITRAL Arbitration Rules (in particular, the 1976 version) and Art. XIII(8) of the applicable BIT, namely the one between Canada and Ecuador. Art. XIII(8) provides:

⁵⁷ VOLTERRA, *Provisional Measures (Interim Measures) and Investment Treaty Arbitration under ICSID and UNCITRAL: developments and Trends*, in BJORKLUND, LAIRD, RIPINSKY (eds.), *Investment Treaty Law. Current Issues III*, BIICL, London, 2009, 23 f.

⁵⁸ See CARON, CAPLAN, *The UNCITRAL Arbitration Rules. A Commentary*, second edition, Oxford, 2013, 524.

⁵⁹ Art. 26, para. 5, reads: “The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative”. See UNCITRAL, 47th Session, UN Doc. A/CN.9/614, no. 2, 11, para. 51.

⁶⁰ CARON, CAPLAN, quoted *supra* footnote 58, 525.

⁶¹ *EnCana Corp. v. Government of Ecuador*, Interim award dated 31 January 2004, LCIA administered, UNCITRAL Arbitration Rules.

“A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation”.

The arbitral tribunal found that, since the treaty provision was specifically applicable to investments by Canadian corporations in Ecuador (and vice versa), it prevailed over the general power contained in Art. 26 UNCITRAL Arbitration Rules.⁶² The clear meaning of the BIT provision indicated that it had the authority to issue binding interim measures.

In *Chevron Corp. v. Republic of Ecuador*, the arbitral tribunal, after denying a different degree of normativity of its decision according to the form adopted,⁶³ declared that “this order shall be immediately final and binding upon all Parties, subject only to any subsequent variation made by the Tribunal (upon either its own initiative or any Party’s request”.⁶⁴

The practice of the Iran-US Claims Tribunal has confirmed the binding power of interim measures under the UNCITRAL Rules, generally relying upon the theory of inherent powers:⁶⁵ the theory plays the dual role of establishing jurisdiction to issue such measures and at the same time affirming binding force. In *Rockwell v. Iran*, the

⁶² *Award*, para. 10.

⁶³ *Chevron Corp. v. Republic of Ecuador*, Order for interim measures dated 9 February 2011, PCA administered, 1976 UNCITRAL Arbitration Rules, US-Ecuador BIT, lett. (C): “As to form, the Tribunal records that, whilst this decision under Article 26 of the UNCITRAL Rules is made in the form of an order and not an interim award, given the urgency required for such decision, the Tribunal may decide (upon its own initiative or any Party’s request) to confirm such order at a later date in the form of an interim award under Articles 26 and 32 of the UNCITRAL Rules, without the Tribunal hereby intending conclusively to determine the status of this decision, one way or the other, as an award under the 1958 New York Convention”.

⁶⁴ *Ibid.*, lett. (I).

⁶⁵ CARLEVARIS, *La tutela cautelare nell’arbitrato internazionale*, Padova, 2006 237: “Per evitare le difficoltà derivanti dall’esatta determinazione dei propri poteri sulla base dell’art. 26, il Tribunale non si è generalmente limitato a giustificare la propria competenza in materia cautelare con riferimento alla norma in esame, e ha frequentemente fatto ricorso ad argomenti diversi, primo tra i quali – come già altrove osservato – quello fondato sulla nozione di <<inherent powers>>”.

arbitral tribunal extended the scope of the precedent *E-Systems v. Iran*⁶⁶ - which had affirmed the theory for the first time in the case law of this tribunal – stating that this inherent power is in no way restricted by the terms of Article 26 UNCITRAL Arbitration Rules:⁶⁷ this means that any doubt as to the legal authority of provisional measures is overcome *in limine* by reference to that principle. Such practice is consolidated in the Iran-US Claims Tribunal.⁶⁸

⁶⁶ *E-Systems, Inc. v. The Government of the Islamic Republic of Iran*, case no. 388, Award no. ITM 13-388-FT. This case, as well as the following ones concerning the activity of the Iran-US Claims tribunal, are drawn and re-elaborated starting from extracts contained in CARON, CAPLAN, quoted *supra* footnote 58, 533 ff.

⁶⁷ *Rockwell Intl. Systems, Inc. v. The Islamic Republic of Iran, Ministry of Defence*, Award no. ITM 20 dated 6 June 1983, 430 f., reprinted in 2 Iran-US CTR 369, 371.

⁶⁸ See also *RCA Global Communications, Inc. v. Islamic Republic of Iran*, Award no. ITM 30-160-1 dated 31 October 1983, 5, reprinted in 4 Iran-US CTR 9, 11 f.; *Islamic Republic of Iran v. United States of America*, cases nos. A/4 and A/15, Award no. ITL 33-A-4/A-15(III)-2 dated 1 February 1984, 5, reprinted in 5 Iran-US CTR 131-133 (1984-1).

B. Comparing ICSID with UNCITRAL investment arbitration: *exclusive v. concurring* jurisdiction between State court and arbitral tribunal

I. ICSID arbitration. – II. Investment arbitration under the UNCITRAL Rules.

B.I. The ICSID Convention provides that agreement to ICSID arbitration prevents the Parties from having recourse to any other form of settlement, in the absence of a written agreement to the contrary.⁶⁹ As a consequence, ICSID arbitral proceedings theoretically bar any other form of judicial peri-arbitral intervention or control. Said feature characterises its self-contained régime.

Particularly for our purposes, in many instances – not all, particularly in the early period of ICSID as we will see – State courts found that they lacked jurisdiction to issue provisional measures in connection with arbitral proceedings pending before ICSID tribunals, provided that the Parties had not otherwise agreed. Such a peculiar feature of ICSID arbitration, as far as provisional measures are concerned, is hereby called *exclusive jurisdiction*, pointing precisely to the exclusion of State court intervention pending proceedings.

Undoubtedly, State court intervention remains necessary in the post-arbitral phase, namely when recognition, enforcement and execution of the award are sought, due to the arbitral tribunal's lack of *imperium* in that regard.

Exclusive jurisdiction constitutes a key distinctive factor between ICSID arbitration and international commercial arbitration or international investment arbitration administered by non-ICSID arbitral institutions,⁷⁰ which on the contrary – on this point – are characterised by *concurring jurisdiction* as an accepted principle under a large majority of arbitral rules in administered as well as *ad hoc* arbitration: indeed, in the latter instance the submission of a claim before an arbitral tribunal does not prevent State courts from issuing provisional measures aimed at safeguarding the rights of either party.

⁶⁹ Art. 26 ICSID Convention: “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention”.

⁷⁰ The most relevant non-ICSID administered international investment arbitration fora are the ICC, LCIA and Stockholm Chamber of Commerce.

For the sake of completeness, it has to be noted that exclusive jurisdiction does not constitute a mandatory provision of the ICSID framework, as in 1985 Art. 39 of the ICSID Arbitration Rules was amended, including a new paragraph 5 – from 2006 paragraph 6⁷¹ – whereby the Parties were allowed to opt out of the exclusive-jurisdiction rule by expressly establishing in writing that they retained their power to request provisional measures from State courts. In 1993, Model Clause no. 14 had been drafted in that respect, so as to facilitate the parties' intention to provide for the availability of court-ordered provisional measures. The model clause at issue only presented a concurring-jurisdiction option, whereas it could also have provided to exclusive jurisdiction in favour of national courts (indeed, the text of Art. 47 of the ICSID Convention opens to such an option: "Except as the Parties otherwise agree..."). Model Clause no. 14 reads as follows:

"Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests".⁷²

This clause acknowledges national court's *imperium* to order provisional measures – while at that time case law and prevalent doctrine considered that ICSID tribunals only had recommendatory authority – and excludes the necessity of their jurisdiction on the merits⁷³ for such measures to be issued (providing that the party may request *any* judicial or other authority to order them).

Then, such a waiver shall automatically be regarded as a waiver to the exclusivity of ICSID proceedings under Art. 26 of the ICSID Convention, provided that such limitation shall operate only in relation to provisional measures, whereas Art. 26 has a

⁷¹ Indeed, in 2006 a new paragraph 5 was inserted in Art. 39 of the Arbitration Rules, providing for an accelerated procedure for the decision on provisional measures: "If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the requests and observations may be considered by the Tribunal promptly upon its constitution".

⁷² ICSID Model Clause no. 14 (1993), 4 ICSID Reports, 365.

⁷³ I.e., had the arbitration agreement not been concluded between the parties.

wider scope embracing all types of parallel proceedings. The system has thus become voluntary; this being said, such an option has not met so far with wide application.

The exclusive / concurrent binomial has to be distinguished from other forms of peri-arbitral judicial intervention, whose aim is not that of assisting-implementing the arbitral procedure, but rather the contrary, i.e. to obstruct the proceedings through the creation of the phenomenon of parallel proceedings, which will be dealt with in another Section.⁷⁴

The novelty introduced by the ICSID framework in relation to the exclusivity rule upon provisional measures was not readily accepted by the actors in the international arena, especially in its first years of operation.

In the first ICSID case, *Holiday Inns v. Morocco*, the Government – desirous to continue operating the hotels and their facilities – did not file a request for provisional measures with the ICSID tribunal, but referred to the local courts in Morocco adopting the summary procedure of *référé*. They thus obtained the authorisation to resume and complete construction at its opponent's expenses, in violation of Art. 26 of the ICSID Convention.⁷⁵

Actually, until 1984 the issue regarding the availability of provisional measures from domestic courts was controversial,⁷⁶ given the silence of the ICSID provisions thereupon: an harmonious reading of Articles 47 and 26 of the ICSID Convention would easily uphold the rule of exclusivity, but there was no universal consensus upon the scope of the term “remedy” (i.e., whether it included or not provisional measures).⁷⁷

Anyway, in reaction to such move, Claimant urged the ICSID tribunal to issue provisional measures directed at making Respondent abstain from further aggravating the dispute, thus focusing on its own legal position which was directly affected.

⁷⁴ See Section three, A.

⁷⁵ LALIVE, P., quoted *supra* footnote 1, 655.

⁷⁶ For an account, see BISMUTH, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, Journal of International Arbitration, Vol. No. 26, Issue No. 6, 2009, 785.

⁷⁷ For example, in *MINE v. Guinea*, counsel for Claimant – which had obtained an attachment of the assets of Guinea from a national court as will be seen below – observed in a letter to the ICSID tribunal (which had received a request for a provisional measures to cause the local proceeding to be suspended) that “lifting the attachment was not justified because, on the one hand, the debt underlying the attachment was the subject of arbitration proceedings currently pending before ICSID and, on the other hand, because Art. 26 of the ICSID Convention only excluded *recours* (the French term) in the sense of legal proceedings intended to settle the merits of disputes, but not provisional measures such as the attachment instituted and governed by Swiss law” (4 ICSID Reports, 48 f.).

Since violation of the rule of exclusivity affects the integrity of the proceedings and therefore the authority of the ICSID tribunal, even in the absence of any request from the opponent party, the tribunal has the power and also the duty to issue *de officio* provisional measures pursuant to Art. 39, paragraph 3, of the Arbitration Rules⁷⁸ in order to restore said integrity.

Any time an arbitral tribunal issues a provisional measures, it has to bear the risk of being perceived as biased and partial; the more so when it issues *de officio* measures⁷⁹ (which explains why they are never issued).⁸⁰ However, in cases of impact on the integrity of the arbitral proceedings, said risk is annulled.

In *Atlantic Triton Co. v. Guinea*,⁸¹ Claimant requested attachment of property before French courts before it started ICSID arbitration. On 12 October 1983, the Commercial Court of Quimper acceded to the request, which was later refused on 26 October 1984 by a judgment delivered by the Court of Appeals of Rennes stating 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”.

On 18 November 1986, the Court of Cassation quashed this judgment, underlining that Art. 26 of the ICSID Convention did not prevent parties from applying to national courts to seek conservatory measures in order to safeguard the execution of the award.⁸²

It has to be noted that between the judgment of the Court of Appeals and that of the Court of Cassation, which alternated exclusive/concurring jurisdiction, the arbitral tribunal issued its decision whereby ICSID jurisdiction to rule upon provisional measures should be exclusive.

⁷⁸ It reads: “(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations”. See, e.g., *Abaclat and Others v. The Argentine Republic*, ICSID case no. ARB/07/5, Procedural order no. 11 dated 27 June 2012, para. 20; *Convial Callao c. Perú*, Decision sobre solicitud de medidas provisionales fechada 22 Febrero 2011, pár. 123.

⁷⁹ The *de officio* power/duty is another specific feature of ICSID arbitration, since the rules of UNCITRAL, ICC, LCIA and SCC only provide for provisional measures requested by one (or more) parties. In public-international-law adjudication the ICJ, having such attribution, exercised it only once in its case law; see OELLERS-FRAHM, *Article 41*, in ZIMMERMANN, TOMUSCHAT, OELLERS-FRAHM [eds.], *The Statute of the International Court of Justice: A Commentary*, Oxford, 2005, 945.

⁸⁰ SCHREUER, quoted *supra* footnote 37, 762.

⁸¹ *Atlantic Triton v. People’s Revolutionary Republic of Guinea*, ICSID case No. ARB/84/1, Award dated 21 April 1986, 3 ICSID Reports 17, 35.

⁸² 3 ICSID Reports, 5 ff., also quoted in BISMUTH, quoted *supra* footnote 76, 785.

In *MINE v. Guinea*,⁸³ Claimant had obtained an award from the Arbitration Panel of the American Arbitration Association (AAA) against Respondent. Further to that, it requested an attachment of the assets of the Republic of Guinea from the President of the Court of First Instance of the Canton of Geneva. On 30 May 1985, the President ordered the attachment of all assets owned by Guinea and held by the Union of Swiss Banks.⁸⁴ Pending the proceedings before ICSID, respondent filed with the arbitral tribunal a request for provisional measures directed at causing the suspension of the attachment proceedings instituted by MINE. Though still adopting the term “recommend”, the language contained in the decision of the arbitral tribunal is way more assertive than in *Atlantic Triton v. Guinea*: indeed, it stated that

“1) The Tribunal recommends that MINE *immediately withdraw and permanently discontinue all pending litigation in national courts, and commence no new action arising out of the dispute* [*italics added, A/N*]. Litigation based upon the award of the American Arbitration Association is considered to arise out of this dispute for the purposes of this Provisional Measure.

2) The Tribunal further recommends that MINE *dissolve every existing provisional measure obtained* [*idem ut supra*] in litigation in national courts (including attachment, garnishment, sequestration, or seizure of the property of Guinea, by whatever term it is designated and by whatever means obtained) and that MINE seek no new provisional remedy in a national court.

3) Pursuant to Article 47 and the applicable ICSID Regulations and Rules, *the Tribunal will take into account in its award the effects of any non-compliance by MINE with its recommendations* [*idem ut supra*].”⁸⁵

Finally, MINE complied with the decision of the ICSID tribunal and caused the attachment to be withdrawn.⁸⁶ In that instance, the arbitral tribunal decided to protect the rule of exclusivity by “showing its teeth” through the intimidating formula

⁸³ *Maritime International Nominees Establishment v. Republic of Guinea*, Case no. ARB/84/4, Award dated 6 January 1988, 4 ICSID Reports, 77.

⁸⁴ 4 ICSID Reports, 45.

⁸⁵ *Ibid.*, 47.

⁸⁶ *MINE v. Guinea*, Award quoted *supra* footnote 83.

contained in point 3;⁸⁷ the more so since the expression *in its award* does not specify whether the potential monetary sanction would have been limited to the determination of the costs of the proceedings, or in another aspect of punitive damages.

Confronting the three decisions under comment and keeping the violation of ICSID jurisdictional exclusivity to rule upon provisional measures, one notes that the first decision is directed to the State, while the other two are directed to the investor. And yet the tone whereby the arbitral tribunal protects its authority is significantly different between these two groups: indeed, it showed much more deference and a cautious attitude towards the State (in *Holiday Inns v. Morocco*) which in addition was the first ICSID case ever, than with regard to the investor. Such a difference may be considered under the light of the principle of equality of the parties before adjudication organs and raise concern, since it may be a manifestation of one of the asymmetries deriving from the mixed character of ICSID arbitration. It is submitted that the difference of treatment at issue may indeed constitute a problematic point in the relationship between the arbitral tribunal and national courts – and even more significantly for the parties between one another and with the arbitral tribunal; nonetheless, said theoretical concern is reduced today, due to the decrease of such situations in ICSID case law, although violations of ICSID’s rule of exclusivity are current practice.⁸⁸

B.II. The principle of concurrent jurisdiction to issue provisional measures in international (investment as well as commercial) arbitration under the 2010 UNCITRAL Arbitration Rules is enshrined in Art. 26, para. 9, providing that

⁸⁷ See SCHREUER, quoted *supra* footnote 37: “*MINE v. Guinea* gives unequivocal support to the protection of ICSID exclusivity *vis-à-vis* domestic proceedings by way of provisional measures. This is clear not only from the unambiguous language in which the Tribunal directs MINE to withdraw and permanently discontinue the domestic proceedings but also from the threat of sanctions and the eventual award of damages for failure to comply with the Tribunal’s recommendation in a timely fashion”.

⁸⁸ See *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID case no. ARB/08/15, Decision on the Claimant’s request for provisional measures dated 3 March 2010, para. 69; *Burlington v. Ecuador*, para. 57; *CSOB v. Slovakia*, Procedural Order no. 4 dated 11 January 1999; see, in the relevant literature dealing with the topic, CARLEVARIS, quoted *supra* footnote 65, 137 ff.

“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement”.⁸⁹

How is this provision to be interpreted? Is the principle of concurrent jurisdiction a mandatory provision of the UNCITRAL Arbitration Rules? In that case, it could not be opted out by agreement of the parties. Apparently, this reading could be construed on the absence in Art. 26 – differently from Art. 47 ICSID Convention – of the expression “except as the parties otherwise agree”, or similar terms. In addition, since a characteristic feature of arbitration under the UNCITRAL Rules in comparison to ICSID arbitration is that provisional measures are enforceable and since the most effective mechanism in that regard is to request provisional measures directly from the adjudicatory organ empowered with *imperium*, opting out of this provision would render the UNCITRAL system equal to ICSID on this point (a possibility which the drafters of the UNCITRAL Arbitration Rules seemingly avoided).⁹⁰

However, it is submitted that arguments mixing up the issuance of provisional measures and their enforcement – though worth being considered in certain respects, which have been addressed – generally generate fallacies. Moreover, since party autonomy is the cornerstone of international arbitration, in the absence of compelling grounds to the contrary, treatification and contractualisation of provisional measures can play a decisive role as *leges speciales*; thus, these two sources open the way to the availability of the contrary principle of exclusive jurisdiction, whose existence State judges shall verify in order to comply with the obligation entered into by “their” State. At the same time, negotiating such a clause in the UNCITRAL framework may be risky, since the arbitral tribunal may be precluded from issuing provisional measures by mandatory provisions of the *lex loci arbitri*; in that case, an arbitral tribunal not pertaining to Gaillard’s third representation, namely that of the *ordre juridique arbitral*, may feel itself compelled to abide by said preclusion, to the detriment of the requesting party which would find itself obstructed.

⁸⁹ 2010 UNCITRAL Arbitration Rules, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

⁹⁰ On the enforcement of provisional measures see *infra*, Chapter four.

Be that as it may, this concern shall not be overestimated, since the deferential archaism of reserving jurisdiction upon provisional measures to local courts is disappearing, though with notable exceptions.⁹¹

Art. 26, para. 9, is identical to Art. 26, para. 3, of the 1976 version. In providing a choice to the applicant party, the powers of municipal courts to issue interim measures supplement those retained by the arbitral tribunal; furthermore, this provision entitles a broad spectrum of competent State courts, allowing parties to request interim measures both at the place of the seat of arbitration and elsewhere.⁹²

The topic of exclusive / concurrent jurisdiction is closely related to all other aspects of provisional measures, in particular with the arbitral tribunal's legal authority to issue them, as this phenomenon impinges upon the effectiveness of the whole process.

⁹¹ See DONOVAN, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, in VAN DEN BERG (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, Leiden, 2005; CARLEVARIS, quoted *supra* footnote 65, 160: "Come sarà evidenziato dai cenni alla recente evoluzione storica di diversi ordinamenti, si registra una generale tendenza verso il sempre maggiore riconoscimento espresso della competenza cautelare degli arbitri. Se, fino ad alcuni decenni addietro, numerosi ordinamenti nazionali escludevano la competenza degli arbitri, o la limitavano fortemente, molte legislazioni più recenti hanno eliminato il divieto, o ridotto la portata delle condizioni cui l'esercizio di tale competenza è subordinato" [footnote omitted, A/N].

⁹² CARON, CAPLAN, quoted *supra* footnote 58, 529.

Section two: general features of provisional measures in international investment arbitration

A. Conditions

I. Introduction. – II. *Prima facie* jurisdiction / *Fumus bonae iuris*. – III. Urgency. – IV. Necessity. – V. *Prima facie bonum ius* / *fumus boni iuris*. – VI. Link between the provisional measures requested and the rights in dispute. – VII. Proportionality.

A.I. This section is devoted to the analysis of the general features which characterise provisional measures in the field at issue, namely their conditions, purposes and atypicalness.

As far as the first element is concerned, paragraph A will present the conditions for provisional measures to be granted through the same descriptive tools as those adopted in the previous chapter in relation to the World Court,⁹³ in line with the main thesis which irrigates the present study. Indeed, Section two constitutes a development of the second part of the differentiated approach, i.e. comparative assessment of public-international-law adjudication systems, in order to derive therefrom convergences and divergences.

Conditions for granting provisional measures are divided into jurisdictional (Subparagraph II) and substantial (Subparagraphs III, IV, V, VI and VII). It has to be noted that the conditions for provisional measures to be granted constitute a praetorian construction through consolidation of arbitral case law, since the relevant norms do not expressly provide for any particular condition, neither in ICSID⁹⁴ nor in arbitration under the UNCITRAL Rules. No reference is made to the jurisdictional condition.

⁹³ See *supra* Chapter two, B.II.i., 78 ff.

⁹⁴ See, e.g., *Abaclat and Others v. The Argentine Republic*, ICSID case no. ARB/07/5, Procedural order no. 10 on security for costs dated 18 June 2012, 2: “Although Article 47 ICSID Convention and ICSID Arbitration Rule 39 do not provide for specific requirements for issuing a recommendation of provisional measures and leaves this largely within the margin of appreciation of the arbitral tribunal, a wide consensus has emerged in practice according to which a recommendation for provisional measures would usually require that following conditions be met: (i) urgency of the requested measures, (ii) the risk of irreparable harm or serious prejudice in case the measures are not granted, (iii) the necessity of the measures in order to preserve the right at risk.” This list does not include the jurisdictional condition; however, as will be discussed below, the arbitral tribunal refrained from addressing said condition, since the request did otherwise not meet the other conditions.

Moreover, Art. 47 of the ICSID Convention merely refers to the tribunal's evaluation whether the *circumstances* so require,⁹⁵ without mentioning any condition.⁹⁶ Quite the same approach can be inferred from the text of Art. 26 of the UNCITRAL Rules, whereas more indications can be derived therefrom: indeed, urgency and risk of irreparable harm can be construed on the reference to current or imminent harm which provisional measures are aimed at preventing pursuant to Art. 26 (2) lett. b, in combined application with Art. 26 (3) lett. a.⁹⁷

Furthermore, Art. 26 (3) lett. b requires an additional condition, whose existence shall be demonstrated by the requesting party, namely the *fumus boni iuris* of its claim.⁹⁸ The difference between ICSID and UNCITRAL in this respect has to be related to the different perspective concerning enforcement of provisional measures issued by the arbitral tribunal: the UNCITRAL framework is more strongly oriented in that direction and therefore – innovating the 1976 Arbitration Rules – the drafters decided to provide the local judge of enforcement with a clearer guidance with respect to the legality of these measures.

A.II. Turning to the jurisdictional condition, as we have seen the World Court developed two different thresholds: 1- the negative perspective, indicating that the jurisdictional condition will be considered satisfied if it cannot be excluded that the

⁹⁵ In addition, the treaty text does not even provide that the tribunal is compelled to issue provisional measures if the circumstances so require, since it merely “may” grant them (i.e., allowing wide discretion); see, e.g., *Quiborax v. Bolivia*, Decision on provisional measures dated 26 February 2010, para. 105: “The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal on the issue of provisional measures”.

⁹⁶ Even though urgency is not expressly mentioned, it may be construed through two paragraphs of Art. 39 Arbitration Rules, namely para. 2 on the priority which the tribunal shall give to requests for provisional measures and para. 5 – included in 2006 – on the accelerated procedure for decisions on provisional measures.

⁹⁷ Art. 26 (3) lett. a reads: “3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”. The same subparagraph introduces the proportionality analysis between the advantage for the requesting party and the disadvantage caused to addressee of the provisional measures issued by the arbitral tribunal. The text of the 2010 UNCITRAL Arbitration Rules is available at the UNCITRAL institutional website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

⁹⁸ Art. 26 (3) lett. b. provides that “3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: [...] (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim.”

adjudicating organ has jurisdiction (called here “*prima facie* jurisdiction”, a low threshold enshrined in the *Anglo-Iranian Oil Co.* case) and 2- the positive perspective, stressing that the jurisdictional condition will be considered met only if there are elements upon which the organ’s jurisdiction may – or might – be founded (called “*fumus bonae iurisdictionis*”, requiring a higher threshold). The *Anglo-Iranian Oil Co.* case constitutes the lowest threshold in the World Court’s case law and at the same time the most unfortunate, since in that respect the Court later found that it lacked jurisdiction to deal with the merits of the case. However, quite curiously, this precedent is very often cited in ICSID cases; what is even more interesting is that it is quoted as a support, when requesting provisional measures, by Claimants.⁹⁹

The first logic step on which a decision thereupon has to be construed is constituted by an *ictu oculi* assessment on jurisdiction to issue a judgment on the merits of the case. However, the jurisdictional condition has been gradually developed since the early ICSID cases, in which it was almost absent: indeed, in *Holiday Inns v. Morocco* the tribunal merely referred to the existence of contractual relations between the parties, construing the jurisdictional condition on their mutual obligation not to frustrate its execution while arbitral proceedings were pending.¹⁰⁰

In *Amco v. Indonesia*, another case involving the development of an hotel and its facilities, Indonesia sought from the arbitral tribunal a decision preventing Claimant from diffusing information about their dispute in the investment community through publication in a specialised newspaper, namely Hong Kong’s *Business Standard*: according to Respondent, such a publication was aimed at discouraging FDIs in Indonesia by shedding a negative light on the host State’s conduct with regard to Claimant’s investment.¹⁰¹ The tribunal found that the article published in the *Business Standard* could not have caused any actual harm to Indonesia, nor aggravate or exacerbate the dispute and consequently declined to issue provisional measures, though it failed to devote a single line on the jurisdictional condition.¹⁰² The same approach

⁹⁹ For example, counsel for Claimant in *Holiday Inns v. Morocco* relied thereupon in order to oppose potential objections from Respondent to the arbitral tribunal’s jurisdiction to issue provisional measures: see Lalive, quoted *supra* footnote 1, 656.

¹⁰⁰ LALIVE, P., quoted *supra* footnote 1, 658.

¹⁰¹ *Amco v. Indonesia*, Request for provisional measures dated 30 September 1983, 1 ICSID Reports, 410.

¹⁰² See *Amco v. Indonesia*, Decision on request for provisional measures dated 9 December 1983, 1 ICSID Reports, 410-412.

was adopted by the ICSID arbitral tribunal in *Atlantic Triton v. Guinea*¹⁰³ and *MINE v. Guinea*.¹⁰⁴

The *Vacuum Salt v. Ghana* case¹⁰⁵ is even more significant in this respect, since the arbitral tribunal granted provisional measures in favour of Claimant despite Ghana's firm objections to its jurisdiction *ratione personae* for non-compliance with Art. 25 (2) lett. b of the ICSID Convention – agreement between the parties to consider a company incorporated in the host State as a foreign investor – and without pronouncing thereupon even on a *prima facie* basis, while in the award the following year it found that it lacked jurisdiction on that same ground.¹⁰⁶ However, the relevance of this precedent shall be reduced, due to the Government's cooperative behaviour in voluntarily undertaking to comply with the provisional measures requested in relation to the preservation of evidence.¹⁰⁷

In *Maffezini v. Spain*,¹⁰⁸ Respondent requested security for costs, on whose admissibility ICSID tribunals never had the occasion to pronounce themselves.¹⁰⁹ Even though the case became very known in relation to the binding force of ICSID provisional measures, it is worth noting that the tribunal declined to grant the requested measures on the basis that they would constitute a pre-judgment of the merits of the case,¹¹⁰ without ruling upon the jurisdictional condition.

In *TanESCO v. IPTL*,¹¹¹ the Tribunal decided that the jurisdictional condition is met if the requirements of Arbitration Rule 39 are satisfied by the requesting party.¹¹² It shall be

¹⁰³ *Atlantic Triton Company v. People's Revolutionary Republic of Guinea*, Award dated 21 April 1986 quoted *supra* footnote 52, 3 ICSID Reports 13 ff. (the text of the decision on provisional measures has not been published: therefore, reference thereto is drawn from the text of the award).

¹⁰⁴ *MINE v. Guinea*, quoted *supra* footnote 83, 68 ff.

¹⁰⁵ *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, ICSID case No. ARB/92/1, Decision no. 3 on provisional measures dated 14 June 1993, 4 ICSID Reports, 320 ff.

¹⁰⁶ *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, Award dated 16 February 1994, 4 ICSID Reports, 322.

¹⁰⁷ *Vacuum Salt Products Limited v. Government of the Republic of Ghana*, ICSID case No. ARB/92/1, Decision no. 3 on provisional measures quoted *supra* footnote 70, 323 f.

¹⁰⁸ See *supra* footnote 39 for an extensive reference to the case.

¹⁰⁹ *Ibid.*, para. 4.

¹¹⁰ *Ibid.*, para. 21: "Llegar a una determinación en este momento, que pueda poner en duda la capacidad de cualquiera de las partes para presentar su caso, no es aceptable. Sería inapropiado para el Tribunal prejuzgar el caso del Demandante recomendando la adopción de medidas provisionales de esta naturaleza".

¹¹¹ *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID case no. ARB/98/8, Decision on the Respondent's request for provisional measures dated 20 December 1999 (Appendix A to the final award dated 22 June 2001).

noted that, even though the tribunal felt compelled to investigate upon the existence of its jurisdiction to issue provisional measures, it construed the latter in terms of power to pronounce said measures, instead of an *ictu oculi* assessment upon the existence of its jurisdiction to rule on the merits of the claim: consequently, this procedural order shall be considered as pertaining to the first generation of decisions concerning the jurisdictional condition (i.e., *absent or light jurisdictional condition*).¹¹³

Other cases, in particular those instituted since the *baby-boom* of international investment arbitration at the beginning of the XXI century, express the arbitral tribunals' concern not to grant provisional measures without first investigating, at least *prima facie*, upon their jurisdiction to deal with the merits of the case. They have proceeded in this direction even in the absence of party's disagreement thereupon, i.e. on a *de officio* basis.¹¹⁴

In a famous case, the arbitral tribunal, consistently with the parties' intentions, ruled definitively on its jurisdiction before resolving the issue of provisional measures: having found that it had jurisdiction and that one of the two provisional measures requested by Claimant was appropriate, it acceded thereto in the same decision.¹¹⁵

¹¹² *Ibid.*, para. 11.

¹¹³ The following ICSID cases take part to this group: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID case no. ARB/03/24, Order on Claimant's request for provisional measures dated 6 September 2005 (where the tribunal, dismissing the application, focused on urgency, necessity, risk of irreparable harm and nexus between the measure requested and the rights in dispute – as we shall see below – without even mentioning the jurisdictional condition); recently, *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Procedural order no. 4 dated 16 March 2013, para. 25: “The Arbitral Tribunals wish to record the fact that the Application has been considered on a without prejudice basis insofar as the Respondent's objections to jurisdiction are concerned. Additionally, while neither Party has addressed the question of *prima facie* jurisdiction in its submissions, the Tribunals are satisfied, based on the reasoning set out below, that the absence of any such submissions is not fatal to their disposing of the Application in the present Procedural Order”; *Tokios Tokelés*, Procedural order no. 1 dated 1 July 2003.

¹¹⁴ *Convial Callao S.A. y CCI – Compania de Concesiones de Infraestructura S.A. c. República del Perú*, caso CIADI no. ARB/10/2, Decisión sobre solicitud de medidas provisionales fechada Febrero 22, 2011, párr. 73: “En este caso no ha habido discusión sobre la facultad que tiene el Tribunal para decretar medidas provisionales antes de tomar una decisión respecto de su jurisdicción. Sin embargo, el Tribunal se abstendría de hacerlo si, *prima facie*, se llegare a establecer que no tiene competencia para decidir la presente controversia. Este no es el caso que nos ocupa”. In paras. 74-78 the arbitral tribunal developed the reasons which grounded the jurisdictional condition: based on the positive perspective (likeness of jurisdiction), it can be considered an analysis of *fumus bonae iurisdictionis*.

¹¹⁵ *Saipem S.p.a. v. The People's Republic of Bangladesh*, ICSID case no. ARB/05/07, Decision on jurisdiction and recommendation on provisional measures dated 21 March 2007, para. 173: “Having concluded that it has jurisdiction to hear the present dispute, there can be no doubt that this Tribunal has the power to recommend provisional measures”; for the part concerning the decision on provisional measures, see paras. 183-185.

The *SGS v. Pakistan* case¹¹⁶ constitute a development in this connection. Since Respondent had instituted parallel proceedings before the courts of Pakistan whose subject-matter related to arbitration and in addition an Islamabad-based arbitration was pending between the parties on the relevant contract claims, Claimant requested the arbitral tribunal to recommend that Respondent withdraw and cause to be discontinued the former, stay the latter and take no action that might aggravate or further extend the dispute submitted to the Tribunal.¹¹⁷ Due to the urgency of a decision in that regard, the arbitral tribunal decided to grant the measures requested without prejudice to the consideration of Pakistan's objections to its jurisdiction: indeed, it found that it had *prima facie* jurisdiction pointing to SGS's *prima facie* right to settle the dispute pending before it through application of the arbitration agreement contained in the applicable BIT.¹¹⁸

More recent cases explore in detail their *prima facie* jurisdiction (*thorough jurisdictional condition*).¹¹⁹

ICSID arbitral tribunals also have jurisdiction to issue provisional measures other than those specified in the request, pursuant to Art. 39, para. 3, of the Arbitration Rules.¹²⁰ Indeed, in *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani*

¹¹⁶ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID case no. ARB/01/13, Procedural Order no. 2 dated 16 October 2002, 8 ICSID Reports 391.

¹¹⁷ *Ibid.*, 293 f.

¹¹⁸ *Ibid.*, 299 f.: "It is clear that SGS has a *prima facie* right to seek access to international adjudication under the ICSID Convention. It has consented to submit its claim to arbitration under Article 9 (2) of the Bilateral Investment Treaty. It has alleged both breach of contract and breach of substantive obligations contained in the BIT. The Islamic Republic of Pakistan is a signatory to the ICSID Convention and has duly ratified it. It is essential for the proper operation of both the BIT and the ICSID Convention that the right of access to international adjudication be maintained. In the Tribunal's view, it has a duty to protect this right of access and should exercise such powers as are vested in it under Article 47 of the ICSID Convention in furtherance of that duty".

¹¹⁹ *Churchill Mining PLC v. Republic of Indonesia*, ICSID case no. ARB/12/14, Procedural order no. 3 on provisional measures dated 4 March 2013, paras. 36-42; *Tethyan Copper*, ICSID case no. ARB/12/1, Decision on Claimant's request for provisional measures dated 13 December 2012, paras. 123-133; *Quiborax v. Bolivia*, ICSID case no. ARB/06/2, Decision on provisional measures dated 26 February 2010, paras. 108-112; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID case no. ARB/08/6, Decision on provisional measures dated 8 May 2009, paras. 39-41.

¹²⁰ Art. 39, para. 3, of the Arbitration Rules provides that "The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations".

Development Co. (Private) Limited v. Republic of Zimbabwe,¹²¹ the tribunals denied the measures requested by Claimants,¹²² but nonetheless issued – in the form of a halfway between *recommendatory* and *binding* measures, by stating that they *strongly encourage* both parties – measures aimed at avoiding further aggravation of the dispute and protecting the proceedings.¹²³

A.III. Urgency is the first substantial condition under examination. As anticipated, although it is not expressly mentioned in Art. 47 ICSID Convention nor in Art. 39 ICSID Arbitration Rules, it may be construed through two paragraphs of the latter article, namely paragraph 2 on the priority which the tribunal shall give to requests for provisional measures and paragraph 5 – included in 2006 – on the accelerated procedure for decisions on provisional measures. This condition is an intrinsic feature of provisional measures, which are granted – where appropriate – precisely because the situation can not await the outcome of the award, on jurisdiction or on the merits.

Furthermore, where procedural integrity of the proceedings are at stake, the tribunal does not need to assess the existence of urgency, which is *in re ipsa*: indeed, in *Quiborax v. Bolivia*, the arbitral tribunal found that “if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition”.¹²⁴

This condition may play a role in the form adopted by the arbitral tribunal when granting a provisional measure, since orders generally require more time for their issuance than interim awards.¹²⁵

¹²¹ See *supra* footnote 113.

¹²² *Ibid.*, para. 15: “In their Application, the Claimants seek specifically that the Tribunals order the Respondent (see Application, para. 7.1): (a) to instruct its police force that only those persons who have been granted permission by the Claimants to enter the Makandi Estate may do so (“Authorised Persons”); (b) to instruct its police force to remove all persons from the Makandi Estate who are not Authorised Persons; and (c) not to take any further action to aggravate the dispute between it and the Claimants”.

¹²³ *Ibid.*, para. 31: “The Arbitral Tribunals, however, strongly encourage both Parties to conduct themselves in a manner so as to avoid further aggravation of the dispute between them in order to ensure the orderly progress of these proceedings”. For the sake of completeness, it is noted that to a certain extent this reminder to the parties of their obligations between themselves and towards the arbitral tribunal resembles lett. c of Claimants’ request, whereas in that case obviously the request was uniquely aimed at the opponent.

¹²⁴ *Quiborax v. Bolivia*, para. 153.

¹²⁵ *Chevron Corp. v. Republic of Ecuador*, Order for interim measures dated 9 February 2011, PCA administered, 1976 UNCITRAL Arbitration Rules, US-Ecuador BIT, lett. (C): “As to form, the Tribunal records that, whilst this decision under Article 26 of the UNCITRAL Rules is made in the form of an

In cases of particular urgency, Art. 16, paragraph 2, ICSID Arbitration Rules provides that the arbitral tribunal may grant provisional measures through the exchange of correspondence among the members of the panel, provided that all of them are consulted.¹²⁶ Such an extreme measure, however, will arguably be adopted when all other conditions are seemingly met, since otherwise the very need to have recourse thereto would be fictional.

In any manner, Art. 39, para. 4, requires that the principle of *contradictoire* has to be respected: *ex parte* measures are prohibited in ICSID arbitration, contrary to arbitration under the UNCITRAL Rules. However, in *Bernhard von Pezold and Others v. Zimbabwe*,¹²⁷ the President of the competent ICSID tribunal decided to issue a pre-provisional measure under the form of “directions” without consulting his co-arbitrators¹²⁸ and in the absence of *contradictoire*,¹²⁹ due to the extreme urgency to preserve disclosure of evidence.¹³⁰ The need to protect evidence is particularly relevant and the correspondent level of urgency depends on the type of measure requested and on its purpose.¹³¹

Since the specific circumstances characterising the existence of urgency in the dispute before the arbitral tribunal are drawn on a case-by-case basis, it is deemed more appropriate to focus on the negative perspective, namely the circumstances excluding urgency. In this regard, a close relationship exists between this condition and the concept of *irreparable harm*, thus connecting urgency with necessity.

In *Plama v. Bulgaria*, the tribunal ruled that the need for provisional measures shall be urgent and necessary to preserve the *status quo* or to avoid irreparable damage.¹³² In

order and not an interim award, given the urgency required for such decision, the Tribunal may decide (upon its own initiative or any Party’s request) to confirm such order at a later date in the form of an interim award under Articles 26 and 32 of the UNCITRAL Rules, without the Tribunal hereby intending conclusively to determine the status of this decision, one way or the other, as an award under the 1958 New York Convention”

¹²⁶ See *Agip v. Congo*, Award dated 30 November 1979, para. 9.

¹²⁷ *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Directions concerning Claimants’ application for provisional measures of 12 June 2012 dated 13 June 2012.

¹²⁸ Contrary to Art. 16, para. 2, ICSID Arbitration Rules.

¹²⁹ Contrary to Art. 39, para. 4, ICSID Arbitration Rules.

¹³⁰ See *infra*, Section two, B.III.

¹³¹ *Biwater Gauff v. Tanzania*, Procedural order no. 1 dated 31 March 2006, para. 76.

¹³² *Plama v. Bulgaria*, Order on provisional measures dated 6 September 2005, para. 38. See also SCHREUER, quoted *supra* footnote 37, 776.

that case, it found that both conditions were lacking, since the tribunal's capacity to issue an award on monetary damages would not be affected by the pending parallel proceedings in Bulgaria, whose suspension Claimant had requested in its request for provisional measures.¹³³

Moreover, if additional harm can be restored by awarding additional damages, such an harm is not irreparable and therefore the condition of urgency is not satisfied. Furthermore, such an irreparable harm shall at the same time be *imminent*, since otherwise provisional measures would not be justified.¹³⁴

This approach has been followed in *ad hoc* proceedings conducted under the UNCITRAL Rules: in *Sergei Paushok v. Mongolia*, the arbitral tribunal ruled that monetary compensation is always sufficient to preclude the requesting party from obtaining interim measures of protection.¹³⁵

A.IV. For a request of provisional measures to be legitimate under the substantive grounds – though not automatically granted – the condition of necessity shall also be satisfied. Both urgency and necessity are included under the broader term *periculum in mora*. The first substantive condition to be evaluated is in any case urgency:¹³⁶ if a given provisional measure is not urgent, therefore it is not necessary. However, the two conditions are so closely interrelated, that in some instances they are melt together in the expression *urgent necessity*¹³⁷ or *urgent need*.¹³⁸

¹³³ *Ibid.*, para. 46.

¹³⁴ *Occidental v. Ecuador*, Decision on provisional measures dated 17 August 2007, para. 89.

¹³⁵ *Sergei Paushok et al. v. Government of Mongolia*, Order on interim measures dated 2 September 2008, *ad hoc* proceeding under the 1976 UNCITRAL Arbitration Rules, Russia-Mongolia BIT, reprinted in 23 Mealey's International Arbitration Report, November 2008, B-1, paras. 59 and 62: "59. The Tribunal is not called upon to rule on that overall situation but taking cognizance of it helps the Tribunal in understanding whether the condition of urgency alleged by Claimants can be met in the present case. [...] 62. The Tribunal is aware of preceding awards concluding that even the possible aggravatio of a debt of a claimant did not ("generally" says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the [1976] UNCITRAL Rules. But those specific features point not only to the urgency of action by the Tribunal but also to the necessity of such action in the face of an imminent danger of serious prejudice".

¹³⁶ See, e.g., *Quiborax v. Bolivia*, para. 154.

¹³⁷ *Cemex v. Venezuela*, Decision on the Claimant's request for provisional measures dated 3 March 2010, para. 40. The ICSID tribunal quoted the ICJ case *Pulp Mills on the River Uruguay (Argentina v.*

The concept of irreparable prejudice derives from the case law of the ICJ: provisional measures are necessary when the actions of a party “are capable of causing or of threatening irreparable prejudice to the rights invoked”.¹³⁹ Said irreparable prejudice,¹⁴⁰ which gives content to the general *chapeau* of necessity, has in certain cases be applied also with regard to monetary damage, theoretically likely to be restored through compensation in the award.¹⁴¹ indeed, in *Saipem v. Bangladesh* the Tribunal found that

“In view of the pending litigation in Bangladesh, the Tribunal considers that there is both necessity and urgency. This finding is reinforced by the facts that [...] there is a risk of irreparable harm if Saipem has to pay the amount of the Warranty Bond”.¹⁴²

Commenting these lines, Roland Ziadé has argued that the arbitral tribunal adopted a milder approach upon the concept at issue, more similar to the relevant case law in international commercial arbitration.¹⁴³

In *Cemex v. Venezuela*, the arbitral tribunal significantly contributed to the development of the concept of irreparable prejudice. First of all, it identified two categories of cases on the issue within the ICSID framework, namely *Plama v. Bulgaria* (“harm is not irreparable if it can be compensated for by damages”)¹⁴⁴ and *Burlington v. Ecuador* (“the risk here is the destruction of an ongoing investment”).¹⁴⁵

Uruguay), Order dated 23 January 2007, ICJ Reports 2007, p. 11, paras 31 f.; see also *Case Concerning Passage through the Great Belt (Finland v. Denmark)*, Order dated 29 July 1991, ICJ Reports 1991, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order dated 17 June 2003, ICJ Reports 2003, p. 107, para. 22.

¹³⁸ *Tanzania Electric v. ITPL*, Decision on provisional measures dated 20 December 1999, para. 18.

¹³⁹ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Order dated 11 September 1976, ICJ Reports 1976, p. 11. See also the *Case Concerning Passage through the Great Belt (Finland v. Denmark)*, Order dated 29 July 1991, ICJ Reports 1991, p. 17.

¹⁴⁰ See also *Phoenix v. Czech Republic*, para. 33; *Occidental Petroleum v. Ecuador*, para. 59.

¹⁴¹ See *Metalclad Corporation v. United Mexican States*, ICSID case no. ARB(AF)/97/1, Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information dated 27 October 1997, para. 8.

¹⁴² *Saipem v. Bangladesh*, Decision on jurisdiction and recommendation of provisional measures dated 21 March 2007, para. 182.

¹⁴³ ZIADÉ, R., *Mesures conservatoires (tribunal arbitral et tribunal étatique)*, in LEBEN (ed.), *La procédure arbitrale relative aux investissements internationaux. Aspects récents*, Paris, 2010, 205: “Comme il s’agissait d’éviter qu’une partie tierce encaisse une garantie, il semblerait que le tribunal arbitral ait adopté dans cette affaire une approche plus souple du préjudice irréparable se rapprochant de la jurisprudence arbitrale commerciale”.

¹⁴⁴ *Plama v. Bulgaria*, para. 46.

¹⁴⁵ *Burlington v. Ecuador*, para. 83.

Secondly, it acknowledged that the distinction between situations where the alleged prejudice can be readily compensated by an award granting damages¹⁴⁶ and those where there is a serious risk of destruction of an ongoing investment should have a bearing upon the test of *irreparable harm*; finally, it ruled that in the second category, which satisfies the *Burlington* threshold, the condition of necessity is satisfied.¹⁴⁷

The idea that monetary compensation does not automatically eliminate the possible need for interim measures has also been advanced in case law under the UNCITRAL Rules.¹⁴⁸

Another element which lies under the general *chapeau* of necessity is proportionality, which will be presented in the appropriate subparagraph.¹⁴⁹

A.V. The third substantial condition consists in the standard to be met upon the existence of rights whose identification and protection is sought through arbitration proceedings.

Since the tribunal is called to rule thereupon on a necessarily urgent and temporary basis – subject to modification and revocation – this assessment has to be made *ictu oculi*; in this sense, it bears resemblance with the type of scrutiny made when addressing the jurisdictional condition.

Quite needless to say, neither ICSID nor UNCITRAL provisions refer to this condition and the threshold which shall be met for it to be considered satisfied; thus, one has to turn to case law. After reviewing it, it is possible to note that the thresholds vary in intensity, from the establishment of a *prima facie* case that the legally protected interest exists¹⁵⁰ to the *prima facie* existence of the right¹⁵¹ and the *strongly arguable case* that

¹⁴⁶ See also on this point *Occidental Petroleum v. Ecuador*, para. 92.

¹⁴⁷ *Cemex v. Venezuela*, paras. 55 f.

¹⁴⁸ See *Behring Intl., Inc. v. Islamic Republic of Iran*, 1983 Trib. Rules, case no. 582 (Chamber Three), Decision dated 19 December 1983, reprinted in 4 Iran-US CTR 93, 95; *Sergei Paushok et al. V. Government of Mongolia*, Order on interim measures dated 2 September 2008, *ad hoc* proceeding under the 1976 UNCITRAL Arbitration Rules, Russia-Mongolia BIT, reprinted in 23 Mealey's International Arbitration Report, November 2008, B-1, para. 68.

¹⁴⁹ See below, A.VII.

¹⁵⁰ *Tethyan Copper v. Pakistan*, para. 117.

¹⁵¹ *Burlington v. Ecuador*, para. 53.

the right exists.¹⁵² In any manner, they are always set forth from a positive perspective (*fumus boni iuris*).

Other conditions, in particular that of necessity, may influence the degree required by the tribunal before considering that *fumus boni iuris* exists in the case before it: a suggestion in that direction is provided by the *Occidental Petroleum v. Ecuador* case, where the tribunal, after denying that such *fumus* was demonstrated by the requesting party, added that any prejudice suffered, “if subsequently found illegal by the tribunal, can be readily compensated by a monetary award”.¹⁵³

Considering the high threshold adopted in that case and the subsequent finding about monetary compensation, it is argued that a higher risk of prejudice, such as that of the *Burlington* test, is able to lower the *fumus boni iuris* threshold.

A.VI. Art. 39, para. 1, ICSID Arbitration Rules provides that the requesting party shall specify, *inter alia*, the rights to be preserved. Shall they necessarily coincide with the rights in dispute?

The link between the provisional measure requested and the rights in dispute can be considered a condition contained in the broader *chapeau* of that of necessity: indeed, the effectiveness of provisional measures may be considered to be depending on the relationship – or even coincidence – between it and the rights which are controverted before the tribunal.

In this regard, two tendencies have arisen in ICSID case law; they will be discussed in more detail in the subparagraph devoted to the analysis of the purpose of preserving the parties’ rights.¹⁵⁴ In brief, one tendency considers that these two elements, namely object of the request for provisional measures and rights in dispute, shall coincide (*Maffezini* test), whereas the other one provides that they must relate, though not necessarily coincide (*Plama* test).

For the reasons set forth below, arbitral tribunals will be well advised to follow the *Plama* test, which best corresponds to the other conditions and purposes of provisional measures.

¹⁵² *Occidental Petroleum v. Ecuador*, para. 86.

¹⁵³ *Ibid.*, para. 92.

¹⁵⁴ See below, B.II.

A.VII. Proportionality, as well, is related to necessity: in *Quiborax v. Bolivia*, the arbitral tribunal found that

“Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated”.¹⁵⁵

This criterion is codified in Art. 17A UNCITRAL Model Law: according to such standard, adopted to an increasing extent in both ICSID¹⁵⁶ and arbitration under the UNCITRAL Rules,¹⁵⁷ the requesting party shall demonstrate that:

“Harm not adequately repaired 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”.¹⁵⁸

It can quite readily be noted that the first part of the provision (“harm not adequately repaired by an award of damages”) refers to the condition of necessity in a rather peculiar form, a sort of halfway between the *Plama v. Bulgaria* (“harm is not irreparable if it can be compensated for by damages”) and *Burlington v. Ecuador* (“the risk here is the destruction of an ongoing investment”) tests; accordingly, the proportionality test will not be applied in every case and, moreover, such a scrutiny will be carried out after verifying that the condition of necessity is satisfied.

Proportionality analysis as a condition for assessing the opportunity to issue provisional measures – not limited to the international investment arbitration area – rose to prominence thanks to the works of Richard Posner in the academia and as a judge appointed to the U.S. Court of Appeals for the Seventh Circuit, in Chicago. One of the

¹⁵⁵ *Quiborax v. Bolivia*, para. 158.

¹⁵⁶ *Burlington v. Ecuador*, Procedural order no. 1 dated 29 June 2009, paras. 81 f.; *City Oriente v. Ecuador*, Decision on Revocation of provisional measures dated 13 May 2008, para. 72.

¹⁵⁷ *Sergei Paushok et al. v. Government of Mongolia*, Order on interim measures dated 2 September 2008, *ad hoc* proceeding under the 1976 UNCITRAL Arbitration Rules, Russia-Mongolia BIT, reprinted in 23 Mealey’s International Arbitration Report, November 2008, B-1, paras. 68 f.

¹⁵⁸ Art. 17A UNCITRAL Model Law.

main theorists in the field of economic analysis of the law, he was a leader of the so-called *Chicago School* of antitrust theory. In a 1986 case, *American Hospital Supply Corp. v. Hospital Products Limited*, he elaborated a formula for determining when preliminary injunctions should be granted:

“If the harm to the plaintiff if the injunction is denied, multiplied by the probability that the plaintiff will win at trial, exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error, preliminary injunctions should be granted”.¹⁵⁹

He extended this formula to any type of provisional measures. Although his view may be criticised on two grounds, namely because it reduces complexities of relations between the parties to mere mathematical products and because the notion of *error* seems excessively broad for a mathematical formula,¹⁶⁰ it nonetheless has the great merit of including the variable of *fumus boni iuris*: indeed, provisional measures are harmful, therefore understandably they shall not unduly burden one of the parties. Moreover, provisional measures which burden Respondent – out of any deferential discourse – have to be handled with particular care, since it is Claimant who stirs its opponent’s legal sphere.

In conclusion, the question whether this criterion shall be applied in international investment arbitration may be answered in the affirmative, not merely because of its establishment in the UNCITRAL Model Law – which is not a binding document, but a collection of fine arbitral practice – but rather as an instrument comprised in the inherent power of the arbitral tribunal.¹⁶¹

¹⁵⁹ U.S. Court of Appeals for the Seventh Circuit, *American Hospital Supply Corp. v. Hospital Products Limited*, 780 F.2d, 1986, 589.

¹⁶⁰ Indeed, considering the “dark side” of *fumus boni iuris*, namely the probability that the claim will be rejected – leaving the appropriate space for undetermination – seems to be more appropriate, inasmuch one decides to stick to mathematical formulas, an apparently hazardous approach.

¹⁶¹ As a consequence, its discretionary application is even more increased.

B. Purposes

I. Introduction. – II. Preserving the parties' rights. – III. Securing discovery of evidence. – IV. Preventing self-help. – V. Safeguarding the enforcement of the award.

B.I. The general purpose of provisional measures is to facilitate both the development and the result of the adjudication process.¹⁶²

The specific purposes of provisional measures are directly related to the conditions for granting them: indeed, both are fundamental indicators for the adjudicating organ of their propriety in that specific case and – in particular – in that specific moment. However, short of reducing the relevance of their role, it has to be noted nonetheless that they are mere indicators, not binding legal grounds, for their granting, due to the evidence that the arbitral tribunal has a discretionary power in this respect (Art. 47 ICSID Convention provides that it *may* recommend provisional measures).

The only purpose of provisional measures *expressis verbis* contained in the treaty texts is the first one analysed in this subparagraph, namely the preservation of the parties' rights: under the aforementioned Art. 47

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken *to preserve the respective rights of either party*” [italics added, in order to indicate the finality of these measures under the terms of the ICSID Convention].

In addition, according to Art. 39, para. 1,¹⁶³ of ICSID Arbitration Rules, the requesting party shall specify:

¹⁶² See SCHREUER, quoted *supra* footnote 37, 759: “The purpose of provisional measures is to induce behaviour by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties' rights, preventing self-help, safeguarding the awards' eventual implementation and generally keeping the peace. They have to be taken at a time when the outcome of a dispute is still uncertain. Therefore, the Tribunal has to strike a careful balance between the urgency of a request for provisional measures and the need not to prejudge the merits of the case” [footnote omitted, *A/N*]. The commentator of the second edition notes that the Tribunal in *Biwater Gauff v. Tanzania*, Procedural order no. 1 dated 31 March 2006, para. 67, quoted the referred passage from the first edition of the Commentary. My analysis of the purposes adopts this representation as a starting point. For a wording similar to that of Schreuer's Commentary see also *Churchill Mining PLC v. Republic of Indonesia*, ICSID case no. ARB/12/14, Procedural order no. 3 on provisional measures dated 4 March 2013, para. 19.

- 1- *the rights to be preserved*;
- 2- the measures the recommendation of which is requested; and
- 3- the circumstances that require such measures.

Even though Art. 39, para. 3, provides that provisional measures can be issued *proprio motu*, practice has shown that they are always requested on the initiative of the interested party.¹⁶⁴ In this connection, the requesting party bears the burden of proving both the purpose of provisional measures (point 1 above) and the conditions¹⁶⁵ on which the request lies (point 3).¹⁶⁶ The existence of such conditions, also called *circumstances* in Art. 47 ICSID Convention and Art. 39, para. 1, ICSID Arbitration Rules, is verified by the arbitral tribunal.¹⁶⁷ In this exercise, the arbitral tribunal can take advantage of the additional tool of verifying whether the measures requested (point 2) are appropriate so as to achieve the alleged purpose (the preservation of rights, i.e. point 1) under the alleged conditions (point 3) of the specific case in that specific moment. Thus, the interplay between the three points in this triangular verification demonstrates the necessity of each point with one another. In such interrelatedness, given the power of

¹⁶³ Art. 39 ICSID Arbitration Rules contains paragraphs providing for both substantial (paras. 1 and 3) and procedural (paras. 2, 4, 5 and 6) elements concerning provisional measures: “(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures. (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1). (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations. (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations. (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution. (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests”.

This paragraph on the purposes of provisional measures focuses on their substantial elements.

¹⁶⁴ This aspect had already been indicated by SCHREUER quoted *supra* footnote 37, 762.

¹⁶⁵ Discussed *supra*, paragraph A.

¹⁶⁶ In *Maffezini v. Spain*, para. 10, the arbitral tribunal generally stated that the requesting party “has the burden to demonstrate why the Tribunal should grant its application”; see also *Saipem v. Bangladesh*, para. 175, footnote 40.

¹⁶⁷ It grants provisional measures after verifying that the circumstances so require.

the arbitral tribunal to issue provisional measures other than those requested,¹⁶⁸ from the applicant's perspective point 2 is less relevant than points 1 and 3.

The purposes are so directly related with the conditions, that, to a certain extent, they may be considered as a further condition to be tested by the arbitral tribunal before granting provisional measures: if the purpose is not legitimate, the measure will not be granted. In particular, the purpose shall satisfy the tests of urgency, necessity and risk of irreparable harm, i.e. the conditions included under the broader term *periculum in mora*. Therefore, conditions and purposes are dealt with separately only for didactic purposes, bearing in mind said features.

There may be various rationales for the opportunity to evaluate the purposes of provisional measures: among others, assessment of the legitimacy of the request, easing the tribunal's task to issue measures other than those requested (if need be), evaluating whether the issued measures are no longer needed and thus complying with their temporary nature, since under Arbitration Rule 39, para. 3, the arbitral tribunal may at any time modify or revoke them.¹⁶⁹ Using Ockham's razor, the simplest explanation is that purposes constitute a useful tool in order to assess the legitimacy of the request; however, minor rationales are applicable as well.

B.II. The first purpose, namely that of preserving the parties' rights, is the only one that is mentioned in the treaty texts. It constitutes a broad *chapeau* under which all the other purposes can be covered: indeed, since it is not specified whether the parties' rights at issue are substantial or procedural, both are included in the provision.

The substantial element covers the safeguard of the enforcement of the award (protecting the right to property, during the proceeding and thereafter), whereas the procedural element covers the right to evidence and – more broadly – to a fair adjudication (securing discovery of evidence¹⁷⁰ and preventing self-help). For the sake

¹⁶⁸ Art. 39, para. 3, ICSID Arbitration Rules.

¹⁶⁹ See e.g. *Tokios Tokeles v. Ukraine*, Procedural order no. 1 dated 1 July 2003, para.5.

¹⁷⁰ Securing discovery of evidence shall be distinguished from orders of production of evidence: while the former is protected under Art. 47 ICSID Convention (since it is a provisional measure), the latter is provided for by Art. 43 ICSID Convention. For the application of such distinction in ICSID case law see *Biwater Gauff v. Tanzania*, ICSID case no. ARB/05/22, Procedural order no. 1 dated 31 March 2006. For earlier precedents see also *Agip v. Congo*, Award dated 30 November 1979, 1 ICSID Reports, 311 (extensively commented by SINAGRA, *L'arbitrato commerciale internazionale nel sistema del CIRDI ed i suoi recenti sviluppi*, Padova, 1984) and *Vacuum Salt v. Ghana*, Award dated 16 February 1994, 4 ICSID

of completeness, another overwhelming purpose has to be mentioned, namely that of protecting the right to integrity of the proceedings under Art. 26 ICSID Convention, pursuant to the rule of exclusivity of ICSID proceedings discussed above.¹⁷¹ The provisional measure aimed at avoiding parallel proceedings is generally an order or recommendation to suspend, discontinue (or cause to be discontinued) non-ICSID proceedings.¹⁷²

Furthermore, a point which has to be clarified consists in the nature of the *rights* which provisional measures aim at preserving, under the terms of Art. 47 ICSID Convention and Art. 39, para. 1, ICSID Arbitration Rules. This issue was addressed for the first time in ICSID history in *Amco Asia v. Indonesia*: the arbitral tribunal found that the rights referred to in those provisions have to be circumscribed within the *rights in dispute*.¹⁷³ While agreeing with the arbitral tribunal's rationale for such limitation, the *Plama v. Bulgaria* tribunal innovated in this respect, extending the breadth of requests for provisional measures to the *rights relating to the dispute*.¹⁷⁴

Reports, 331 f. These cases are dealt with in detail below, Section two, B.III).

¹⁷¹ See *supra*, Section one, B.I.

¹⁷² See, *ex multis*, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID case no. ARB/06/2, Decision on provisional measures dated 26 February 2010; *CSOB v. Slovak Republic*, ICSID case no. ARB/97/4, Procedural order no. 4 dated 11 January 1999 and Procedural order no. 5 dated 1 March 2000 (where bankruptcy proceedings were pending before national authorities). In *Plama v. Bulgaria*, ICSID case no. ARB/03/24, Order dated 6 September 2005, another case in which bankruptcy proceedings had been instituted before local authorities while ICSID arbitration was pending, the arbitral tribunal rejected Claimant's request for suspensive provisional measures because it found that the situation was different: contrary to the case before it, in *Plama v. Bulgaria* the arbitral tribunal had recommended the suspension of bankruptcy proceedings "because and to the extent that the court in those proceedings might determine claims of a right to receive funds which were at issue in the arbitration. Moreover, there was a direct link between the Slovak Republic as the respondent to CSOB's application for interim measures and the Slovak Collection Agency [...]" (at para. 43).

¹⁷³ *Amco Asia v. Indonesia*, ICSID case no. Arb/81/1, Decision dated 9 December 1983, 1 ICSID Reports, 411.

¹⁷⁴ *Plama v. Bulgaria*, Order dated 6 September 2005, para. 40: "It seems to the Arbitral Tribunal that the rights referred to in Article 47 of the ICSID Convention and Article 39(1) of the ICSID Arbitration Rules must be limited in some way. In the context of the present arbitration, the terms cannot mean any and all rights a party may have unconnected with the ECT or vis-à-vis third parties. If the words used in *Amco Asia*, "rights in dispute", may be too narrow, at least a limitation such as "rights relating to the dispute" is reasonable and necessary. The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out". In the same sense, quoting part of the passage above, *Churchill Mining v. Indonesia*, para. 48; *Quiborax v. Bolivia*, paras. 118-124; *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID case no. ARB(AF)/12/6, Ruling on motion to amend the provisional measures order dated 12 May 2014, para. 11.

The reason for limiting the *rights* whose protection can be afforded by provisional measures is readily understandable: admitting protection for any sort of right, even unrelated with the dispute, would generate a distortion of this procedural mechanism and of the respective legal conditions of the parties between each other and before the arbitral tribunal. It is argued that the latter interpretation is the only one which is correct, while that purported in *Amco Asia* shall not be followed,¹⁷⁵ for two reasons which the *Plama v. Bulgaria* did not explain.¹⁷⁶ Firstly, referring to mere *rights in dispute* would unduly exclude the application of security for costs,¹⁷⁷ whose purpose is to safeguard the enforcement of the award.¹⁷⁸ As a matter of fact, Respondent may suffer a prejudice when Claimant's case is manifestly groundless: the scrutiny carried out by the Secretary-General when a request for arbitration is filed with the ICSID Centre is limited – and rightly so – to a verification of non-manifest lack of jurisdiction of the Centre (i.e., there is no evaluation of the merits of the case).¹⁷⁹ Therefore, the potential institution of completely groundless arbitration proceedings can not – and shall not – be excluded: security for costs are there precisely to avoid the risks of non-coverage of

¹⁷⁵ See, *contra*, *Churchill Mining v. Indonesia*, paras. 49-50. However, it is submitted that the impact of the interpretation made by the arbitral tribunal in this case shall not be overestimated, due to the close resemblance that this case bore with *Amco v. Indonesia* (acknowledged by the tribunal itself). Moreover, the alleged rights to be protected were extremely generic and, as a consequence, weak. Finally, the arbitral tribunal found – at para. 50 – that those rights “are not rights in dispute that could warrant the recommendation of provisional measures”, therefore implicitly confirming that the mere fact that the alleged rights are not in dispute can not suffice for a request to be rejected.

¹⁷⁶ Nor did the *Churchill Mining v. Indonesia* arbitral tribunal.

¹⁷⁷ Indeed, in *Maffezini v. Spain*, paras. 24 f., the arbitral tribunal incredibly denied Respondent's request for security for costs under the following ground: “24. In this case, the subject matter in dispute relates to an investment in Spain by an Argentine investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case. 25. It is clear that these are two separate issues. *The issue of provisional measures is unrelated to the facts of the dispute before the Tribunal*” [italics added, A/N]. However, a few lines above, at para. 23, it had stated that “Any preliminary measure to be ordered by an ICSID arbitral tribunal *must relate to the subject matter of the case* before the tribunal and not to separate, unrelated issues or extraneous matters” [italics added]. The tribunal apparently falls in contradiction, because it firstly asserts that a request for provisional measures must relate to the subject matter of the dispute (which security for costs undoubtedly do) and then states that the issue of provisional measures is *unrelated to the facts of the dispute* (which may be true, but certainly is something different that what had been set out before as a condition). It is not a clerical error, since upon this point the tribunal dismissed Respondent's application; it can tentatively be argued that it is highly probable that the tribunal had already decided not to grant the request due to the hypothetical situations on which it was based (see para. 16), however the surprising result which shall not be followed remains.

¹⁷⁸ See below, Section two, B.V.

¹⁷⁹ Art. 36, para. 3, ICSID Convention reads: “The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register”.

costs when arbitration is concluded in favour of Respondent and Claimant is impecunious. This right to property does not constitute a *right in dispute*, but nonetheless it deserves protection by way of provisional measures: therefore, the analysis of the purposes of provisional measures contributes to a better understanding and a correct interpretation of their scope.

Secondly, there is a reason which derives – in the perspective of mere logic – from the text of Art. 39, para. 1, ICSID Arbitration Rules, where it provides that the requesting party has to specify the rights to be preserved:¹⁸⁰ had such rights to be exclusively those in dispute, there would be no need to specify them; accordingly, adopting the *effet utile* criterion of interpretation,¹⁸¹ we are able to reach the conclusion that the rights to be preserved through provisional measures shall not necessarily coincide with the rights in dispute.

B.III. The category of protected rights is not limited, as we have seen, to the mere *rights in dispute*.¹⁸² Indeed, procedural rights such as the right to preservation of evidence are essential conditions of fair adjudication and due process.

In *Biwater Gauff v. Tanzania*, Respondent carried out a seizure of Claimant's assets, occupying its offices and taking over the whole business, allegedly performing an unlawful expropriation for which Claimant asked compensation and reparation of damages before ICSID.¹⁸³ In its request for arbitration, Claimant also formulated a request for provisional measures in relation to payments of certain sums and to preservation of records and other relevant documents pending the determination of the arbitral tribunal. In a nutshell, Claimant maintained that the seizure of its property had made it impossible for it to assess and demonstrate in detail the character of the expropriation it had suffered and therefore to pursue its claim in the arbitral proceeding; in addition, it considered those documents to be at risk of loss or destruction if left in

¹⁸⁰ See *supra* Section two, B.I.

¹⁸¹ Also known under the latin formula *ut res magis valeat quam pereat*.

¹⁸² See above, B.II.

¹⁸³ *Biwater Gauff v. Tanzania*, ICSID case no. ARB/05/22, Procedural order no. 1 dated 31 March 2006, paras. 1-14.

the possession of the party whose economic interest was at stake due to their existence.¹⁸⁴

The facts of the case were analogous with two of the most renowned early precedents of ICSID, namely *Agip v. Congo*¹⁸⁵ and *Vacuum Salt v. Ghana*.¹⁸⁶ In this respect, the purpose of the request for provisional measures was that of preserving its procedural right to evidence and therefore to a fair adjudication of its claims, to which the arbitral tribunal acceded in general terms.¹⁸⁷ However, it ruled that such a right is not absolute, meaning that not all sort of evidence deserves protection by way of provisional measures, even if it may be pertinent to the case at stake: accordingly, Claimant's request for an inventory of documents under the availability of Respondent was partially amended because it lacked specificity and therefore was excessively burdensome to the latter; the arbitral tribunal referred the parties to a scheme of mutual cooperation with the aim of identifying the relevant documents to be inserted in the inventory.¹⁸⁸

In any event, the tribunal's most significant contribution to the precise identification of the procedural rights at issue consists in the demarcation of the dividing line between Art. 47 (provisional measures) and Art. 43 (production of documents) of the ICSID Convention. Art. 43 reads:

“Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

(a) call upon the parties to produce documents or other evidence, and

¹⁸⁴ *Ibid.*, para. 29.

¹⁸⁵ See *Agip v. Congo*, award dated 30 November 1979, 1 ICSID Reports, 311

¹⁸⁶ See *Vacuum Salt v. Ghana*, award dated 16 February 1994, 4 ICSID Reports, 331.

¹⁸⁷ *Biwater Gauff v. Tanzania*, para. 86: “In the Arbitral Tribunal's view, BGT's request that this evidence be preserved is reasonable. Until a view can be taken as to the relevance and materiality of such evidence, the safest course at this early stage of the proceedings is to ensure that no adverse step is taken in relation to the same. To this extent, BGT has clearly identified the right which it seeks to preserve by means of the requested provisional measures. It has also identified the measures the recommendation of which is requested. The Arbitral Tribunal also considers that the requirements of necessity and urgency are met, the former because of the potential need for the evidence in question, and the latter because there is a need for such evidence to be preserved before the proceedings progress any further (e.g. to enable each party properly to plead their respective cases)”. On the test of reasonableness, see also, *ex multis*, *Railroad Development Corporation v. Republic of Guatemala*, ICSID case no. ARB/07/23, Decision on provisional measures dated 15 October 2008, para. 34.

¹⁸⁸ *Ibid.*, paras. 89-98.

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate”.

In the management of documents pending proceedings, two different purposes may be achieved under the Convention, namely preservation and production. In the tribunal’s provisional view,¹⁸⁹ Art. 47 is designed to ensure preservation, whereas Art. 43 provides for production.¹⁹⁰ According to such decision, it will be relevant to draw on the specific purpose aimed at by the applicant before granting provisional protection under Art. 47 of the Convention.

Said precedent regarding the dividing line between preservation and production was taken into account by Claimant in *Railroad Development Corporation v. Republic of Guatemala*,¹⁹¹ in which it made a request under Art. 47 – and Art. 10.20.8 of CAFTA,¹⁹² being that treaty applicable in the case – only in relation to the former purpose. Incidentally, it is worth noting in this vein that this distinction plays an additional role: the persuasiveness of the 2010 IBA Rules on the taking of evidence¹⁹³ is higher as to production – to which they are related – than to preservation of documents.¹⁹⁴

In *Abaclat and Others v. The Argentine Republic*, the arbitral tribunal acceded to Respondent’s request whereby Claimant had to refrain from deleting and/or destroying

¹⁸⁹ *Ibid.*, para. 101.

¹⁹⁰ *Ibid.*, para. 100: “This is a more controversial issue [i.e., production of documents, *A/N*] when framed as an application for provisional measures under Article 47 of the ICSID Convention. Actual production is not usually considered within the ambit of such interim relief, partly because preservation is usually sufficient to protect the rights in question, and partly because actual production is catered for by other rules (in particular Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules). Indeed, the two procedures are aimed at different issues: 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”.

¹⁹¹ See for the reference to the case *supra* footnote 117.

¹⁹² Art. 10.20.8 of CAFTA provides in relevant part: “A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction”.

¹⁹³ The 2010 IBA Rules on the taking of evidence were adopted by IBA Council resolution dated 29 May 2010. For the text of the rules see IBA’s official website: <http://www.ibanet.org>.

¹⁹⁴ As correctly pointed out by the arbitral tribunal at para. 32, “the IBA Rules are used widely by international arbitral tribunals as a guide even when not binding upon them. Precedents and informal documents, such as the IBA Rules, reflect the experience of recognized professionals in the field and draw their strength from their intrinsic merit and persuasive value rather than from their binding character”; see also para. 20.

any document relating to Claimants having allegedly withdrawn from the proceedings under two purposes: preserving Respondent's right of defense and ensuring the integrity of the proceedings,¹⁹⁵ the latter – as we have seen – being an element characterising both the interests of the parties and the authority of the arbitral tribunal.

Concluding on the purpose of preservation of evidence, it is deemed relevant to briefly sketch a peculiar case of pre-provisional measures issued under the term of *directions* in the *Bernhard von Pezold and Others v. Zimbabwe* case:¹⁹⁶ since Respondent had allegedly intimidated Claimants ordering a documents disclosure regime in violation of the one ordered by the arbitral tribunal at the joint first session, the President of the arbitral tribunal issued an interim order directing that Respondent refrain from such actions, with the purpose in this case of preserving the documents disclosure regime.¹⁹⁷ This unprecedented decision, made solely by the President and derogating from the principle of *contradictoire* provided for by Art. 39, para. 4 ICSID Convention, indicates the unavoidable preminence of the preservation of documents for fair arbitration proceedings.

B.IV. The purpose of preventing self-help is quite often referred to in cases of publications or any other form of communications to the *media* carried out by Claimant while proceedings are pending, in order to harm the host State. In this light, it is addressed in contrast with right to confidentiality of arbitration. However, since confidentiality is rapidly eroding – at least in ICSID arbitration – usually this kind of requests are denied *in limine*, even before evaluating their urgency and necessity. As a consequence, this stream of ICSID case law and the purpose of preventing self-help are relatively unknown, though there are instances of other types of application deserving being mentioned.

In *Churchill Mining PLC v. Republic of Indonesia*, Respondent requested, *inter alia*, “that the tribunal order Claimant to refrain from making false, unfounded and

¹⁹⁵ *Abaclat and Others v. The Argentine Republic*, ICSID case no. ARB/07/5, Procedural order no. 11 dated 27 June 2012, para. 21.

¹⁹⁶ *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Directions concerning Claimants' application for provisional measures of 12 June 2012 dated 13 June 2012.

¹⁹⁷ *Ibid.*, para. 8.

misleading statements in the media regarding the case at hand”.¹⁹⁸ The dispute had originated from the alleged revocation of mining licenses by Respondent. According to Indonesia, Claimant’s conduct in the press was depicting the host State as an unfavourable scene for foreign direct investments with the additional aim of exerting pressure and gaining a negotiation tool in that regard: accordingly, the purpose for its request of provisional measures was that of preventing self-help.¹⁹⁹ In its response, Claimant relied on *Amco v. Indonesia*,²⁰⁰ *World Duty Free v. Kenya*²⁰¹ and *EDF v. Romania*²⁰² as evidence of a tendency contrary to the alleged right to confidentiality. The arbitral tribunal, after recalling that in *Amco v. Indonesia* the issues were similar, since Indonesia complained of various newspaper articles that it considered harmful, found that the ICSID framework did not impose confidentiality and that the alleged “right to attract foreign investment” and analogous formulations made by Respondent were not rights in dispute worth of recommendation for provisional measures.²⁰³ Thus, in the case under comment the arbitral tribunal ruled that the applicant had failed to qualify the right that may justify provisional measures, without the need to investigate the conditions urgency and necessity (which however were evaluated for the sake of completeness and deemed to be absent),²⁰⁴ it nevertheless upheld the validity of the purpose of preventing self-help.

In a different context, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Claimants requested provisional measures with the purpose of preventing self-help, due to the intimidating conduct carried out by agents for Respondent who entered

¹⁹⁸ *Churchill Mining PLC v. Republic of Indonesia*, ICSID case no. ARB/12/14, Procedural order no. 3 dated 4 March 2013, para. 1, lett. a.

¹⁹⁹ *Ibid.*, para. 19: “By engaging in “false, unfounded and misleading campaigns” and approaching officials of the Indonesian government in order to exert pressure to settle the dispute outside of the present proceedings, the Claimant engages – so the Respondent says – in self-help which justifies the provisional measures sought by the Respondent” [footnote omitted].

²⁰⁰ *Amco Asia Corporation v. Republic of Indonesia*, ICSID case no. ARB/81/1, Decision on Request for provisional measures dated 9 December 1983, 412 (reported at para. 25 as well as the two following cases).

²⁰¹ *World Duty Free Company Limited v. Kenya*, ICSID case no. ARB/00/7, Award dated 4 October 2006, para. 16.

²⁰² *EDF (Services) Ltd v. Romania*, ICSID case no. ARB/05/13, Procedural order no. 2 dated 30 May 2008, para. 43.

²⁰³ *Churchill Mining PLC v. Republic of Indonesia*, para. 50.

²⁰⁴ *Ibid.*, paras. 55 f.

Claimants' property without authorisation.²⁰⁵ Claimants requested that the arbitral tribunals

“Order the Respondent to instruct its police to prevent people from coming onto the Makandi Estate, and to the extent that those people have already arrived on the Makandi Estate, to remove them, unless those people are authorised by the Claimants”.²⁰⁶

Having Respondent undertaken to ensure the maintenance of the *status quo* and that the police would protect Claimants upon any reports received, the arbitral tribunal decided to dismiss Claimants' application for failure to demonstrate the basis for provisional measures.²⁰⁷ In this case as well, it nonetheless upheld the validity of the purpose of preventing self-help.²⁰⁸

B.V. The purpose of safeguarding the enforcement of the award constitutes a *genus*, of which security for costs is a *species*: indeed, the latter aims at securing the potential enforcement of the award in favour of Respondent against a losing impecunious Claimant. However, there is no parallelism in favour of Claimant in arbitral case law at the provisional measures stage, for a series of reasons: first of all, due to the presumption against the probability that the State will be unable to honour the award (a presumption which should be reconsidered, in the face of current practice); secondly, and perhaps more importantly, due to a persistent mindset among the majority of investment arbitrators whereby deference towards the State shall be paid to the largest possible extent. Of course, the necessity of deference is admittedly essential for the very practicality of mixed dispute settlement mechanisms; at the same time, concerns regarding equality of arms in international adjudication and the opportunity to reduce its asymmetries warrant new assessment. In consideration of the present *vacuum*, at this

²⁰⁵ *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Procedural order no. 4 dated 16 March 2013, para. 8.

²⁰⁶ *Ibid.*, para. 2.

²⁰⁷ *Ibid.*, para. 28.

²⁰⁸ For an application of the purpose under comment see *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Directions concerning Claimants' application for provisional measures of 12 June 2012 dated 13 June 2012, paras. 3 ff.

stage my analysis focuses on security for costs, discussed in the following paragraph dealing with atypicalness.²⁰⁹

²⁰⁹ See below, C.V.

C. Atypicalness

I. Introduction. – II. Measures for the protection of the tribunal’s jurisdiction. – III. Measures aimed at preventing aggravation or exacerbation of the dispute. – IV. Preservation of evidence. – V. Security for costs.

C.I. The third part of this section is devoted to the presentation of a relevant feature of provisional measures, namely their atypicalness. Art. 47 ICSID Convention provides that the arbitral tribunal may issue *any* provisional measure it deems appropriate, considering the specific case and the specific moment at hand.²¹⁰ This adds to other features which render this procedural mechanism so fascinating and flexible: there is no standard moment when a decision on provisional measures shall be made; there is no standard party entitled to originate a decision thereupon; nothing prevents the parties from reiterating the very same request, taking account of a modification occurred while the proceedings were pending; it is only in part a decision, since it does not bind the arbitral tribunal (empowered to modify or revoke it) nor is it conducive to a pre-judgment on the merits of the case.

As we have already seen, provisional measures vary and are tailored to the specific case for which they apply, therefore the vital element of their atypicalness shall be maintained, avoiding crystallisations. This being said, it is nonetheless deemed useful to advance further with the analysis of how provisional measures have been applied in order to draw indications from arbitral practice: short of categorising, this part aims at illustrating analogies in terms of type of case and correlated type of measures: the more parallelisms appear, the more useful the research in this sense will be.

Atypicalness is related to purposes: different purposes require different measures, as we will see below. In addition, it is deemed relevant to note how standard conditions are considered at different degrees due to different purposes and the atypicalness of provisional measures.

²¹⁰ See *RSM v. Saint Lucia*, Decision on Saint Lucia’s request for security for costs dated 13 August 2014, para. 51: “Neither Article 47 ICSID Convention nor ICSID Arbitration Rule 39 deals with the tribunal’s power to order security for costs explicitly. The type of provisional measures a tribunal may recommend is not specified in those provisions”.

C.II. The need to protect the arbitral tribunal's jurisdiction is fundamental. It comprises all the purposes discussed above: preserving the parties' rights, securing discovery of evidence, preventing self-help and safeguarding the enforcement of the award.²¹¹ Aimed at avoiding²¹² and neutralising²¹³ interferences from national authorities, it constitutes a development of the negative effect of the *kompetenz-kompetenz* principle provided for by Art. 41 ICSID Convention. Apart from what has been discussed on the rule of exclusivity to decide upon provisional measures,²¹⁴ this issue is broader, as it encompasses all sort of peri-arbitral obstruction by way of parallel proceedings.²¹⁵

In regard to jurisdiction, it is particularly connected with preservation of evidence: however, while the latter focuses on *how* jurisdiction will be exercised, the former consists in the *very power and duty* to carry out its function. The *Quiborax, Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia*²¹⁶ case is the clearest example of both aspects, namely interrelation and difference.

The dispute between the parties drew its origin from the revocation by the executive power of eleven mining concessions allegedly held by Claimants.²¹⁷ Considering this governmental act a confiscatory measure in violation of the applicable BIT, Claimants filed a request for arbitration before ICSID, which was registered on 6 February 2006. At the end of 2008, criminal proceedings against Claimants and persons related to them were instituted before the Courts of Bolivia, based on the accusations of forgery, use of forged documents, fraud and destruction of personal property to defraud:²¹⁸ they were accused of having forged minutes of a shareholders' meeting in order to retroactively reinforce the establishment of ICSID jurisdiction for the purpose of the then pending arbitration. While Respondent intended thereby to protect its sovereignty on criminal

²¹¹ See this Section, B.

²¹² Before peri-arbitral litigation is instituted.

²¹³ After peri-arbitral litigation has been instituted.

²¹⁴ See Section one, B.I.

²¹⁵ See *Tokios Tokelés*, ICSID case no. ARB/02/18, Order no. 1 on Claimant's request for provisional measures dated 1 July 2003, para. 2 lett. b: "According to this basic principle, ICSID tribunals have repeatedly ruled: (a) [...] (b) that the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further such proceedings in connection with the dispute before the ICSID tribunal"; see also *Internationaal Quantum Resources Limited, Frontier SPRL et Compagnie minière de Sakania SPRL c. République démocratique du Congo*, Affaire du CIRDI ARB/10/21, Ordonnance de procédure no. 1 du 1er Juillet 2011, para. 23, lett. (i) and (ii).

²¹⁶ In the text also referred to as *Quiborax*.

²¹⁷ *Quiborax v. Bolivia*, Decision on provisional measures dated 26 February 2010, para. 4.

²¹⁸ *Ibid.*, para. 30.

matters,²¹⁹ Claimants maintained that criminal proceedings were being used with the purpose of intimidating Claimants and some of its key witnesses and consequently compel them to renounce their claims in the arbitration. In a nutshell, the parties differed as to the need to: 1- protect the arbitral tribunal's jurisdiction – since the subject-matter of the two proceedings did not coincide, while undoubtedly criminal proceedings were having an impact on the ICSID proceedings – and 2- to preserve evidence.²²⁰

The tribunal, while acknowledging – under the *Perenco v. Ecuador* test²²¹ – that the exclusivity of ICSID proceedings applies only to investment disputes,²²² found that

“Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses”.²²³

In sum, the arbitral tribunal decided to extend the need to protect its jurisdiction because in that specific instance Claimant's right to have potentially relevant evidence preserved risked being impaired by Respondent's conduct.²²⁴

As to the conditions for granting provisional measures, interestingly the tribunal annulled the threshold of urgency²²⁵ and adopted the proportionality test embodied in

²¹⁹ As indicated by an ICSID arbitral tribunal in *Abaclat and Others v. The Argentine Republic*, ICSID case no. ARB/07/5, Procedural order no. 13 dated 27 September 2012, paras. 39 ff.: “An arbitral tribunal can in principle not prohibit a Party from conducting criminal court proceedings before competent state authorities”.

²²⁰ For a slightly different case, in which parallel criminal court proceedings were allegedly adopted in order to collect evidence to be used in the ICSID arbitration – contrary to the integrity of the proceedings – see *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID case no. ARB(AF)/12/6, Ruling on motion to amend the provisional measures order dated 12 May 2014, para. 26.

²²¹ *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID case no. ARB/08/6, Decision on provisional measures dated 8 May 2009, para. 61.

²²² Therefore, it did not extend to parallel criminal proceedings pending before the Courts of Bolivia. See also *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID case no. ARB(AF)/12/6, Ruling on motion to amend the provisional measures order dated 12 May 2014, para. 30: “In other words, a criminal proceeding does not *per se* violate the principle of exclusivity of ICSID arbitration, or aggravate the dispute. *Something more* has to be at stake to justify a tribunal enjoining a State to suspend or defer a criminal investigation. The Tribunal is convinced that such exceptional circumstances exist in this case”.

²²³ *Quiborax v. Bolivia* quoted *supra*, para. 148.

²²⁴ Point two gave rise to an extension of point one.

Art. 17A of the UNCITRAL Model Law²²⁶ in order to evaluate irreparable harm and consequently the necessity test.²²⁷

On those grounds, the tribunal issued a binding²²⁸ provisional measure directing Respondent to take all appropriate measures to suspend the pending criminal proceedings²²⁹ and to refrain from instituting any other criminal proceedings directly related to the subject-matter of the investment arbitration.²³⁰

In conclusion, the tribunal achieved the result of protecting both the integrity of the proceedings and evidence focusing on the latter aspect.²³¹ The case under comment exemplifies to a significant extent the interrelationships between conditions, purposes and atypicalness of provisional measures in international investment arbitration.

C.III. Measures aimed at preventing aggravation or exacerbation of the dispute encompass a wide panorama of situations, which the general expression embraces: there is no specific type of provisional measure in this respect.

²²⁵ *Quiborax v. Bolivia*, para. 153: “The Tribunal agrees with Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, *they are urgent by definition*” [italics added, A/N].

²²⁶ According to Art. 17A of the UNCITRAL Model Law, the party requesting a provisional measures shall demonstrate that “Harm not adequately repaired 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”.

²²⁷ See *Quiborax v. Bolivia*, paras. 154-165, particularly paras. 156-157; see also *Convial Callao c. Perú*, Decision sobre solicitud de medidas provisionales fechada 22 Febrero 2011, pár. 120: “Ambas Partes sostienen que el Tribunal igualmente debe considerar la proporcionalidad de las medidas provisionales solicitadas. Este Tribunal ha ponderado seriamente los posibles perjuicios que sufriría el Perú en caso de decretar la medida provisional, pues esta es una tarea que no se debe tomar a la ligera. Así, el Tribunal considera que la protección a la integridad del proceso a la que tienen derecho las Demandantes respecto de los señores Lowry y Guasco sobrepasa el posible perjuicio de la Demandada. En efecto, el Perú puede seguir el proceso penal y al mismo tiempo abstenerse de tomar medidas que puedan entorpecer la colaboración de los señores Lowry y Guasco en el procedimiento arbitral. La situación inversa no tiene el mismo resultado: si el Perú, dentro del proceso penal, toma decisiones que entorpezcan la colaboración de los señores Lowry y Guasco en el procedimiento arbitral, el derecho de las Demandantes a presentar su caso podría verse seriamente afectado”.

²²⁸ Though not provided for *expressis verbis*, the tribunal adopted the term “shall”, showing a directive tone; see para. 165, point one.

²²⁹ For other cases of stay or deferral of criminal proceedings in appropriate instances, see *City Oriente Limited v. Ecuador and Petroecuador*, ICSID case no. ARB/06/21, Decision on provisional measures dated 19 November 2007, paras. 61 ff.; *Tokios Tokelés v. Ukraine*, ICSID case no. ARB/02/18, Order no. 3 dated 18 January 2005, para. 11.

²³⁰ *Ibid.*, para. 165, points one and two.

²³¹ For an almost identical decision in recent ICSID case law, see *Convial Callao c. Perú*, Decision sobre solicitud de medidas provisionales fechada 22 Febrero 2011.

The *aggravation / exacerbation* binomial is an hendiadys which characterises the inherent obligation of the parties with each other and towards the arbitral tribunal, corresponding to the latter's inherent power to issue provisional measures as discussed above. It is by no means an obligation without a sanction, since damages caused in breach thereof will be awarded to the party having suffered prejudice. Indeed, as it is linked to the principle of good faith and abidance by the arbitration agreement, its issuance in the course of the proceedings has a mere declaratory – not constitutive – effect and therefore may play a role in terms of evidence.

Said binomial is in certain cases associated with the preservation of the *status quo* and may be adopted as a sort of *pre-provisional measure* – in the form of a temporary restraint – pending determination of a request for provisional measures.²³² In such cases, it is submitted that the necessary respect of the principle of *contradictoire* expressly provided for in Art. 39, para. 4, ICSID Arbitration Rules does not apply, on three main grounds:

- first of all, because it consists of a general obligation which applies even in the absence of express mention;
- secondly, as it can be readily modified or revoked if groundless: the proportionality test is flatly favourable to an effective application and quick revision, instead of facing the risk of greater or even irreparable harm;
- most importantly, since ICSID tribunals' inherent power renders the arbitral mechanism able to confront situations where immediate decisions are unavoidable, constituting moreover a corollary to the principles of good faith and abidance by the arbitration agreement and the jurisdiction of the tribunal.

²³² *Perenco v. Ecuador*, para. 23: “Perenco asked the Tribunal to act swiftly to prevent aggravation of the dispute, impairment of the rights Perenco was seeking to enforce in the arbitration and interference with the Tribunal's ability to grant effective relief. Since forcible collection measures could take effect within three days, Perenco requested the Tribunal to issue immediately an order in the nature of a temporary restraining prohibiting Ecuador from undertaking any measures pending determination of the application for provisional measures”.

The right to preservation of the *status quo*, non-aggravation and non-exacerbation of the dispute has been established in public-international-law adjudication before the PCIJ,²³³ the ICJ²³⁴ and earlier ICSID case law since *Holiday Inns v. Morocco*.²³⁵ In addition, the *travaux préparatoires* of the ICSID Convention address the need “to preserve the status quo between the parties pending the final decision on the merits” and the same does the commentary to the 1968 edition of the ICSID Arbitration Rules.²³⁶ However, its autonomous existence seems to be excluded in ICSID jurisprudence. In *Burlington Resources v. Ecuador*, this measure was issued in addition to other more specific measures.²³⁷ In this regard, the arbitral tribunal in *Cemex Caracas Investments v. Venezuela* has been even more assertive when it ruled that

“This Tribunal [...] recalls that Article 47 of the ICSID Convention does give ICSID Arbitral Tribunals power to recommend measures directed at the preservation of the rights of the parties. In exercising this power, ICSID Tribunals may recommend measures in order to avoid the aggravation or extension of the dispute. But those “non-aggravation” measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind”.²³⁸

Finally, it is noted that in a case the applicant requested a provisional measure of non-aggravation of the dispute in the form of a formal interim order.²³⁹ The arbitral tribunal,

²³³ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment dated 5 December 1939, PCIJ Series A/B no. 79, 199.

²³⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order dated 23 January 2007, ICJ Reports 2007, para. 49; *LaGrand*, Judgment dated 27 June 2001, ICJ Reports 2001, para. 103.

²³⁵ *Holiday Inns v. Morocco*, Order of 2 July 1972, reported by LALIVE, P., quoted *supra* footnote 1, 654 ff. and BYIL, 1980. For further decisions on aggravation of the dispute from the earliest cited above to the more recent, namely the *Amco v. Indonesia* (“both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult”, 1 ICSID Reports, 412), *Pey Casado v. Chile*, *CSOB v. Slovakia*, *Azurix v. Argentina*, *Plama v. Bulgaria* and *Occidental v. Ecuador*, see SCHREUER, quoted *supra* footnote 37, 793-795.

²³⁶ It explained that Art. 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” (1 ICSID Reports 99, also quoted in *Burlington Resources v. Ecuador*, para. 62, and SCHREUER, quoted *supra* footnote 37, 793).

²³⁷ *Burlington Resources v. Ecuador*, para. 88, point 8.

²³⁸ *Cemex Caracas Investments v. Venezuela*, para. 65.

²³⁹ *Internationale Quantum Resources Limited, Frontier SPRL et Compagnie minière de Sakania SPRL c. République démocratique du Congo*, Affaire du CIRDI ARB/10/21, Ordonnance de procédure no. 1 du 1er Juillet 2011, para. 24: “Dans leur lettre du 23 Mai 2011, les Demanderesses ont présenté la demande

having found that the request was too generic in its formulation, rejected the application; however, precisely because non-aggravation of the dispute constitutes a general principle applicable to each and every party to an arbitration, it recalled such obligation to both parties.²⁴⁰ In these circumstances, apart from a different degree of precision, there seems to be no difference between a formal order-recommendation and such reference to the principle.

C.IV. Measures for the preservation of evidence generally consist in procedural orders recommending or ordering²⁴¹ the addressee to act accordingly with the purpose for which those measures are required, clearly if the conditions for their issuance are met. As already pointed out,²⁴² measures under Art. 47 ICSID Convention exclude indications as to the actual production of documents, since they are covered by Art. 43 ICSID Conventions and the special requirements thereof.

In a special case, the President of the ICSID arbitral tribunal decided to issue, the day following the application, *directions* for urgent provisional measures concerning the preservation of a document disclosure regime which was at risk due to Respondent's conduct.²⁴³ In that regard, it is argued that the specific atypical form of the decision – a *pre-provisional measure* in the sense that its validity had to be verified by the entire panel thereafter for its confirmation or revocation – was required by the fact that it was not collegial and that the principle of *contradictoire* provided for by Art. 39, para. 4, ICSID Convention had not been followed.

d'ordonnance intérimaire suivante concernant la non-aggravation du différend: (f) *Une ordonnance interdisant à la RDC de prendre quelque mesure que ce soit et de poser quelque acte ou geste que ce soit qui aurait pour effet d'aggraver le différend, incluant, sans limiter la généralité de ce qui précède, toute mesure de représailles additionnelle contre les Demanderesses ou toute autre entité du groupe de sociétés FQM jusqu'à ce que le Tribunal ait rendu une décision sur la Requête pour mesures provisoires des Demanderesses*".

²⁴⁰ *Ibid.*, para. 28: "Le Tribunal estime que la demande des Demanderesses est trop générale dans sa formulation pour pouvoir faire l'objet d'une recommandation. Toutefois, le Tribunal rappelle qu'il est un principe général applicable à toute partie à un arbitrage de s'abstenir dans la mesure du possible et raisonnable de tout acte susceptible d'aggraver le différend".

²⁴¹ In any case, the fundamental right to fair arbitration proceedings renders the measure preemptory even in spite of *soft* terms.

²⁴² See above, B.III.

²⁴³ *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangan Development Co. (Private) Limited v. Republic of Zimbabwe*, joined ICSID cases no. ARB/10/25, Directions concerning Claimants' application for provisional measures of 12 June 2012 dated 13 June 2012.

C.V. As anticipated above,²⁴⁴ security for costs – also known under the Latin formula *cautio iudicatum solvi* – is a *species* of the *genus* “measures aimed at securing the enforcement of the award”: indeed, its purpose is to secure the potential enforcement of the award in favour of Respondent against a losing impecunious or unwilling Claimant. More developed than its counterpart, it can not however be said that this measure has met with success in investment case law: indeed, the majority opinion is that the power to order security for costs – be it based on Art. 47 ICSID Convention or on the theory of inherent powers in annulment proceedings – should be adopted only in extreme circumstances, such as when there is evidence of abuse of process.²⁴⁵ Accordingly, a significant number of ICSID tribunals have rejected applications for security for costs.²⁴⁶ The main reason for that consists in the concern about Claimant’s – or Applicant’s, in annulment proceedings – right to effectively present its claim, without unbearable economic barriers.²⁴⁷

An additional concern is to avoid upholding hypothetical assumptions, namely that Respondent will win the case and secondly that the case was so manifestly groundless that Claimant will have to cover the totality of costs and expenses of the proceedings, at an early stage; furthermore, the arbitral tribunal shall not prejudge the case.²⁴⁸

²⁴⁴ See above, B.V.

²⁴⁵ See *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* [hereafter *Commerce Group v. El Salvador*], ICSID case no. ARB/09/17 (Annulment Proceeding), Decision on El Salvador’s application for security for costs dated 20 September 2012, para. 45.

²⁴⁶ See, *inter alios*, *Commerce Group Corp.* quoted *supra* footnote 174; *Abaclat and Others v. The Argentine Republic*, ICSID case no. ARB/07/5, Procedural order no. 10 on security for costs dated 18 June 2012; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Government of Grenada*, ICSID case no. ARB/10/6, Tribunal’s decision on Respondent’s application for security for costs dated 14 October 2010; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID case no. ARB/06/8, Decision on preliminary issues dated 23 June 2008; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID case no. ARB/98/2, Decision on provisional measures dated 25 September 2001; *Maffezini c. España*, caso CIADI ARB/97/7, Resolución procesal no. 2.

²⁴⁷ *Commerce Group v. El Salvador*, para. 52: “At the same time, the Respondent’s request, if granted, might seriously affect the Applicant’s right to seek annulment of the award. The Committee does not find in the Respondent’s arguments – which rest on several assumptions – a compelling reason to interfere with Applicant’s right to seek annulment of the award”.

²⁴⁸ *Maffezini c. España*, pár. 21: “Llegar a una determinación en este momento, que pueda poner en duda la capacidad de cualquiera de las partes para presentar su caso, no es aceptable. Sería inapropiado para el Tribunal prejuzgar el caso del Demandante recomendando la adopción de medidas provisionales de esta naturaleza”.

Atypicalness of this measure consists in the form of guarantee: generally the posting of a bond, entering into a deposit, a letter of credit and any other instrument having the same objective. Its vitality may start a new life in the near future, after a very recent development in the *RSM Production Corporation v. Saint Lucia* decision on security for costs, handed down on 13 August 2014.²⁴⁹ It is the first decision in which security for costs was granted in investment treaty arbitration, mainly in consideration of the fact that Claimant had been funded by a third party, an unknown litigation *financier*. The peculiarity of such funding rose concerns about Claimant's capability to pay an adverse costs award. This investment contract arbitration was instituted following a request filed with ICSID on 2 April 2012. In brief, the dispute arose from an exclusive oil exploration license granted by Respondent to Claimant and modified thereafter due to boundary disputes in that area, to the detriment of Claimant. RSM requests – arbitration is still pending – an award prohibiting Respondent to grant to third parties any exploration licenses in the disputed area or, in the alternative, declare that it breached its contractual obligations and award damages.

On 6 September 2013, Respondent filed a request for provisional measures. After written exchanges between the parties and the tribunal (opposition, reply and rejoinder), a hearing was held on 4 October 2013. On 12 December 2013, the arbitral tribunal issued its decision upon Saint Lucia's request, directing Claimant to bear all advances and refund Respondent of its costs to that date, whereas the decision on Respondent's request for security for costs was suspended.²⁵⁰ Thus, it constituted a sort of *pre-provisional measure* or a halfway security for costs, since its breadth did not cover all future envisageable expenses.

On 6 June 2014, Respondent reiterated its request for security for costs in addition to all the other outstanding advances. It alleged urgency and necessity to protect its procedural right against the risk that Claimant will be unable or unwilling to pay a costs award very likely to be issued against it.²⁵¹ In order to ground its position, Respondent

²⁴⁹ *RSM Production Corporation v. Saint Lucia*, ICSID case no. ARB/12/10, Decision on Saint Lucia's request for security for costs dated 13 August 2014.

²⁵⁰ This brief factual background is derived from the Decision referred to in the above footnote, paras. 4-14 and 23.

²⁵¹ *Ibid.*, para. 29.

made reference to Claimant's prior conduct in arbitration and domestic proceedings, in which it failed to comply with costs awards and judgments rendered against it.

Furthermore, Claimant was funded by a third party under what Respondent depicted as a sort of predatory scheme, whereby the third party funds the initiation of proceedings, but neither Claimant nor the third party will comply with the costs award: in the words of Gavan Griffith QC, arbitrator appointed by Respondent in that ICSID case, in his Assenting Reasons – a sort of individual-concurring opinion – appended to the decision under discussion, “such a business plan for a related or professional funder is to embrace the gambler's Nirvana: Heads I win, and Tails I do not lose”.²⁵² Interestingly, and correctly, Respondent denied the existence of the jurisdictional condition in relation to this type of provisional measures, since it shall retain the right to contest jurisdiction without having to renounce the availability of said measure.

On its side, Claimant denied the arbitral tribunal's authority to grant security for costs, mainly basing its position on the right to pursue its claim and on the *Maffezini* precedent about the hypothetical nature of the related type of assessment, falling out of the *right to be preserved* under Art. 47 ICSID Convention and Art. 39 Arbitration Rules.²⁵³

In its analysis of the request, the arbitral tribunal dealt with the issue of the jurisdictional condition, without however finally deciding thereupon.²⁵⁴ In his Assenting Reasons appended to the decision, arbitrator Gavan Griffith QC wished to express his disagreement on this point, under the following terms:

“*Paras 59 and 60.* Whilst under a BIT treaty claim an investor claimant may be required to establish *prima facie* jurisdiction to obtain an order for provisional measures, conceptually it is inadmissible to apply any such requirement upon a respondent State party's application for security for costs orders.

²⁵² *Assenting Reasons* appended by Gavan Griffith QC to the Decision on Saint Lucia's request for security for costs, para. 13.

²⁵³ *Decision*, paras. 38 and 41.

²⁵⁴ *Decision*, paras. 59-60: “It has regularly been held in previous ICSID arbitrations that a tribunal needs to have, on a *prima facie* basis, subject matter jurisdiction. An argument favorable to that position is that a tribunal which evidently does not have jurisdiction lacks the power to render any decision at all. On the other hand, a respondent may well have a legitimate interest in obtaining security for costs even in cases where the tribunal does not have subject matter jurisdiction. 60. In the case at issue, however, the Tribunal need not finally decide upon the exact requirements, if any, of establishing its jurisdiction”.

First, it is no function of the respondent State to establish jurisdiction: indeed the application may be based upon the contention that there is none. Second, a respondent party has no obligation to advance any case in defence on jurisdiction or on merits before the claimant has made its case. Third, to require a respondent State to establish the negative against its own interests, namely, as a pre-condition for the making of such orders in defence, would be a plain breach of Article 52 of the Convention as a serious departure from a fundamental rule of procedure.

For these reasons, I would recast the possibility hinted at *paras. 59 and 60* to the level of an absolute proposition that there is no requirement for a respondent party applying for provisional measures to establish any, let alone *prima facie*, position on jurisdiction”.²⁵⁵

In this regard, I find it even more relevant to state my position on the jurisdictional condition, since the issue has never been addressed conclusively so far by any investment tribunal: in cases of requests for security for costs, this condition shall be reversed, i.e. a *prima facie* assessment that jurisdiction to deal with the merits of the case may lack shall even increase the opportunity to grant security for costs, if the other conditions are met. Indeed, focusing on its purpose – namely, to protect Respondent’s right to cover a favourable costs award against an impecunious or unwilling losing Claimant – it seems that the probable lack of jurisdiction warrants the measure at issue (*an*), whereas the point to be discussed shall be that of the amount of money (*quantum*) to be secured in case of bifurcation of the proceedings (arguably a more reduced sum). In a nutshell, and perhaps going even further than Gavan Griffith QC on this point, I argue that no jurisdictional condition shall exist in these cases – agreeing with said arbitrator – and, if Respondent wishes to object to jurisdiction, the *prima facie* lack thereof shall play a role, contributing to the establishment of the other conditions, in particular that of necessity.

As to the issue of rights to be preserved through provisional measures, the tribunal dismissed the *Maffezini* precedent,²⁵⁶ upholding instead the approach advanced by the

²⁵⁵ *Assenting Reasons*, paras. 4-6.

²⁵⁶ *Decision*, paras. 72-73: “Furthermore, the Tribunal finds that the right to be preserved by a provisional measure need not already exist at the time the request is made. Also future or conditional rights such as the potential claim for cost reimbursement qualify as “*rights to be preserved*”. The hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures. At the same time, however, the prohibition of prejudging the merits of the case already at this stage ensures that the conditional character of the respective right is duly taken into account. As long as interim measures do

Plama v. Bulgaria tribunal²⁵⁷ and followed by the *Burlington v. Ecuador* tribunal,²⁵⁸ whereby also procedural rights – including the alleged right to obtain reimbursement of costs – may be protected.²⁵⁹

Moreover, the tribunal paid attention to the circumstances of the case in relation to Claimant's consistent precedents of non-compliance in other ICSID and non-ICSID proceedings, concluding that there were "compelling grounds for granting Respondent's request" and accordingly acceded – by majority vote²⁶⁰ – to the request for security for costs.²⁶¹

Gavan Griffith QC, while agreeing on the conclusion of the tribunal, opined that the strongest ground for security for costs in that case – as well as in others – concerned, rather than the peculiar RSM history of non-compliance with awards and judgments, the issue of third-party funding.²⁶² His view is that, once it appears that a third party has funded Claimant in order to allow it to institute proceedings, there should be a *presumptio iuris tantum* that security for costs shall be granted to Respondent, unless Claimant demonstrates contrary circumstances, such as its independent capacity to meet cost orders. Such a fresh proposal indicates an aspect of the important role played by provisional measures in securing equilibrium between the parties in the overall arbitral process, thus normalising the relationship between the parties and improving its efficacy. As reported by a commentator, his view has met with a mixed reaction by the specialists in the field.²⁶³ Professional litigation financiers seem to be divided.²⁶⁴ His

not cross the line of a definite judgment, the right allegedly to be protected need, in the Tribunal's opinion, not definitely exist at the time the respective measure is issued. 73. Therefore, the (conditional) right to reimbursement of legal costs qualifies as a right to be protected within the meaning of Article 47 ICSID Convention and ICSID Arbitration Rule 39 (1)"[footnote omitted, *A/N*].

²⁵⁷ *Plama v. Bulgaria*, Order dated 6 September 2005, para. 40.

²⁵⁸ *Burlington v. Ecuador*, Procedural order no. 1 dated 29 June 2009, para. 60.

²⁵⁹ *RSM v. Saint Lucia*, Decision dated 13 August 2014, para. 65.

²⁶⁰ Indeed, the arbitrator appointed by Claimant, Judge Edward Nottingham, voted against such decision and formally expressed his entire disagreement by appending a dissenting opinion to the decision.

²⁶¹ *Ibid.*, paras. 82 and 90.

²⁶² *Assenting Reasons*, para. 11.

²⁶³ KARADELIS, in *Global Arbitration Review* dated 1 September 2014, reports the following: "Australian arbitrator Gavan Griffith QC's contention that third-party funded claimants should be expected to post security for costs in investment treaty cases has received a mixed reaction from funders, counsel and academics".

²⁶⁴ *Global Arbitration Review* dated 11 September 2014 reports the fiercely disapproving opinion of Christopher Bogart, CEO of litigation financier Burford Capital, according to which Gavan Griffith QC's *Assenting Reasons* constitute a "preposterous overreaction". In a response to that article, Peter Griffin of investment claims consultancy Slaney Advisors wrote that Bogart's criticism and particularly his

position even cost him a challenge filed by RSM under the ground that he has allegedly demonstrated bias against third-party funded Claimants;²⁶⁵ if one reads his Asserting Reasons, such a challenge seems to be manifestly groundless.

More importantly, this view is opposed by his co-arbitrator, Judge Nottingham, in his dissenting opinion: according to him, firstly security for costs are not comprised within the types of provisional measures which an ICSID tribunal may grant and, secondly, these measures can not be ordered, but merely recommended. Addressing the first point, he acutely pointed to the purpose of the ICSID Convention, namely that of encouraging host States' – and overall – economic development through foreign direct investments by private parties; in this connection, security for costs would constitute an element of unpredictability, contrary to the purpose of the ICSID Convention.²⁶⁶

Other reasons are advanced in order to exclude the availability of security for costs, namely the *hypothetical right* argument contained in *Maffezini*,²⁶⁷ the different provision contained in Art. 25, para. 2, of the LCIA Arbitration Rules²⁶⁸ and the undefined terms of the relevant provisions concerning provisional measures, which in his opinion do not warrant such an invasive measure.²⁶⁹ The second line of analysis merely reproduces the debate about the legal authority of the ICSID arbitral tribunal to issue provisional measures, therefore I draw the reader's patience to the appropriate section.²⁷⁰

Very briefly, I incidentally and respectfully note his *locus classicus* of preaching strict adherence to the treaty text on the belief – or even faith – that such an attitude will more closely correspond to a correct interpretation under international law. However, the opinion whereby various arbitral precedents reiterating that provisional measures are binding, without any visible reaction from States in their BITs, Model BITs nor in their investor-State contracts seems every day more adherent to the correct interpretation,

castigation of Gavan Griffith QC is “regrettable” (see Global Arbitration Review dated 26 September 2014).

²⁶⁵ KARADELIS, in Global Arbitration Review dated 1 September 2014, reports: “US oil company RSM is seeking to disqualify Australian arbitrator Gavan Griffith QC from an ICSID tribunal hearing its claim against St Lucia, arguing that an opinion he appended to a recent decision on security for costs reveals bias against third-party funders and funded claimants”.

²⁶⁶ *Dissenting opinion*, para. 4.

²⁶⁷ See *supra*, 58 and *Dissenting opinion*, paras. 6-7.

²⁶⁸ *Dissenting opinion*, para. 8.

²⁶⁹ *Ibid.*, para. 9.

²⁷⁰ See above, Section one, A.1.

following a modification in State practice in this direction. On the other hand, his view that security for costs may run against the purpose of the ICSID Convention due to its unpredictability has some merits, while at the same time it has to be recalled that the drafters' intention was precisely that of drafting general provisions in many areas, leaving the task of specifying their contents to the ensuing arbitral case law. Whether arbitral case law is – or will ever be – sufficiently consistent and which force shall be attributed to arbitral precedents constitutes another debate which has been discussed in the previous chapter.²⁷¹

In my opinion, a link between third-party funding and security for costs shall by no means be automatic, not even on a *iuris tantum* basis: indeed, the automatism shall apply only if the third-party funder refuses to cover adverse costs award. The *onus* shall be cast on Claimant to produce a written document before the arbitral tribunal, disclosing the identity of the third-party funder and demonstrating the existence of an agreement between Claimant and the latter, whereby it undertakes the obligation to cover said costs and expenses.

The issue whether third-party funding should automatically provoke an order granting security for costs against Claimant has been the subject of debates among arbitrators, scholars and practitioners in recent years. It is mainly a common law institution which finds provisions and wider application in that context, such as the English Civil Procedural Rules,²⁷² the English Arbitration Act 1996²⁷³ and the LCIA Rules.²⁷⁴ It is significantly applied in international commercial arbitration under the referred norms.

In an interesting article published last year, a point is correctly made on the fact that security for costs shall not be automatically linked to third-party funding, since it

“would unfairly penalize claimants with meritorious claims, but who had relied upon third-party funding rather than alternative forms of financing a claim [since the same approach – namely

²⁷¹ See Chapter two.

²⁷² Rule 25.12, Civil Procedural Rules, also referred to – as well as the two following references – by KIRTLEY, WIETRZYKOWSKI, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?*, Journal of International Arbitration, 2013.

²⁷³ Section 38 (3) of the Arbitration Act 1996.

²⁷⁴ Art. 25, para. 2, LCIA Rules: “The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate [..]”.

the automatic issuance of security for costs under discussion – is not advanced in relation to the presence of other instruments for borrowing, such as contingency fee agreements, bank loans or conditional fee agreements, *A/N*]. It would also unfairly reward respondents who had no realistic chance of being awarded costs at the end of the arbitration, but were requesting security for costs on a purely tactical basis”.²⁷⁵

In my opinion, in international investment arbitration the issue of third-party funders shall inevitably raise serious concerns, due to the arbitrators’ lack of *imperium* vis-à-vis third parties: unlike judges in some jurisdictions, they lack power to order payment to those parties, should the losing Claimant be unable to cover an adverse costs award. Moreover, the *arbitral hit-and-run* shall be contrasted.²⁷⁶ At the same time, should the automatic approach be followed, this would open the way to abusive actions from Respondent in order to stifle genuine claims²⁷⁷ (e.g., by systematically applying for security, in order to increase Claimant’s costs or prevent it from having recourse to third-party schemes). Automatism shall be avoided: on the contrary, the guiding star has to be – as in many other respects – the flexible principle of good faith in the evaluation of the conduct of both parties: its application will guarantee fair results.

²⁷⁵ KIRTLEY, WIETRZYKOWSKI, quoted *supra* footnote 272, 29.

²⁷⁶ *RSM Production Corporation v. Saint Lucia* quoted *supra* footnote 178, para. 33: “Respondent alleges that the proceedings initiated by Claimant are funded by third parties (which Claimant admits), and concludes that these third parties fund the initiation of proceedings, but they will not comply with Claimant’s obligations under a resulting costs award. This, in Respondent’s view, constitutes an exceptional situation justifying an order of security for costs, which Respondent describes as “arbitral *hit-and-run*”” [footnotes omitted, *A/N*].

²⁷⁷ For instance, in *Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID case no. ARB/07/24, award dated 18 June, 2010, para. 15, where Claimant was third-party funded, the arbitral tribunal rejected an application for security for costs, due to the risk of impairing a meritorious claim.

Section three: looking beyond the current status. Treatification and contractualisation of provisional measures in international investment arbitration

International investment arbitration is triggered by three groups of instruments. These groups are (i) the piece of legislation on investments enacted by the host State, (ii) the investment treaty between host State and home State and/or (iii) the agreement between the host State and the foreign investor (investor-State contract).

Investment legislation of the host State may allow foreign investors to institute arbitral proceedings (investment *law* arbitration).

The investment treaty – BIT or MIT – allows the foreign investor having the nationality of the home State to file its claim against the host State to the appropriate arbitral *forum* according to the arbitral clause contained in the treaty (investment *treaty* arbitration).

Thirdly, the arbitral clause contained in the investor-State contract may allow for investment *contract* arbitration.²⁷⁸

These three normative layers interact with each other and determine both the substantial and the procedural framework of the arbitration proceeding. The clearest example of this interaction is constituted by umbrella clauses, namely provisions whereby States agree in the BIT to comply with each and every contractual commitment they may enter to with foreign investors of what will eventually be the home State: indeed, genuine umbrella clauses serve the purpose of bridging the gap between different layers, as a sort of normative elevator.

The role of contract in investment arbitration is not limited to the establishment of a different substantial protection – which would necessarily be higher than that of the BIT – to covered investments, since it can also represent a new frontier of arbitration, setting more specific procedural *leges speciales*. In this respect, it is worth noting that, contrary to substantial protection (which can only be increased through contract), such a procedural protection may either be increased or decreased through contract; accordingly, there arises its potential value, which is to crystallise bargaining.

²⁷⁸ This terminology has been set forth by VAN HOUTTE, BRUNETTI, quoted *supra* footnote 7, 554.

For example, let us consider provisional measures and the complex issue concerning their legal authority. As we have seen, there is an ongoing phenomenon which I call *treatification of provisional measures*, where the treaty plays the role of *lex specialis* in relation to the relevant arbitration rules (ICSID, UNCITRAL, and so forth): in this instance, the treaty specifies whether the tribunal is empowered to issue binding or recommendatory measures, or both. Indeed, in *EnCana Corp. v. Government of Ecuador* case, the special provision contained in the treaty reinforced the arbitral tribunal's authority to issue binding interim measures.²⁷⁹ Said phenomenon is likely to acquire more relevance in the near future, considering the tendency of arbitral proceedings to last longer and the understanding of the role it plays.

A phenomenon parallel to treatification may be that of *contractualisation* of said measures, operating at the third layer presented above. While it is true that it constitutes up to now a theoretical exercise, since there seem to be no examples thereof in current arbitral practice, its availability should not be set aside. How would it operate? First of all, there should be an alignment between the treaty and the contractual arbitral clauses, say, providing for ICSID arbitration; otherwise, the host State's jurisdictional offer in the contract would absorb the *lex specialis* concerning provisional measures, even in the presence of umbrella clauses (which operate on the substantial level, equalising contract claims and treaty claims). Secondly, umbrella clauses would not be necessary, since contractualisation of provisional measures provides for a *lex specialis* relating to a jurisdictional offer which would have already been made. Apart from better tailoring the legal protection to the specific investment, such a choice would be able to increase its legal security in arbitration, due to the relatively inconsistent ICSID arbitral jurisprudence on this point. Moreover, it is submitted that it would be more consistent with "the" cornerstone of arbitration, which is party autonomy. This would be achieved in its very essence, since the contractual parties are the very ones who possibly will be parties in arbitration, contrary to the treaty parties (one of which is absent): in this sense, contractualisation of the arbitral procedure regarding investments is more representative of party autonomy than any BIT provision of the same kind.

²⁷⁹ See Section one, A.II.

CHAPTER FOUR

THE IMPLEMENTATION OF PROVISIONAL MEASURES IN INTERNATIONAL INVESTMENT ARBITRATION

Introduction to the problem. – Section one: normative framework. A. ICSID Convention and Arbitration Rules. – B. UNCITRAL Arbitration Rules and the Model Law. – Section two: scenarios in the course of arbitration proceedings and relevant practice. A. Compliance. – B. Non-compliance and its legal consequences. – C. Possibility for the addressee to oppose tribunal-ordered provisional measures.

Introduction to the problem. Implementation of provisional measures comprises two different behaviours of the addressee: voluntary compliance on one side, coercive measures before State courts (enforcement) – when the addressee does not comply voluntarily with provisional measures – on the other. Said implementation constitutes a corollary of the abidance by the arbitration agreement, since, through its conclusion, the parties conferred adjudicatory power to a specific organ; accordingly, they shall abstain from any measure capable of prejudicing the execution of its final decision. In this connection, in the absence of an agreement to the contrary,¹ they have to cooperate with the arbitral tribunal and facilitate its task: failure to abide by arbitral provisional measures inevitably aggravates the dispute between the parties, in violation of the arbitration agreement; the more so, when the dispute settlement mechanism does not provide for enforcement of these measures, as we will see in relation to ICSID arbitration. In any case, the premise for a legal analysis of this topic shall necessarily be the binding force of provisional measures. However, the relationship between enforceability and their legal authority only goes in this direction:² indeed, while it is true that non-binding measures are *ipso facto* unenforceable, this does not

¹ Such as an express provision barring the tribunal from issuing provisional measures.

² I.e., it is univocal.

imply that unenforceable measures shall necessarily be non-binding; therefore, one may be well advised not to mix up the two planes.³

Contrary to ICSID arbitration, the UNCITRAL Arbitration rules provide for enforcement of provisional measures through the assistance of State courts. Such assistance is not limited to the courts of the State where arbitration proceedings have their seat, but potentially involves the participation of the courts of other countries, in whose territory enforcement is sought. In this vein, it can be said that the delocalised ICSID system coexists with the plurilocalised UNCITRAL system. In this regard, it is submitted that the relevant State court shall not verify the existence of the jurisdictional condition for provisional measures, namely the arbitral *prima facie* jurisdiction: this is part of the negative effect of the *kompetenz-kompetenz* principle;⁴ at the same time, it has to be acknowledged that such an effect is not widely recognized by State courts.⁵

For the purposes of the present chapter in relation to investment arbitration under the UNCITRAL Arbitration rules, the present analysis will be focused on the enforcement of tribunal-ordered – as opposed to court-ordered – provisional

³ See Chapter three, section one, A.I.

⁴ Under the negative effect of the *kompetenz-kompetenz* principle, State courts abstain from verifying whether the arbitral tribunal is competent to deal with the merits of the case or not. This is the prevailing view in French jurisprudence and doctrine; see, for an analysis of compatibility with Art. 2(3) of the 1958 New York Convention, GAILLARD, BANIFATEMI, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, in GAILLARD, DI PIETRO (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London, 2008, 258: “Providing for the arbitrators’ power to rule on their own jurisdiction, this principle [i.e., the *kompetenz-kompetenz* principle, *A/N*] embodies the mirroring effect that the courts should refrain from engaging into the examination of the arbitrators’ jurisdiction before the arbitrators themselves have had an opportunity to do so. Known as the ‘negative effect of the principle of competence-competence’, this rule of priority in favour of the arbitrators, today increasingly recognised in practice, exemplifies the specific nature and autonomy of international arbitration, in full harmony with the New York Convention’s philosophy of recognition of validity of the arbitration agreement and of the award resulting from the arbitral process”. See, for a critical opinion, BREKOULAKIS, *The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative*, *Austrian Arbitration Yearbook*, 2009, 238 ff.

⁵ For the current tendency in US jurisprudence, see BERMANN, *The “Gateway” Problem in International Commercial Arbitration*, *Yale Journal of International Law*, 2012, 28 ff.

measures:⁶ the reason for this choice lies in the self-executing power of the latter⁷ under the laws of procedure of the national legal order where said enforcement is sought.

After an outline of the normative framework concerning the implementation of provisional measures in section one, section two considers what may happen when these measures are issued: indeed, tribunal-ordered provisional measures may either be voluntarily complied with (A) or not (B), entailing in the latter case the availability of two options for the innocent party; such options – alternative, but not mutually exclusive⁸ – consist in the arbitral power to draw adverse inferences and/or to award damages⁹ and in the availability of court enforcement.¹⁰ They are not mutually exclusive, for two main reasons.

⁶ For a discussion of the relevant case law on the enforcement of court-ordered provisional measures in aid of arbitration, see BORN, *International Arbitration. Cases and Materials*, New York, 2011, 847-875.

⁷ MALINTOPPI, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order*, in BINDER, KRIEBAUM, REINISCH, WITTICH (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford, 2009, 180: “However, provisional measures are not in themselves self-executing and, in case of non-compliance, an ICSID tribunal does not have the power to enforce provisional measures which are normally decided through procedural orders and not binding awards”; BISMUTH, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, *Journal of International Arbitration*, Vol. No. 26, Issue No. 6, 2009, 788: “Interim protective measures granted by arbitral tribunals are not self-executing, unlike those adopted by national courts”; SCHWARTZ, *The Practices and Experience of the ICC Court*, *ICC Bulletin, Conservatory and Provisional Measures in International Arbitration*, Paris, 1993, 59: “The most important and obvious such difference is that orders given by arbitrators are not self-executing, like those of courts, and must generally take the form of directions to the parties to perform or to refrain from performing certain acts”; see also TWEEDDALE, A., TWEEDDALE, K., *Arbitration of Commercial Disputes*, Oxford, 2007, para. 9.57 (quoted in part below, footnote 8).

⁸ See, *contra*, TWEEDDALE, A., TWEEDDALE, K., quoted *supra* footnote 7, *ibid.*: “Orders made by the arbitral tribunal are not self-enforcing. Where a party refuses to comply with an order that the arbitral tribunal has made then it may penalize that party by drawing an adverse inference from its refusal or sanction that party with costs. Alternatively, *if the arbitral tribunal is not empowered to sanction the defaulting party in that manner then a national court may be asked to enforce the order*” [italics added, A/N].

⁹ See *MINE v. Guinea*, Award dated 6 January 1988, 4 ICSID Reports 59, 69: “In view of Article 47 and the applicable ICSID Rules, the Tribunal will take into account in its award the consequences of any failure by MINE to abide by these recommendations”.

¹⁰ As already said, an arbitral tribunal cannot compel compliance, due to its lack of *imperium*. However, the scope of this notion remains uncertain: see JARROSSON, *Réflexions sur l’imperium*, in *Études offertes à Pierre Bellet*, Paris, 1991, 245: “La doctrine ne désigne jamais la notion qu’en latin, aucune traduction n’en donnant d’équivalent satisfaisant”. On the distinction between arbitral *iurisdictio* and *imperium*, see MAYER, *Imperium de l’arbitre et mesures provisoires*, in

Firstly, even when the arbitral tribunal is empowered to draw adverse inferences and/or to award damages, in certain instances, the ensuing damages cannot be properly evaluated, due to the very violation of the provisional measure, as in the cases of preservation of evidence: under such circumstances, if the applicable instrument provides for court enforcement, it is meaningless to compel the innocent party to suffer such a violation and wait for an imprecise award on damages (in the most fortunate scenario, since it may even lose its case for lack of evidence!).

Secondly, it is reminded that one of the substantive conditions for granting provisional measures (either under the *Burlington* or the *Plama* test)¹¹ is that of necessity-irreparable damage, i.e. a damage which cannot be restored through monetary compensation: therefore, it would be manifestly contradictory to award damages in that scenario, because it would mean that the substantive condition at issue may not be satisfied, unless we admit that in such cases the arbitral tribunal may be empowered to award punitive damages (a doubtful and undesirable option, if we compare it with court enforcement).

Finally, paragraph C addresses the procedural instrument available to the addressee in order to oppose the arbitral tribunal's decision on provisional measures. In this as well as in all other regards, relevant practice both in administered arbitration under the ICSID Convention and Arbitration Rules and *ad hoc* arbitration under the UNCITRAL Arbitration Rules will be considered in order to evaluate the current practice in international investment arbitration.

HALDY, RAPP, FERRARI (eds.), *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Lausanne, 1999, 438.

¹¹ See Chapter three, section two, A.IV.

Section one: normative framework

A. ICSID Convention and Arbitration Rules

A. The effectiveness of provisional measures is of utmost relevance for both the measure itself and, in general, the proper functioning of any dispute settlement mechanism empowered with this procedural instrument.¹² Indeed, it constitutes the very essence of provisional measures,¹³ and its lack is able to deprive the latter of any utility¹⁴ and to weaken the adjudicatory organ through the impact on its authority.

Despite such relevance, and to a certain extent, because of it, there is no provision on the recognition and enforcement of provisional measures, neither in the ICSID Convention nor in the Arbitration Rules. From a broader perspective, it has been noted that this is a general problem in public-international-law adjudication.¹⁵

In the ICSID Convention, provisions on recognition and enforcement are limited to *awards*, therefore they are not applicable to provisional measures, which can only be rendered through procedural orders, decisions and in special instances directions. Indeed, an *award* in the ICSID system is a final decisions,¹⁶ not subject to modification nor revocation as in the case of *provisional* decisions, which are

¹² See *Roussalis v. Romania*, ICSID case no. ARB/06/1, Decision on provisional measures dated 22 July 2008, para. 21; SABATER, *National Courts, Supranational Courts and Arbitral Tribunals in International Litigation*, Currents International Trade Law Journal, Vol. 14, Issue 3, 2005, 8 f.

¹³ RACINE, *L'exécution des mesures provisoires ordonnées par un arbitre – L'éclairage du projet de nouvelle loi type CNUDCI*, in JACQUET, JOLIVET (éd.), *Les mesures provisoires dans l'arbitrage commercial international : évolutions et innovations*, Paris, 2007, 114.

¹⁴ ZIADE, R., *Mesures conservatoires (tribunal arbitral et tribunal étatique)*, in LEBEN (ed.), *La procédure arbitrale relative aux investissements internationaux. Aspects récents*, Paris, 2010, 214.

¹⁵ MCLACHLAN, *The Continuing Controversy over Provisional Measures in International Disputes*, in *Les mesures provisoires en droit international*, ILA International Law Forum – Forum du droit international, Vol. 7, Leiden, 2005, 13: “Given the importance of provisional measures, it is remarkable how limited the extent of their recognition and enforcement outside the court awarding them has been” (also referred to in ZIADE, R., quoted *supra* footnote 14, 214).

¹⁶ An indication in this sense is provided by Art. 53(2) ICSID Convention, pursuant to which “for the purposes of this Section [Section 6, on recognition and enforcement of the award, *A/N*], “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52”.

temporary in nature.¹⁷ Art. 54(1) ICSID Convention – which mentions the term *award* four times in that paragraph – reads as follows:

“Each Contracting State shall recognize an *award* [italics added, *A/N*] rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that *award* [*idem ut supra*] within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an *award* [*idem ut supra*] in or through its federal courts and may provide that such courts shall treat the *award* [*idem ut supra*] as if it were a final judgment of the courts of a constituent State”.¹⁸

In addition, the institution of diplomatic protection is equally inapplicable in relation to provisional measures as an instrument for the enforcement of these measures in the ICSID system, precisely for the same terminological reason: according to Art. 27(1) ICSID Convention, home States shall not give diplomatic protection to their nationals involved in a dispute with a given host State, unless the latter State “shall have failed to abide by and comply with the *award* rendered in such dispute”.

However, it is possible to construe the necessary assistance of State courts to ICSID arbitration by reference to other norms. It has been evidenced that, under international law, the obligation of those States which agreed to submit to ICSID arbitration – and thereby not to frustrate the object of the proceedings – extends to their judiciaries by virtue of Art. 27 VCLT:¹⁹ consequently, according to this interpretation, State courts of those legal orders would be under the obligation to

¹⁷ See Art. 39(3) ICSID Arbitration Rules, whereby the arbitral tribunal “may at any time modify or revoke its recommendations”.

¹⁸ Art. 54(1) ICSID Convention, available at the Centre’s institutional website. It is noted incidentally that the second sentence merely reproduces a customary norm in international law, later enshrined – in 1969 – in Art. 27 VCLT, whereby a State party to a treaty is prevented from invoking its internal law as a justification for its failure to comply with its international obligations: accordingly, the internal organisation of the judiciary in a federal State can by no means prejudice that State’s compliance with the obligation to recognize and enforce an award rendered pursuant to the ICSID Convention, obviously provided that it is a party thereto.

¹⁹ Art. 27 VCLT reads as follows: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46 [on the competence to conclude treaties, *A/N*]”.

give effect to ICSID provisional measures. In the words of Mavrogordato and Sidere,

“The failure to comply with them [i.e., ICSID provisional measures, *A/N*] would constitute a breach of the general obligation not to frustrate the object of the proceedings and/or the obligation to submit to ICSID jurisdiction. Such obligations extend to the local courts of the state party concerned and, arguably, to all signatories to the Convention. By virtue of art. 27 of the Vienna Convention on the Law of Treaties, states are responsible for the actions of their judiciaries and cannot rely on local laws (such as Law 105/1992) [i.e., the internal law prohibiting enforcement of tribunal-ordered provisional measures in the ICSID case under that comment, namely *Roussalis v. Romania, A/N*] to excuse non-compliance with international obligations”.²⁰

In this sense, the decision of an ICSID tribunal would constitute an international norm,²¹ of whose abidance State courts and, as a second step, their States are responsible. This opinion has the merit of connecting the implementation of ICSID provisional measures to the general obligation arising from the ratification of the Convention and involving States parties thereto, together with their organs; however, a clarification is deemed necessary in this respect: which States and, consequently, which courts are bound to give effect to ICSID provisional measures issued in the course of arbitration proceedings between “party A” and “State party B”? All States parties to the ICSID Convention, or only those States more directly involved in the specific case before the arbitral tribunal, namely State party B-Respondent (generally, the host State) and the home State of party A (i.e., the State of which Claimant (A) is a national)? Undoubtedly, the

²⁰ MAVROGORDATO, SIDERE, *The Nature and Enforceability of ICSID Provisional Measures*, Arbitration, Vol. 75, Issue 1, 2009, 44; the text is reproduced omitting its footnotes.

²¹ The construction of a decision in public-international-law adjudication as an international norm, through the operation of the power delegated to the international court by the States parties to the jurisdictional agreement, has been developed by MORELLI, *La sentenza internazionale*, Padova, 1931, 212 ff. This reasoning is equally applicable in the ICSID framework, due to the origin of the attribution to the Centre of the relevant jurisdiction.

difference has both theoretical and practical relevance. The passage above seems to opt for the former view,²² however without advancing any justification.

In fact, the international obligation at issue may be seen as not indefinitely extending to all States parties to the ICSID Convention, to the extent that they have not ratified the investment treaty (BIT or MIT) containing the ICSID arbitration clause, i.e. the instrument upon which such an international obligation – to submit to ICSID arbitration – is constituted. Indeed, ratification of the ICSID Convention does in no way entail ICSID jurisdiction to rule upon investment disputes: to that end, it is necessary to apply a second instrument, which is the ICSID arbitration clause; this instrument may be contained in a treaty, a contract or host State legislation, otherwise ICSID arbitration cannot be triggered by the prospective investor. Consequently, only the host State and the home State may be under an obligation to implement a tribunal-ordered provisional measure, provided that they have not otherwise agreed in the relevant instruments containing the arbitration clause.

One of the most significant applications of this construction is arguably the injunction to suspend or discontinue parallel proceedings before local courts, in order to preserve the integrity of the proceedings pursuant to Art. 47 and Art. 26 of the ICSID Convention. Said injunction has so far been directed to the parties to arbitration: if the addressee fails to abide by the injunction, the innocent party is arguably entitled to request from the State court the implementation of the tribunal-ordered provisional measure, with the limit of international public policy. In this regard, the cooperative attitude of the Court of Appeals in Rennes in the *MINE v. Guinea* case referred to above²³ to lift attachments to Guinean assets may be considered a voluntary compliance – as opposed to a compulsory one – with

²² For another quite unclear view on this aspect, apparently advancing the idea that State courts of all States parties to the ICSID Convention would be bound by this obligation, see ZIADÉ, R., quoted *supra* footnote 14, 218: “S’il peut paraître contestable que les tribunaux étatiques puissent assister les parties dans la mise en œuvre des <<recommandations>> des tribunaux CIRDI, lesdites recommandations s’imposent néanmoins aux juridictions étatiques. En effet, selon les règles du droit international, les États sont responsables des agissements de leurs propres juridictions, ce qui devrait assurer une certaine efficacité à tout le moins aux recommandations qui concernent la suspension des procédures étatiques parallèles” [footnote omitted, *A/N*].

²³ See the analysis contained in Chapter three, section one, B.I.

tribunal-ordered provisional measures.²⁴ As a matter of fact, the justification for such an extensive international obligation of State courts to implement these measures is a corollary of the general obligation not to frustrate the object and purpose of the ICSID Convention, as expressed in its preamble.²⁵

The availability of State court enforcement may be rendered more effectively grounded through a specific provision to that effect by mutual agreement between the parties in the relevant instrument.²⁶

In any manner, from a practical point of view parties are more likely to comply if it is established that provisional measures are binding,²⁷ as demonstrated in the analysis of the current practice in ICSID case law.²⁸ In this connection, the interpretation of provisional measures as binding would be in line with the *travaux préparatoires* of the ICSID Convention, based on the distinction between their *binding* as confronted to *enforceable* nature: provisional measures, being temporary in nature, are not enforceable (contrary to final awards), but

²⁴ For an account, see BROWER, GOODMAN, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings*, ICSID Review, Vol. 6, Issue 2, 1991, 445.

²⁵ See SCHREUER, *The ICSID Convention. A Commentary*, second edition, Oxford, 2009, 797.

²⁶ *Contra*, BISMUTH, quoted *supra* footnote 7, 789: “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”. While I agree with Dr. Bismuth that party autonomy cannot render provisional measures enforceable as if they were *awards* in the sense of Art. 54 ICSID Convention, I argue that State courts will be more confident in complying with their obligation in the presence of an agreement to this effect freely entered into between the parties. In my opinion, party autonomy will play a significant role in this sector, as indicated in Chapter three, section four (through treatification and contractualisation). For examples of arbitration agreements concerning scope and implementation of provisional measures, which can be inserted in investor-State contracts, see (in Spanish) FRIEDLAND, LLANO ODDONE, *Cláusulas de arbitraje para contratos internacionales*, Buenos Aires, Bogotá, México, Santiago, 2010, 120: “Además de las facultades conferidas al/los árbitro/s por el reglamento antes designado, y sin perjuicio de cualquier medida cautelar que pueda ser otorgada por un tribunal competente, el/los árbitro/s tendrán la facultad de ordenar medidas cautelares que estimen apropiadas, incluyendo, sin limitación, interdictos, *en la inteligencia de que cualquier medida cautelar que ordenen los árbitros será, en la medida en que ello sea permitido por el derecho aplicable, considerada como un laudo definitivo en cuanto al objeto de la medida y podrá ser ejecutada como tal*” [italics added, A/N] and “Cada una de las partes podrá solicitar medidas cautelares al/los árbitro/s con el propósito de mantener el *statu quo* hasta tanto sea dictado el laudo final o la controversia se resuelva de otra forma, y *cualquier medida cautelar dictada por los árbitros podrá ser ejecutada por cualquier autoridad judicial competente*” [italics added, A/N].

²⁷ MAVROGORDATO, SIDERE, quoted *supra* footnote 20, 42.

²⁸ See Chapter three, section one, A.1.

nonetheless are binding. Such a view has never been discarded by the Drafting Committee.²⁹

²⁹ FRIEDLAND, *ICSID and Court-Ordered Provisional Remedies: An Update*, *ICSID Review*, 1988, 163; see also CARLEVARIS, *La tutela cautelare nell'arbitrato internazionale*, Padova, 2006, 151.

B. UNCITRAL Arbitration Rules and the Model Law

B. The UNCITRAL Arbitration Rules contain more straightforward provisions on the recognition and enforcement of tribunal-ordered provisional measures than does the ICSID system.

First of all, the arbitral tribunal may issue these measures in the form of an award or an order.³⁰ Due to its more formal requirements, the issuance of an award usually takes more time than that of an order: therefore, reasons of peculiar urgency may require preference for the second form, sacrificing the effective enforcement of the measure in a balanced evaluation. However, when urgency is not peculiar (though existing), the arbitral tribunal will generally be inclined to issue an interim award. Indeed, Art. 34(1) of the 2010 UNCITRAL Arbitration Rules permits such an option, reading that “the arbitral tribunal may make separate awards on different issues at different times”. The following paragraph provides that any award is final and binding on the parties, with the parties undertaking to carry out such award without delay.

Despite the apparent contradiction of a final instrument embodying a decision which is temporary in nature,³¹ the parties to investment treaties containing such an option for arbitration under the UNCITRAL Rules reinforce the binding power of interim measures through their mutual undertaking to provide in their territories for their enforcement.³²

Furthermore, dealing with the enforcement of provisional measures in relation to the UNCITRAL Arbitration Rules, it is worth considering Art. 26(8), providing that

“The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the

³⁰ See, e.g., *Chevron Corp. and Texaco Petroleum Company v. Republic of Ecuador*, Second interim award on interim measures dated 16 February 2012, PCA administered, UNCITRAL Arbitration Rules, para. 1; DUNMORE, *Interim Measures by Arbitral Tribunals: The Enforceability Conundrum*, Asian International Arbitration Journal, Vol. 8, Issue 2, 2012, 222 ff.

³¹ Art. 26(2) 2010 UNCITRAL Arbitration Rules.

³² See Art. VI.3(6) of the US-Ecuador BIT.

circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings”.

This norm addresses the issue of liability of the requesting party if the provisional measure is later found to be groundless. Considering the equality of the parties, this paragraph serves the purpose of construing addressee’s necessary compliance with the provisional measure rendered against it. Indeed, Art. 26(6) contains the availability of an *arbitral provisional countermeasure*, namely an appropriate security in connection with the provisional measure, aimed at covering costs and damages for its implementation. In a nutshell, if the requesting has to face the potential liability for costs and damages deriving from a groundless provisional measure, at the same time it is fair that the addressee shall cover costs and damages caused by its failure to comply with the provisional measure, and perhaps *a fortiori*, due to the aggravating factor of having disobeyed a decision issued by the arbitral tribunal.

In *Chevron and Texaco v. Ecuador*, the arbitral tribunal acceded to Claimant’s request for provisional measures, namely through an injunction to suspend enforcement of local proceedings against Claimant before the local courts in Ecuador. In the same interim award, it reiterated the requesting party’s obligation under Art. 26(8) UNCITRAL Arbitration Rules to cover Respondent’s costs and losses incurred by the latter in performing its obligation. In addition, it ordered Claimant to deposit a sum of US\$ 50 Million as a security for said costs (what I term the *arbitral provisional countermeasure*, since it serves the function of a provisional measure).³³

³³ *Chevron Corp. and Texaco Petroleum Company v. Republic of Ecuador*, Second interim award quoted *supra* footnote 30, para. 4: “The Tribunal determines that the Claimants shall be legally responsible, jointly and severally, to the Respondent for any costs or losses which the Respondent may suffer in performing its legal obligations under this Second Interim Award, as may be decided by the Tribunal within these arbitration proceedings (to the exclusion of any other jurisdiction); and further that, as security for such contingent responsibility the Claimants shall deposit within thirty days of the date of this Second Interim Award the amount of US\$ 50,000,000.00 (United States Dollars Fifty Million) with the Permanent Court of Arbitration in a manner to be designated separately, to the order of this Tribunal”.

Furthermore, costs and damages arising out of actions performed in violation of the mutual obligation not to frustrate the outcome of the proceedings and to avoid extending the dispute – a general obligation, which does not require a specific provisional measure to that effect – are taken into account by the arbitral tribunal in its final award: this constitutes an intra-arbitral instrument of implementation of provisional measures.

The more effective system provided for by the UNCITRAL system in this topic is confirmed by the norms contained in another instrument within this regime, namely the 2006 Model Law on International Commercial Arbitration. Art. 17 is significantly broad, following the US statutory tradition. Indeed, the drafters intended to provide State courts with a detailed guidance as to the conditions for granting provisional measures and their scope, basically with the idea that said guidance would facilitate their task and confidence to cooperate with the arbitral tribunal at the phase of enforcement.³⁴ Art. 17H(1) provides that

“An 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”.

This general norm requiring State court assistance in the implementation of provisional measures through the application of *imperium* is subject to some exceptions. They coincide *grosso modo* with the exceptions whereby a State court may refuse to recognize a final award. In addition, a State court may decide to deny enforcement to a tribunal-ordered provisional measure if it finds that the requesting party has failed to comply with the security issued in order to cover the measure: in other words, the court of enforcement is entitled to verify its compliance with the tribunal’s *arbitral provisional countermeasure* issued

³⁴ On the key role played by the detailed regime on the enforcement of provisional measures, see CASTELLO, *Generalizing about the Virtues of Specificity: The Surprising Evolution of the Longest Article in the UNCITRAL Model Law*, *World Arbitration and Mediation Review*, 2012, 7 ff.; CASTELLO, *Interim Measures under UNCITRAL’s Model Law: New Proposals*, paper presented at the 2nd ITA-CANACO International Arbitration Workshop in Mexico City in March 2006, published seven years later in *World Arbitration & Mediation Review*, 2013, 119 ff.

pursuant to Art. 28(6) UNCITRAL Arbitration Rules and, after verifying its violation, may deny enforcement of the provisional measure.

In the *Chevron and Texaco* case referred to above, this would have occurred if Claimants had failed to deposit the sum of US\$ 50 Million as decided by the arbitral tribunal. In like circumstances, of course if that party is not excused by external factors which prevented it from abiding by the decision nor if the decision is abnormal, the requesting party, also called *innocent party*, becomes, say, to a certain extent *guilty* and therefore shall bear the consequences of its (in)actions in terms of unenforceability of the provisional measure. In addition to this exception, enforcement can be denied where the measure is not compatible with the State court's own powers, or where it has been suspended or terminated by the tribunal or by the courts of the *locus arbitri*.³⁵

Therefore, the current situation concerning enforceability of provisional measures in investment arbitration under the UNCITRAL Rules seems to correspond to that existing in international commercial arbitration.³⁶

Although UNCITRAL provisional measures appear to be more readily enforceable than ICSID provisional measures, the difference may be limited in the investment arbitration context. Indeed, even though a State party is bound by the UNCITRAL Rules to implement interim measures, there seem to be no practical means of enforcing this obligation through the host State's courts.

The situation is arguably similar in relation to monetary awards rendered under the UNCITRAL Rules: although they can theoretically be enforced by execution on assets located in the host State by operation of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, they will normally

³⁵ See Arts. 171 and 36 2006 UNCITRAL Model Law.

³⁶ The current situation in international commercial arbitration has been aptly summarised – in relation to Argentina, though it represents the general tendency – by Professor Tawil under the following terms: “Enforcement of provisional measures must be sought exclusively through State courts. Arbitral tribunals lack the necessary *imperium* to execute their orders by force. In cases such as actual attachment of assets ordered by the arbitral tribunal, the parties or the arbitral tribunal shall request enforcement from the courts. Although compelled to support arbitral proceedings, the courts frequently second-guess the arbitral tribunal's decision by verifying that all legal requirements for granting preliminary measures were met in the case at hand”. (TAWIL, *Argentina*, in *Int'l Handbook on Commercial arbitration*, edited by PAULSSON, Alphen aan den Rijn, 2011, 19).

lack jurisdiction to compel compliance with an arbitral tribunal's interim award.³⁷ Moreover, the issue of the enforceability of interim awards in national courts as "foreign awards" under the New York Convention is controversial.³⁸

However, Gary Born's review of cases in this matter seems to indicate the correct evolution of the subject, towards the enforceability of interim awards also in relation to investor-State arbitration.³⁹

In conclusion, it is submitted that the UNCITRAL normative framework does not require amendments for tribunal-ordered provisional measures to be enforced before State courts: evolution towards their more stable enforceability may originate from judicial practice.

³⁷ DUGAN, WALLACE, RUBINS, SABAHI, *Investor-State Arbitration*, Oxford, 2008, 139.

³⁸ UNCITRAL, *Possible Future Work in the Area of International Commercial Arbitration*, 32nd session, 17 May – 4 June 1999, Un Doc A/CN.9/460, para. 121: "Sometimes arbitral tribunals issue interim measures of protection in the form of interim awards. Such a possibility is expressly envisaged, for example, in Art. 26(2) of the UNCITRAL Arbitration Rules. This raises the question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers also such interim awards. As the Convention does not define the term "award", it is not clear whether the Convention applies to interim awards as well. The prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards" (available at the UNCITRAL institutional website: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V99/827/50/IMG/V9982750.pdf?OpenElement>).

GOLDSTEIN, *Interpreting the New York Convention: When Should an Interlocutory Arbitral "Order" Be Treated as an "Award"?*, ASA Bulletin, 2000, 830 ff; see also BISMUTH, quoted *supra* footnote 7, 790 f.

³⁹ See, in relation to enforceability of tribunal-ordered provisional measures under the Federal Arbitration Act (FAA) and an account of the *Sperry v. Israel* case (in which the U.S. District Court for the Southern District of New York enforced the relevant interim award granting provisional measures), see BORN, *International Arbitration. Cases and Materials*, New York, 2011, 840-844.

Section two: scenarios in the course of arbitration proceedings
and relevant practice

A. Compliance

A. As already mentioned, parties are more willing to comply if it is admitted that provisional measures are binding. Other factors have an impact on the addressee's acceptance of the decision on provisional measures, namely the establishment of jurisdiction to rule on the merits of the case: comparing two cases, if all the other variables are unchanged, arguably the degree of voluntary compliance with a provisional measure is directly proportional to the height of the threshold adopted by the tribunal concerning the jurisdictional condition to issue the latter measure. Let me give a brief example. In the first case, the tribunal adopts the *Anglo-Iranian* test, namely the *prima facie* jurisdiction – negative-perspective view (“so far, it has not been demonstrated that I do not have jurisdiction”). In another case, the tribunal adopts the *Churchill Mining* test, namely the *fumus bonae iuris* – positive-perspective view (“there is a provisional basis whereby I may have jurisdiction”).⁴⁰

In the second scenario, the tribunal opts for a more demanding threshold for the jurisdictional condition to be met: consequently, in my opinion, the addressee of the decision will be more inclined to comply therewith under the *fumus bonae iuris* condition than the former, if all other conditions remain unchanged. The parallelism between this condition and compliance with provisional measures has been underlined by Simpson and Fox in their classic study on international arbitration.⁴¹

⁴⁰ See Chapter three, section two, A.II.

⁴¹ SIMPSON, FOX, *International Arbitration*, London, 1959, 167: “The further the Court goes, as in the *Interhandel* case [where the ICJ adopted the *Anglo-Iranian* test, *A/N*], in disregarding the question of jurisdiction, the harder it becomes to say that a defendant state, which is contesting the

As a general matter, the obligation to abide by the provisional measures issued by an arbitral tribunal derives from the obligation to respect the integrity of the proceedings: it is a corollary of the respect of the arbitration agreement freely entered into between the parties.⁴²

Although arbitral tribunals lack the *imperium* to enforce their provisional measures, addressees tend to comply voluntarily in the great majority of cases,⁴³ for a series of reasons.

First of all, compliance is part of an intuitive strategy: parties inevitably pay attention to the way in which they are perceived by the arbitral tribunal and do not want to be cast in a bad light. They are aware that uncooperative behaviours are detrimental for themselves in the first place, putting the fair conduct of the proceedings at risk.⁴⁴

Secondly, as we will see in the following paragraph, non-compliance entails adverse consequences in terms of monetary compensation, since for example disobedient respondents may, in the event of losing their case, even have to pay accrued amounts of monetary compensation in considerations of costs and damages caused.

Thirdly – and particularly in relation to respondents – host States appearing as defendants before investment tribunals are aware of the fact that the attentive eyes of the international business community are turned to their procedural behaviour: reasons of international prestige and marketing to be considered investor-friendly

jurisdiction is or should be bound to take the interim measures indicated by the Court”. Although the authors referred to State-to-State adjudication, this reasoning is valid for all public-international-law adjudication.

⁴² See *supra* Section one, A.

⁴³ 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 Association for International Arbitration (ed.), *Interim Measures in International Commercial Arbitration*, Antwerp and Apeldoorn, 2007, 13; BISMUTH, quoted *supra* footnote 7, 788.

⁴⁴ MALINTOPPI, quoted *supra* footnote 7, 180: “There generally appears to be voluntary compliance by losing parties in the great majority of cases, mainly because parties are careful not to act in a way that may have an adverse effect on the conduct of the proceedings, alienate the tribunal, or aggravate the dispute”.

environments in order to attract foreign direct investments play a fundamental role in the current context. In addition to that, both States and investors necessarily take into account the fact that in the last decade the policy at ICSID has changed towards a significant level of transparency: an unfavourable *strepitus fori* is a further element which may be detrimental to their image. In this connection, it is deemed useful to recall that this element was at the centre of Indonesia's request for provisional measures in *Churchill Mining PLC v. Republic of Indonesia*, as well as in *Amco v. Indonesia* thirty years earlier. In *Churchill Mining PLC v. Republic of Indonesia*, Respondent requested, *inter alia*, "that the tribunal order Claimant to refrain from making false, unfounded and misleading statements in the media regarding the case at hand".⁴⁵ The dispute had originated from the alleged revocation of mining licenses by Respondent. According to Indonesia, Claimant's conduct in the press was depicting the host State as an unfavourable scene for foreign direct investments with the additional aim of exerting pressure and gaining a negotiation tool in that regard: accordingly, the purpose for its request of provisional measures was that of preventing self-help.⁴⁶ In its response, Claimant relied on *Amco v. Indonesia*,⁴⁷ *World Duty Free v. Kenya*⁴⁸ and *EDF v. Romania*⁴⁹ as evidence of a tendency contrary to the alleged right to confidentiality. The arbitral tribunal, after recalling that in *Amco v. Indonesia* the issues were similar, since Indonesia complained of various newspaper articles that it considered harmful, found that the ICSID framework did not impose confidentiality and that the alleged "right to attract foreign investment" and analogous formulations made by Respondent were not rights in dispute worth of

⁴⁵ *Churchill Mining PLC v. Republic of Indonesia*, ICSID case no. ARB/12/14, Procedural order no. 3 dated 4 March 2013, para. 1, lett. a.

⁴⁶ *Ibid.*, para. 19: "By engaging in "false, unfounded and misleading campaigns" and approaching officials of the Indonesian government in order to exert pressure to settle the dispute outside of the present proceedings, the Claimant engages – so the Respondent says – in self-help which justifies the provisional measures sought by the Respondent" [footnote omitted].

⁴⁷ *Amco Asia Corporation v. Republic of Indonesia*, ICSID case no. ARB/81/1, Decision on Request for provisional measures dated 9 December 1983, 412 (reported at para. 25 as well as the two following cases).

⁴⁸ *World Duty Free Company Limited v. Kenya*, ICSID case no. ARB/00/7, Award dated 4 October 2006, para. 16.

⁴⁹ *EDF (Services) Ltd v. Romania*, ICSID case no. ARB/05/13, Procedural order no. 2 dated 30 May 2008, para. 43.

recommendation for provisional measures.⁵⁰ Thus, in the case under comment the arbitral tribunal ruled that the applicant had failed to qualify the right that may justify provisional measures, precisely because the alleged right to confidentiality does not exist in ICSID arbitration as an absolute right. Therefore, parties pay a great deal of attention before deciding to disregard a decision granting provisional measures against them: quite often, disregarding these decisions will be more harmful to themselves than complying therewith.

Fourthly, from a non-strictly-legal point of view, States will increasingly tend to comply with ICSID provisional measures, since another actor which will – and does already – take State conduct into account is the World Bank, before deciding whether to finance a given project involving that State, or not.⁵¹ Such an attitude, which goes under the name of conditionality, is not exclusive of the World Bank. Indeed, another third party, though it does not belong to the World Bank Group, plays this same role, *mutatis mutandis*: it is the International Monetary Fund (IMF).⁵² By way of example, although it is not directly related to provisional measures (but signifying exactly the same approach), it is well known that at the beginning of the disputes against Argentina, following its economic crisis in December 2001 and the abrogation of the *pesificación* of the US Dollar, the IMF threatened the Country to withhold loans therefrom until its executive branch reached an agreement with its bondholders.⁵³ The existence of these manoeuvres, though not very orthodox, shall always be kept in mind when assessing the rationales for State conduct in arbitration proceedings; perhaps, they contribute to the abandonment of the *convenient myth of David and Goliath*⁵⁴ in international

⁵⁰ *Churchill Mining PLC v. Republic of Indonesia*, para. 50.

⁵¹ LEW, *ICSID Arbitration: Special Features and Recent Developments*, in HORN, KRÖLL (eds.), *Arbitrating Foreign Investment Disputes*, Alphen aan den Rijk, 2004, 272.

⁵² On the issue of conditionality as a key tool for Country development in the policies of both the World Bank and the IMF, see DREHER, *A Public Choice Perspective of IMF and World Bank Lending and Conditionality*, *Public Choice*, 119, 2004, 445 ff.

⁵³ SAUVANT (ed.), *Yearbook on International Investment Law & Policy 2011-2012*, Oxford, 2013, 441.

⁵⁴ This expression alludes to an article authored by REED, MARTÍNEZ, *The Convenient Myth of David and Goliath in Treaty Arbitration*, *World Arbitration & Mediation Review*, Vol. 3, 2009, 443 ff.

investment arbitration, whereby party equality would be a principle able to reestablish fairness against an omnipotent Leviathan.

B. Non-compliance and its legal consequences

B. The possibility always exists for arbitral tribunals, in case a party does not comply with a decision on provisional measures, to take that conduct into account in the final award.⁵⁵ During the negotiations of the ICSID Convention, the drafters considered the inclusion of a provision to that effect, but the proposal was eventually defeated. Nevertheless, the chairman, Mr. Aaron Broches, stated that “the tribunal would normally take compliance into account in its final award even if this factor was not specifically addressed”.⁵⁶ Current practice shows that ICSID tribunals agree with the view that parties’ failure to abide by decisions on provisional measures may – not *shall*, in line with the discretionary evaluations in this area – be taken into account in the final decision.⁵⁷ Indeed, arbitral tribunals may draw adverse inferences from non-compliance.⁵⁸ Furthermore, they may award costs and damages deriving from said non-compliance.

In *Agip v. Congo*, the Government decided not to comply with the provisional measures.⁵⁹ In its award on the merits, the arbitral tribunal took into account

“(c) that the Government did not comply with the decision of the Tribunal, dated 18 January 1979, 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”.⁶⁰

Finally, the arbitral tribunal awarded further damages due to Respondent’s conduct. The possibility to draw adverse inferences is of utmost relevance in proceedings where provisional measures are sought in order to preserve evidence, as a corollary of the respect for the arbitration agreement. Adde ZIADé nota 134.

In *MINE v. Guinea*, the arbitral tribunal harshly warned Claimant by affirming

⁵⁵ MALINTOPPI, quoted *supra* footnote 7, 180.

⁵⁶ SCHREUER, 768 and Note B to ICSID Rule 39 of 1968.

⁵⁷ See, *inter alios*, *Victor Pey Casado v. Chile*, paras. 21-24.

⁵⁸ See LEW, MISTELIS, KRÖLL, *Comparative International Commercial Arbitration*, Den Haag, 2003, 593.

⁵⁹ *Agip v. Congo*, Award dated 30 November 1979, paras. 7 ff.

⁶⁰ *Ibid.*, para. 42.

that “pursuant to Article 47 and the applicable ICSID regulations and rules, the Tribunal will take into account in its award the effects of any non-compliance by MINE with its recommendations”.⁶¹ After some hesitation, finally MINE complied with the decision on provisional measures and caused the attachments it had obtained in Belgium and Switzerland against Guinea to be lifted. However, since those State court proceedings had provoked costs and damages, the tribunal awarded a sum in compensation of these expenses, although it reduced the amount by about one third due to the novelty of the relevant circumstances concerning court-ordered provisional measures parallel to ICSID proceedings.

More recently, in *City Oriente v. Ecuador* the arbitral tribunal affirmed that “a failure to comply with orders given to respondents by the tribunal in accordance with Art. 47 will entail a violation of Art. 26 (the contractual obligation to submit to ICSID jurisdiction) and engage respondent’s liability”.⁶²

In conclusion, the reactions against non-compliance with a decision on provisional measures appear rudimentary and, to a certain extent, contradictory with one of the substantive conditions for granting provisional measures, namely necessity under either the *Plama* or the *Burlington* tests: indeed, unless we admit the availability of punitive damages, *post hoc* award of damages for non-compliance means that the provisional measure was not necessary to avoid irreparable harm, or that monetary compensation is a mere sweetener, failing more effective means such as court enforcement.⁶³

It is submitted that the combination of two or more out of the four reasons for complying with provisional measures presented above⁶⁴ play a more significant role on the addressee’s evaluation of its costs and benefits than a decision awarding damages for non-compliance.

⁶¹ *MINE v. Guinea*, Decision on provisional measures dated 4 December 1985 (reported in the tribunal’s award dated 6 January 1988, 4 ICSID Reports, 69).

⁶² *City Oriente Ltd. v. Ecuador*, ICSID case no. ARB/06/21, Decision on provisional measures dated 19 November 2007, para. 53.

⁶³ See *supra*, introduction to the problem *in fine* and section one.

⁶⁴ See *supra*, section two, A.

C. Possibility for the addressee to oppose tribunal-ordered provisional measures

C. The addressee of a decision granting provisional measures against it will wish to avoid their implementation. However, a fair and reasonable party understands that a failure to comply therewith is not appropriate. The means of harmonising these opposite concerns is to seek their revocation or modification. Indeed, Art. 39, paragraph 3, ICSID Arbitration Rules provides that the arbitral tribunal may at any time modify or revoke its recommendations. Although it is not specified, it can do so either *proprio motu* or – as it happens more frequently – upon application of a party. The conditions for obtaining an amendment of the earlier decision differ to a certain extent from those addressed in Chapter three concerning provisional measures in general. Since they are not contained in the applicable instruments, it is deemed necessary to refer to a recent decision which arguably expresses the current status of this issue in ICSID arbitration.

In *Lao Holding N.V. v. Laos*, Respondent sought amendment of the provisional measures order (hereafter referred to as “PMO”) preventing the Government from modifying the *status quo* or aggravating the dispute between the parties while arbitration proceedings were pending.⁶⁵ Respondent intended to conduct criminal investigations against employees of Claimant for alleged bribery and corruption of officials of the Government in connection with Claimant’s investment in the country. Since said action would have altered the *status quo* agreed by the parties and enshrined in the PMO, Respondent’s request and permission from the tribunal were necessary. The hearing on the merits of the case was scheduled to commence the following month, therefore the parties were in the phase of trial preparation.

Respondent contended that it retained its sovereign right to conduct criminal investigations which moreover were not part of the dispute before the arbitral

⁶⁵ *Lao Holding N.V. v. The Lao People’s Democratic Republic*, ICSID case no. ARB(AF)/12/6, Ruling on motion to amend the provisional measures order dated 12 May 2014, para. 1.

tribunal and thus did not affect the integrity of the proceedings, whereas Claimant submitted that this attitude was part of a procedural strategy of evidence collection⁶⁶ in order to take an unfair advantage in view of the arbitration proceedings on the merits, in violation of the principle of equality of arms.⁶⁷

In its analysis, the arbitral tribunal first made a parallelism between a decision granting provisional measures and a decision modifying or revoking the latter: indeed, also in this instance it found in general terms that a tribunal adopts a new provisional measure, provided that the substantive conditions of urgency and necessity are satisfied.⁶⁸ It did not refer to the jurisdictional condition – namely *prima facie* jurisdiction / *fumus bonae iurisdictionis* – and rightly so: as a matter of fact, this condition has already been verified at the moment the provisional measures whose modification/revocation are sought were issued, therefore its reiteration would be senseless. Indeed, in this subsequent phase there are three scenarios:

- the tribunal finally finds that it lacks jurisdiction: in this case, it renders a final award, of course without the availability of provisional measures;
- the tribunal has not ruled yet upon its jurisdiction to decide the merits of the case: since it has already positively considered the jurisdictional condition, there would be no reason to depart therefrom until a final decision is rendered;
- the tribunal has already handed down a final decision establishing its jurisdiction: *a fortiori*, the jurisdictional condition is satisfied.

In each of these three scenarios, it is evident that the jurisdictional condition to

⁶⁶ *Ibid.*, para. 7: “The Claimant denies unlawful activity. No corruption. No money laundering. No embezzlement. Its position is that the Respondent is simply seeking improperly to use its criminal law machinery to collect evidence on the eve of the June arbitration hearing to advance its defence on the merits in the current arbitral proceeding”.

⁶⁷ *Ibid.*, para. 32: “A criminal investigation, according to the Claimant, crosses the line between the Government’s general concern about corruption and enters the forbidden territory of using the process of the criminal law to obtain an unfair advantage in the arbitration proceedings over the Claimant, aggravating the inequality of arms between the parties”.

⁶⁸ *Ibid.*, para. 9.

issue a decision modifying or revoking provisional measures exists.

Thereafter, the arbitral tribunal went on to address the substantive condition of the link between the (modification or revocation of the) provisional measures requested and the rights in dispute, confirming the *Plama* test discussed in chapter three,⁶⁹ whereby the rights whose protection is sought shall not necessarily coincide with the rights in dispute (contrary to the *Maffezini* test), but nonetheless they shall relate to the specific dispute before the arbitral tribunal.⁷⁰ In this connection, while it acknowledged that criminal proceedings are not encompassed by the arbitration agreement⁷¹ – thus preventing in principle the application of the rule of ICSID exclusivity – the tribunal found that

“This general rule having been reaffirmed by the Tribunal, there are however a number of exceptional circumstances in this case which lead the Tribunal to depart from the general rule entitling a State to enforce on the national level its criminal laws. In particular, the Tribunal is satisfied on the evidence that the primary purpose for which the Respondent intends to use the powers of criminal investigation, at least in the first instance, is to collect evidence for use at the arbitration, which, in the result, will undermine the integrity of the arbitral process”.⁷²

In a nutshell, it considered the rule and its exception from the perspective of the right to non-aggravation of the dispute, in this case protecting the innocent party and maintaining the effect of the provisional measure granted. At the same time, it is interesting to note that it confirmed the high threshold for the restraint on a sovereign right to investigate crime to be imposed by an ICSID tribunal.⁷³

Furthermore, the arbitral tribunal dismissed the application because it considered that Respondent had not established the change of circumstances, which is a

⁶⁹ See Chapter three, section two, A.VI.

⁷⁰ *Ruling on motion to amend the provisional measures order*, para. 11.

⁷¹ See *Abaclat v. Argentina*, ICSID case no. ARB/07/5, Procedural order no. 13 dated 27 September 2012, para. 39.

⁷² *Ruling on motion to amend the provisional measures order*, para. 26.

⁷³ See also *Burlington v. Ecuador*, ICSID case no. ARB/08/5, Procedural order no. 1 on the request for provisional measures dated 29 June 2009, para. 129; *Caratube v. Kazakhstan*, ICSID case no. ARB/08/12, Decision regarding Claimant’s application for provisional measures dated 31 July 2009, para. 137. These two cases are referred to by the arbitral tribunal at para. 33.

condition for this type of requests to be successful.⁷⁴ This condition, unique feature of the motion under comment, absorbs the classic substantive conditions of necessity and urgency: it is not by chance that – after ruling upon the absence of change of circumstances – the tribunal synthetically stated that Respondent had failed to demonstrate the necessity and urgency for granting such a modification of the PMO only one month before the merits hearing. The tribunal included, once again *ad abundantiam*, a hint on the substantive condition of proportionality, which is part of the condition of necessity.⁷⁵ The rationale for such an absorption and preminence of the change-of-circumstances condition is logical: if no change of circumstances has occurred between the decision granting provisional measures and the moment of the ruling on motion to modify or revoke those measures, how could modification or revocation be urgent and necessary?

In conclusion, a few words on the burden to demonstrate this fundamental condition. In the case under comment, the tribunal stated that it is incumbent upon the requesting party, namely the addressee of the decision on provisional measures, to establish said change of circumstances.⁷⁶ Actually, given the tribunal's *proprio motu* power to modify or revoke its recommendations at any time, pursuant to Art. 39, paragraph 3, ICSID Arbitration Rules, one may theoretically envisage a situation whereby, despite the requesting party's failure to satisfy this condition, the tribunal may evaluate the evidence already present in the records and find that a sufficient change of circumstances has occurred.

⁷⁴ *Ruling on motion to amend the provisional measures order*, para. 49: “What seems to have happened is not so much a “change of circumstances” as a change of tactics as the arbitration hearing date approached”. The tribunal noted at para. 43 that this condition was discussed in the *MOX Plant case (Ireland v. United Kingdom)*, ITLOS case no. 10, Order dated 24 June 2003, and in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Order dated 16 July 2013, ICJ Reports 2013, para. 31. On the change of circumstances in ICSID case law see also *City Oriente Ltd. v. Ecuador*, ICSID case no. ARB/06/21, Decision on revocation of provisional measures and other procedural matters dated 13 May 2008, para. 72.

⁷⁵ *Ruling on motion to amend the provisional measures order*, para. 73: “There is no sufficient evidence of necessity or urgency to establish that a deferral of the criminal investigation for another few months until the witnesses are heard at the arbitration and an award is made, will prejudice the Respondent in any way proportionate to the potential prejudice to the Claimant of the diversion and distraction of a full-scale criminal investigation landing on top of the ICSID arbitration”.

⁷⁶ *Ibid.*, para. 10.

Indeed, if the arbitral tribunal has the power to originate a modification and/or a revocation of provisional measures on its own motion, *a fortiori* it has the power to complement an unsteady request. However, this would be an extreme case, since practice has indicated that arbitral tribunals never avail themselves of their *proprio motu* power: they are wary and careful not to appear as partial in the eyes of the parties, which may consider their actions as an excess of authority and a pre-judgment of the case. The same reasoning and theoretical – so far – construction is applicable to arbitration under the UNCITRAL Rules.⁷⁷ Such an attitude is perhaps natural, however it is submitted that it may – at least in part – derive from the relatively recent application of the norms concerning provisional measures.

⁷⁷ Art. 26, para. 5, 2010 UNCITRAL Arbitration Rules provides that: “The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative”. This provision is even more interesting, in consideration of the fact that in the UNCITRAL framework arbitrators lack *proprio motu* power to issue provisional measures (see Art. 26, para. 1).

CONCLUSION: THE ROLE OF CONSENT

Before concluding the present analysis, it is appropriate to devote these last lines to some brief remarks on the impact of party autonomy on provisional measures in the international investment framework. Indeed, this theme will arguably constitute the basis upon which the development of our topic will be built in the years to come.

The role of consent in this respect has already been evoked in various instances throughout this thesis, since some of its manifestations have come to surface.¹ Party autonomy is one of the cornerstones of international arbitration and, at the same time, of the private international law system relating to contractual obligations.² In relation to the latter aspect, it has been noted that the area of contractual obligations – also as far as jurisdiction is concerned – is the first one in which legislators showed their willingness to attribute value to party autonomy.³ The two aspects are interrelated, since the expansion of party autonomy as an instrument of regulating transnational⁴ relations also embraces investor-State contracts.⁵ This normative framework can play a role in shaping not only the substantial elements of the underlying economic operation, but also the

¹ See Chapter two, B.II.vi, and Chapter three, section three.

² An example of this second aspect has recently been enshrined in EC Regulation no. 593/2008 (Rome I) of the European Parliament and of the Council, dated 17 June 2008, on the law applicable to contractual obligations, whose point 11) states that “The parties’ freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations”: see Official Journal of the European Union, L 177/6, 4 July 2008, available at <http://eur-lex.europa.eu>

³ MOSCONI, CAMPIGLIO, *Diritto internazionale privato e processuale. Parte generale e obbligazioni*, Vol. 1, sixth edition, Torino, 2013, 399.

⁴ Some authors emphatically call them *cosmopolitan*, arguably referring to Kant’s classic construction of this area on the minimum standard of treatment due to foreigners: see TORRES, *A afirmação do direito cosmopolita. Novas perspectivas do Direito internacional contemporâneo*, in DIREITO, CANÇADO TRINDADE, PEREIRA (org.), *Estudos em homenagem ao Professor Celso D. de Albuquerque Mello*, Rio de Janeiro, 2008, 924; for one of the most recent and already authoritative interpretations of Kant’s cosmopolitanism, see KLEINGELD, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*, Cambridge, 2012 (as the right of the foreigner to present himself and ask for admission).

⁵ See, *ex multis*, CARBONE, *Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un’unica funzione*, *Rivista di Diritto internazionale privato e processuale*, Vol. 3, 2013, 584.

procedural setting where the dispute settlement option allows the parties to tailor it to their specific needs, as in the case of provisional measures. Sure enough, these processes are more complex than purely inter-individual negotiations, due to the sovereign nature (or political subdivision) of one of the parties. Moreover, provisional measures in international investment arbitration are currently in a relatively embryonic phase of development, in which arguably the necessity of entering into specific provisions thereupon is not felt yet. However, the general idea that parties are interested in more specific norms in relation to procedure has already made its appearance: in this connection, BITs and MITs function as *lex specialis*.⁶

The phenomenon of *treatification of provisional measures*, arguably more advanced than its counterpart in the contractual framework (namely, their *contractualisation*) exists in the NAFTA and in the Model BITs of the United States and Canada. In relation to the latter, negotiators acting on its behalf, on the one side, and on behalf of the EU Commission, on the other, have recently completed their work on the draft agreement which goes under the name of “Comprehensive Economic and Trade Agreement” (CETA). It consists of a very detailed body of norms which, in the intention of the parties, are designed to tackle the main issues on trade, investment, sanitary and phytosanitary measures and so forth, in order to enhance economic exchanges between Canada and the EU. The consolidated CETA text was published on 26 September 2014 and still has to be submitted to the EU Council and Parliament for ratification, following a thorough review of its provisions.⁷ From a structural viewpoint, it resembles the NAFTA and, in relation to our topic, it contains a specific provision on provisional measures, thus treatifying them. Indeed, art. X.31 (“Interim Measures of Protection”) provides that

⁶ MCLACHLAN, *Investment Treaties and General International Law*, International and Comparative Law Quarterly, 2008, 361.

⁷ The consolidated text is available at the EU Commission’s institutional website: <http://ec.europa.eu/trade/policy/in-focus/ceta>.

“A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal may not order attachment nor may it enjoin the application of the measure alleged to constitute a breach referred to in Article X.22 (Submission of a Claim to Arbitration). For the purposes of this Article, an order includes a recommendation”.

This provision is of utmost relevance – even though the Draft Agreement is not yet in force – since it indicates a trend which has already emerged in its American predecessors and references: provisional measures can be *ordered*, thus solving any arbitral and doctrinal controversy about their legal force, at least in this context.

Due to the scarce quantitative presence of like provisions, said phenomenon of incipient treatification is to be considered as an aspect of *lex specialis*, not yet as a factor of consolidation of commonly accepted norms (customary international law). In any manner, the passage from the first step – emergence – to the second – consolidation – shall not be excluded: indeed, at this stage, nothing prevents us from predicting that this kind of provisions will be reiterated in the upcoming BITs and MITs, as one of the guarantees of a fair and effective arbitration. This development will also generate the beneficial effect of guiding arbitral tribunals – and State courts – even in cases where they are to apply different treaty instruments, silent on the point of, respectively, the binding force of provisional measures and their enforcement: instead of merely referring to case law, these adjudicating organs will be able – and, perhaps, facilitated – in their task to verify whether a given norm has consolidated in the international framework and to act accordingly.

The contribution provided by treatification will undoubtedly be useful; even more useful and interesting will be that of contractualisation, since in that second case the parties to the agreement will coincide with the parties which will prospectively arbitrate against one another. In this connection, the parties will be able to tailor effectively the kind of provisional measures they want, the

conditions to which their issuance is subject, their legal force, and so forth (thus crystallising bargaining). In this manner, through the increase in legal security in this respect, the investor-State contract will serve in greater depth its economic function⁸ and raise the probability that the parties will cooperate, since they will have a better picture of the scenario they will have to face in case of arbitration.

As a matter of fact, one has to bear in mind that the analysis made in Chapter three on conditions, purposes and atypicalness of provisional measures is applicable if parties do not agree otherwise: they constitute *default rules*. In case of private ordering of this procedural mechanism, it will then be necessary to evaluate on a case-by-case basis whether the parties exceed their autonomy, drafting provisional measures which are null and void: as a matter of fact, there exists a *noyau dur* of provisional measures which cannot be impaired, since otherwise their very nature becomes distorted. By way of example, the parties will undoubtedly be barred from providing that the tribunal may be empowered to issue provisional measures even in case of complete lack of urgency.

Treatification and contractualisation of provisional measures will also be of relevance in regard to the phase of their enforcement before State courts. Indeed, State immunity from pre-judgment measures of constraint is extensive, meaning that such measures are excluded unless the State against whose property or possession the measures are to be issued has expressly consented to them by the specified means provided for in art. 18 of the 2004 United Nations Convention on State Immunity (UNCSI) or, alternatively, has allocated or earmarked the property for the satisfaction of the claim which is object of the proceedings.⁹

⁸ SALACUSE, *The Three Laws of International Investment. National, Contractual and International Frameworks for Foreign Capital*, Oxford, 2014, 167: “From an economic point of view, an investment contract is more than merely a statement of legal rights and duties. It also serves important economic functions that are fundamental in achieving the purposes of the investment and in assuring the cooperation that is so necessary for economic activity”.

⁹ Art. 18 UNCSI provides as follows: “No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
(i) by international agreement;
(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

Consequently, if the host State, in the quality of co-contractor with the prospective foreign investor, specifies the assets out of which the latter, in case it will be victorious in the provisional-measures phase, will be able to obtain enforcement before the State court in which such assets are located, the overall effectiveness of this procedural mechanism will undoubtedly be improved. Of course, a provision to that effect will be inserted only if – and to the extent that – such prospective foreign investor finds itself in a strong bargaining position, at least in this embryonic phase, in which these provisions are very rare, if not absent at all. Although the UNCSI is not yet in force, this provision “is probably consonant with customary international law”.¹⁰

Only the future will tell if all or part of these predictions will prove to be true, so that provisional measures will really prove to be the *front teeth* of international investment arbitration.

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding”. The text of the Convention is available at the UN institutional website: http://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

¹⁰ Brown, O’KEEFE, *Art. 18*, in O’KEEFE, TAMS (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, Oxford, 2013, 306. For a detailed account of the current state of this topic in regard to national and international practice, see KOUTSOUKOU, ASKOTIRIS, *Tightening the Scope of General Waivers of Sovereign Immunity from Execution*, *Rivista di Diritto internazionale privato e processuale*, Vol. 2, 2014, 285 ff.

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