

**PROVISIONAL MEASURES IN INVESTMENT ARBITRATION: WADING THROUGH THE MURKY
WATERS OF ENFORCEMENT**

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Abstract

Provisional measures can secure a party's rights pending final disposal of the arbitration. They can be especially important in investment arbitration proceedings, which are often lengthy, complex, and costly. Parties may approach arbitral tribunals or national courts for provisional relief. National courts are particularly useful, before a tribunal has been constituted, or for relief outside the scope of a tribunal's power, such as ex parte relief. In practice, the enforcement of provisional measures can be problematic, notwithstanding that international jurisprudence generally considers such measures to be binding on the parties. Arbitral tribunals lack powers of coercion, and thus have a limited ability to enforce provisional measures. Tribunals can only draw adverse inferences against parties which do not comply with provisional measures for document production; or impose costs for non-compliance with other measures. Provisional measures granted by national courts would be enforced according to the domestic regime for the enforcement of court orders. However, national courts may be hesitant to enforce provisional relief granted by arbitral tribunals because of the form in which it is granted (for example if the provisional relief is an "order"), or on the premise that the provisional relief lacks the requisite finality to constitute an award.

I. Introduction

Provisional measures help safeguard arbitral proceedings. They help prevent the derailment of the arbitration proceedings, by allowing a party to secure its rights and avoid aggravation of the dispute pending its final resolution. While provisional measures are potentially very powerful tools, their Achilles' heel lies in their enforcement.

The regime for the enforcement of provisional measures is murky, owing to the relatively weak powers of arbitral tribunals to enforce such measures, and the absence of a clear framework for their enforcement before national courts. A number of lexical inconsistencies, such as the varying usage of the terms "order" or "award" to denote such measures, and the absence of a consensus as to the "finality" of such measures further complicates the enforcement regime. In an attempt to navigate the framework for the enforcement of provisional measures in investment arbitration, this paper: (in section **II**) provides a brief overview of the granting of provisional measures regime in investment arbitration; (in section **III**) discusses the current means by which provisional measures are enforced by both arbitral tribunals and national courts; (in section **IV**) identifies the difficulties associated with

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The authors would like to extend their sincere gratitude to Ms. Amy Seow (Advocate and Solicitor, Singapore; Attorney and Counselor-at-law, New York State, New York, USA) for her invaluable insight and assistance with the completion of the present article.

their enforcement by both tribunals and courts; (in section V) concludes with remarks on the enforcement of provisional measures in investment arbitration.

II. Overview of the granting of provisional measures in investment arbitration

To give context to the enforcement of provisional measures (which is the focus of this article), it is germane to briefly address the regime for the granting of provisional measures.¹ All the major institutional rules, such as the International Centre for Settlement of Investment Disputes Convention [**ICSID Convention**], ICSID Rules of Procedure for Arbitration Proceedings [**ICSID Arbitration Rules**],² ICSID Arbitration (Additional Facility) Rules,³ United Nations Commission on International Trade Law [**UNCITRAL**] Arbitration Rules⁴, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [**SCC Arbitration Rules**]⁵, the London Court of International Arbitration [**LCIA**] Rules,⁶ International Chamber of Commerce Rules of Arbitration [**ICC Arbitration Rules**],⁷ and the Investment Arbitration Rules of the Singapore International Arbitration Centre [**SIAC IA Rules**]⁸ authorise the granting of provisional measures by arbitral tribunals.⁹ The ICC, SCC, and SIAC IA Rules go one step further and provide for emergency relief, or provisional relief, even before the tribunal is constituted.¹⁰ The major institutional rules referred to above do not restrict the types of provisional measures that may be granted by the tribunals. The UNCITRAL Rules (both 1976 and 2010) and LCIA Rules (both 2008 and 2014) each provide a non-exhaustive list of the types of measures available under those Rules.¹¹ Where the institutional rules are silent, the types of provisional measures available have developed through arbitral practice.¹² Provisional measures can be broadly classified into those which: (i) require the parties to co-operate in the proceedings, preserve evidence or decide on confidentiality;¹³ (ii) preserve the *status quo* between the parties and avoid further aggravation of the dispute through

¹ For a more detailed discussion on the jurisdiction of the tribunal to grant provisional measures, the preconditions to the granting of such measures, and the types of provisional measures, *see* Benoit Le Bars & Athina Fouchard Papaefstratiou, *Interim Measures in International Investment Arbitration, Chapter 9*, in INVESTMENT TREATY ARBITRATION REVIEW (2d ed. 2017).

² ICSID Convention, art. 47; ICSID Arbitration Rules, r. 39 (2006).

³ ICSID Arbitration Additional Facility Rules, r. 46.

⁴ UNCITRAL Arbitration Rules, art. 26 (1976 and 2010).

⁵ SCC Rules, art. 31 (1999); SCC Rules, art. 32 (2007 and 2010); and SCC Rules, art. 37 (2017).

⁶ LCIA Rules, art. 25 (2008 and 2014).

⁷ ICC Rules, art. 23 (1998); ICC Rules, art. 28 (2012 and 2017).

⁸ SIAC Investment Arbitration Rules, art. 27 (2017).

⁹ All subsequent references to institutional rules must be understood to mean the most current version of such rules that are in force, unless otherwise specified.

¹⁰ ICC Rules, art. 29; SCC Rules, app. II; SIAC Investment Arbitration Rules, art. 27.4 & sched. 1.

¹¹ UNCITRAL Rules, art. 26.2 (2010); UNCITRAL Rules, art. 26.1 (1976); LCIA Arbitration Rules, art. 25.1 (2008 and 2014).

¹² CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 780 (2d ed. 2009).

¹³ For example, in *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 11, (June 27, 2012) at 10, ¶ 2, the tribunal recommended that the respondent refrain from altering or destroying certain categories of documents; in *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures (May 12, 2016) at ¶ 114(3), the tribunal recommended that the respondent refrain from publicly discussing documents filed in the arbitration.

unilateral action;¹⁴ (iii) prevent the parties from instituting or continuing parallel proceedings to defeat the arbitration proceedings;¹⁵ or (iv) secure compliance with an eventual award, for example, by way of an order of security for costs.¹⁶ The criteria for the granting of provisional measures are not generally set out in the major institutional rules. Five conditions, however, have been recognised by commentators and investment arbitration jurisprudence,¹⁷ namely that the: (i) tribunal has jurisdiction on a *prima facie* basis; (ii) claimant has a *prima facie* claim on the merits; (iii) measures requested are necessary; (iv) measures are urgently required; and (v) measures ordered are proportional, *i.e.*, the harm that the applicant is likely to suffer if the measures were not granted, would outweigh any harm that the party against whom it is directed may suffer, if the measures were granted. The tribunal granting the provisional measures is usually the same tribunal that will hear the merits of the dispute (with the exception of emergency tribunals¹⁸). Accordingly, it could be argued that this would be an incentive for most parties to comply with provisional measures, as parties are generally conscientious about being co-operative in the eyes of the tribunal.

Be that as it may, when faced with a recalcitrant party that refuses to comply with a provisional measure, the party in whose favour the provisional measures were granted will have to depend on either the arbitral tribunal or a national court to enforce these measures.

III. The enforcement of provisional measures by tribunals and by national courts

A. Enforcement of provisional measures by tribunals

An arbitral tribunal's power to issue provisional measures is derived from a combination of the:¹⁹ (i) arbitration agreement, which records the parties' consensus to give arbitral tribunals the power to

¹⁴ For example, in *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No.1, Claimant's Request for Provisional Measures (July 1, 2003), at ¶ 7(a) [*hereinafter* "Tokios Tokelés"], the tribunal recommended the stay of proceedings in domestic courts; in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (Apr. 8, 2016) at ¶ 239(a), the tribunal recommended that the respondent refrain from publicising criminal investigations.

¹⁵ For example, in *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 (Feb. 26, 2010) at Part V, ¶¶ 1, 2 [*hereinafter* "Quiborax v. Bolivia"], the tribunal recommended that the respondent suspend extant criminal proceedings related to the arbitration, and refrain from initiating any other criminal proceedings related to the arbitration or engaging in any other course of action which may jeopardise the procedural integrity of the arbitration; and in *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) [I]*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (Nov. 19, 2007), Part IV at ¶ 1 [*hereinafter* "Petroecuador [1]"], the tribunal recommended that the respondent refrain from instituting or prosecuting judicial proceedings against the claimant or its personnel, and demanding payment from the claimant.

¹⁶ For example, in *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB 12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014), at ¶¶ 81, 83, 85, 90, the tribunal ordered the claimant to provide security for the respondent's costs.

¹⁷ Régis Bismuth, *Anatomy of the Law and Practice of Interim Protective Measures in International Investment Arbitration*, 26(6) J. INT'L ARB. 773, 814–819 (2009); Gabrielle Kaufmann-Kohler & Aurélie Antonietti, *Interim Relief in International Investment Agreements*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENT: A GUIDE TO THE KEY ISSUES* 528–544 (Katia Yannaca-Small ed., 2010); Sam Luttrell, *ICSID Provisional Measures "In The Round"*, 31(3) ARB. INT'L 393, 398–410 (2015); *See also* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 5.32 (6th ed. 2015) where the authors consider that only necessity and urgency are inherent preconditions to the granting of interim measures.

¹⁸ ICC Rules, app. V, art. 2(6); SCC app. II, art. 4(4); SIAC Investment Arbitration Rules, sched. 1(6).

¹⁹ Pierre A. Karrer, *Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please*, in *INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY*, ICCA CONGRESS SERIES, VOL. 10 97, 101 & 104

order provisional measures; (ii) arbitral rules to which the arbitration agreement refers, which grant tribunals the power to preserve the sanctity of the arbitral process; and (iii) *lex arbitri*, which allows parties to enter into an agreement that confers powers on an arbitral tribunal to issue provisional relief. Although arbitral tribunals have wide powers to issue provisional measures, there are limits to their powers to enforce such measures because tribunals lack coercive powers and cannot exercise public authority.²⁰ For example, an arbitral tribunal may not order sanctions such as criminal sanctions that fall within the exclusive domain of state courts.²¹ However, this does not mean that the arbitrators' hands are completely tied when it comes to enforcing provisional measures. Depending on the nature of the provisional measure ordered, arbitrators can sanction parties who fail to comply, either by (i) drawing adverse inferences against them; or (ii) imposing costs on them.

i. Adverse inferences drawn by arbitral tribunals

The drawing of adverse inferences is an important tool used by arbitrators to enforce compliance with provisional orders for the production of evidence. An adverse inference is “*a detrimental conclusion drawn by the fact-finder from a party’s failure to produce evidence that is within the party’s control.*”²²

Indeed, the 2010 IBA Rules on the Taking of Evidence in International Arbitration [the “**IBA Rules**”] specifically provide for the drawing of adverse inferences by stating that a tribunal may infer that a document, which a party is requested to produce but fails to produce without satisfactory explanation, is adverse to the interests of that party.²³ Adverse inferences are thus an evidentiary rule allowing the tribunal to rely on indirect evidence to establish a fact. As held by the International Court of Justice [“**ICJ**”] in the Corfu Channel case, “[*A*]his indirect evidence is admitted in all systems of law, and its use is recognised by international decisions.”²⁴

Investment arbitration tribunals have found that blatant disregard for document production orders could warrant the drawing of adverse inferences;²⁵ and are not sympathetic to States refusing to produce documents on the basis of national laws or Crown privilege, as a State’s domestic laws should not ordinarily justify breach of an international obligation (see discussion on the ILC Articles

(Albert Jan van den Berg ed., 2001); Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 (3) AM. REV. INT’L. ARB. 317, 321 (2009).

²⁰ Marianne Roth, *Interim Measures*, 2012 J. DISP. RESOL. 425, 434 (2012).

²¹ Caline Mouawad & Elizabeth Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 (3) ARB. INT’L 381, 423 (2013).

²² BLACK’S LAW DICTIONARY 847 (9th ed. 2009).

²³ IBA Rules, art. 9.5; In a recent decision, the Paris Court of Appeal refused to set aside an ICC (commercial) award that was based on adverse inferences, and held that insofar as the parties had agreed to the use of the IBA Rules in the procedural order, the arbitral tribunal would not have to further consult the parties before applying Article 9.5 of the IBA Rules to draw adverse inferences. (Cour d’appel [CA] [regional court of appeal] Paris, Feb. 28, 2017, 15/06036).

²⁴ Corfu Channel (United Kingdom v. Albania) (Merits) (1949) I.C.J. Rep. 18 [*hereinafter* “Corfu Channel”]; See also, the Parker Case, in which it was held that, “*In any case where evidence which would probably influence [the Commission’s] decision is particularly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision.*”, Parker (United States v. Mexico) 4 R.I.A. 35 (1926), at 39.

²⁵ See e.g., Flemingo DutyFree Shop Private Limited v. The Republic of Poland, Award (Aug. 12, 2016) ¶ 448 [*hereinafter* “Flemingo DutyFree”]; Europe Cement Investment & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award (Aug. 13, 2009), ¶¶ 99-103, 152.

on State Responsibility [the “**ILC Articles**”] below).²⁶ However, a tribunal will not automatically decide the issue against a party who refuses to produce documents, without weighing the indirect evidence of non-production against any other evidence on record.²⁷ Before drawing adverse inferences, arbitrators have to satisfy themselves that various requirements have been met,²⁸ depending on the circumstances in which the adverse inferences have been sought:

a. The party seeking the adverse inference must produce all available evidence corroborating the inference sought

Where an arbitral tribunal finds that a requesting party is itself reticent to provide evidence which could corroborate the inference sought and fails to explain its non-production, arbitral tribunals will refuse to draw an adverse inference against the opposing party.²⁹ In the *Levitt* case, the Iran-US Claims Tribunal found that the respondent’s failure to comply with document production orders did not relieve the claimant, (which ultimately bore the burden of proving its claims), of its obligation to muster all the evidentiary support at its disposal.³⁰

b. The party requesting the adverse inference must establish that the opposing party has or should have access to the evidence sought

An arbitral tribunal will not draw adverse inferences if the requesting party is unable to convince the tribunal that the opposite party has, or should reasonably have, access to the documents in question.³¹ Tribunals have historically exempted parties from their duty to produce evidence where it is established that the evidence was lost due to civil strife, war, riots, revolution, or natural disaster.³² For example, the Iran-US Claims Tribunal has acknowledged the evidentiary hurdles confronting claimants displaced by the Islamic Revolution.³³ However, explanations based on the loss of documents (including during civil wars *etc.*) have not been accepted when they are *prima facie* inconsistent with known facts or reasonable business practices.³⁴

²⁶ *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, (May 24, 2006) at 8; *Pope and Talbot Inc. v. Government of Canada*, Decision of the Tribunal, (Sept. 6, 2000, ¶ 1.5; *United Parcel Services of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal Relating to Canada’s Claim of Cabinet Privilege (Oct 8, 2004), ¶ 7 [*hereinafter* “*United Parcel Services v. Canada*”].

²⁷ Alexander Sevan Bedrosyan, *Adverse Inferences in International Arbitration: Toothless or Terrifying*, 38 (1) U.P.A.J.INT’L L. 248 (2016).

²⁸ These requirements have been identified by Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-Production of Evidence*, 22(4) ARB. INT’L 549, 551; Poland also relied on the criteria distilled by Jeremy K. Sharpe in *Flemingo DutyFree*, Award (Aug. 12, 2016), ¶ 413.

²⁹ *Mark Dallal v. Islamic Republic of Iran*, Award, IUSCT Case No. 149 53-149-1, (Jun. 10, 1983), in *YEARBOOK COMMERCIAL ARBITRATION*, vol. IX, 264, 269 (Pieter Sanders ed., 1984); *Kathryn Faye Hilt v. The Islamic Republic of Iran*, Award, IUSCT Case No. 10427, 354-10427-2, (Mar. 16, 1988) in *SELECTED AWARDS AND DECISIONS OF THE IRAN — US CLAIMS TRIBUNAL* 9, ¶ 21.

³⁰ *William J. Levitt v. Islamic Republic of Iran*, Award, IUSCT Case No. 210 (520-210-3 (Aug. 29, 1991), in *SELECTED AWARDS AND DECISIONS OF THE IRAN — US CLAIMS TRIBUNAL* 50, ¶ 109.

³¹ *George Edwards v. The Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 251 (451-251-2) (Dec. 5, 1989), in *SELECTED AWARDS AND DECISIONS OF THE IRAN — US CLAIMS TRIBUNAL* 6, ¶ 11 [*hereinafter* “*George Edwards v. Iran*”].

³² NATHAN D. O’MALLEY, *RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE* 300 (2012).

³³ *George Edwards v. Iran*, Award, IUSCT Case No. 251 (451-251-2) (Dec. 5, 1989).

³⁴ *Republic of Indonesia v. Amco Asia Corp and others Annulment Decision* (May 16, 1986), in *YEARBOOK COMMERCIAL ARBITRATION*, VOL. XII 139, 143 (Albert Jan van den Berg ed., 1987).

- c. The inference sought must be reasonable, consistent with facts on the record, and logically related to the probable nature of the evidence withheld

A tribunal will not draw adverse inferences where the inference would contradict the arbitral record, be inconsistent with the general circumstances of the case, or incompatible with known facts in the dispute.³⁵ In all cases, the inferences sought must be reasonable, and must be based on a series of facts which logically lead to a conclusion when linked together.³⁶

- d. The party seeking the adverse inference must provide *prima facie* evidence of its claim or defence

In the absence of *prima facie* evidence, arbitral tribunals will be reluctant to draw an adverse inference against the opposing party. To evaluate whether a party seeking an adverse inference has established a *prima facie* case, arbitral tribunals will assess whether the requesting party itself has furnished evidence that is, in the circumstances, reasonably consistent, complete and detailed.³⁷

- e. The tribunal should afford the party against whom the measure is requested, sufficient opportunity to produce evidence before drawing an adverse inference against it

The main objective of drawing adverse inferences is to encourage parties to comply with tribunal orders on the production of evidence, in the interest of a fair hearing. However, given that adverse inferences are a form of indirect evidence, they should never be a substitute for available direct evidence. In order to ensure a fair hearing, tribunals should first warn parties that adverse inferences may be drawn against them, so as to encourage them to produce evidence, before actually drawing any adverse inferences. Indeed, “*the obligation of an arbitral tribunal to act fairly towards the parties extends even to parties that are ‘difficult’*”.³⁸ Gary Born argues against the use of adverse inferences in cases of non-compliance with provisional orders that are not related to disclosure of evidence as, “*even if a party has not behaved as a “good citizen” the tribunal remains obliged to decide the parties’ claims in accordance with the law and evidentiary record. If an arbitral tribunal were to draw adverse inferences from a party’s refusal to comply with provisional measures (other than disclosure related orders), it might well depart from its arbitral mandate and obligation to resolve the dispute impartially.*”³⁹

ii. The imposition of costs by arbitral tribunals

If recalcitrant parties add to the length or expense of the arbitration proceedings, arbitral tribunals may take such behaviour into account while awarding costs.⁴⁰ Most international arbitration instruments give tribunals significant discretion in the allocation of costs,⁴¹ which extends to sanctioning non-compliance with provisional measures ordered by a tribunal. In *MINE v. Guinea*, the tribunal ordered the claimant to pay a portion of Guinea’s costs and legal fees incurred in defending a parallel proceeding that had been initiated by the claimant, after the claimant flouted the

³⁵ O’MALLEY, *supra* note 32, at 218.

³⁶ Corfu Channel, (1949) I.C.J. Rep. 18.

³⁷ Sharpe, *supra* note 28, at 564.

³⁸ Karrer, *supra* note 19, at 102.

³⁹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2448 (2d ed. 2014).

⁴⁰ Karrer, *supra* note 19, at 102.

⁴¹ See e.g., ICSID Convention, art. 61(2); ICSID Rules, r. 47; NAFTA, art. 1135(1); UNCITRAL Arbitration Rules, art. 40(1) (2010); ICC Arbitration Rules, art. 38 (2017).

tribunal's order to immediately withdraw and permanently discontinue litigation that was pending in national courts, and refrain from commencing any new action in connection with the dispute.⁴²

Similarly, in *AGIP v. Congo*,⁴³ the State contravened the tribunal's order asking it to preserve evidence, as a result of which the claimant did not have access to a number of documents which would have assisted it in the preparation of its case. Consequently, the tribunal took Congo's non-compliance into account while issuing the final award, and ordered Congo to pay all of the tribunal's costs, including all administrative costs associated with the arbitration.⁴⁴

B. The enforcement of provisional measures by national courts

National courts use court orders as a means to enforce provisional measures granted by both tribunals and courts. The enforcement process, therefore, follows the typical procedures available in a national court. In common law jurisdictions, for example, these could include the imposition of fines or imprisonment, if a court order directing compliance with provisional measures is disobeyed in contempt of court. When the need for provisional measures arises in arbitral proceedings, parties have to decide whether to approach national courts or the arbitral tribunal for assistance.⁴⁵ National courts are state organs, and possess coercive powers flowing from a state's sovereignty. Arbitral tribunals, by contrast, are creatures of party consent and lack coercive power over third parties that have not consented to the tribunal's jurisdiction. National courts play an important role in the enforcement of provisional measures in international arbitration, as they may either themselves grant provisional measures; or enforce provisional measures granted by arbitral tribunals.

i. Provisional measures granted by national courts

While Parties are free to approach national courts for provisional relief at any time, including after the initiation of proceedings before a tribunal, in practice, they would typically approach national courts in two circumstances: in situations of urgency, particularly before the constitution of the arbitral tribunal; or when the arbitral tribunal lacks the jurisdiction or power to grant the measures requested.

⁴² *Maritime International Nominees Establishment v. The Republic of Guinea*, ICSID Case No. ARB 84/4, Order for Interim Measures (Dec. 4, 1985) 4 ICSID Rep. 77 (1997) [*hereinafter* "MINE v. Guinea"].

⁴³ *AGIP v. Congo* (Nov. 30, 1979), 1 ICSID Rep. 306 (1993).

⁴⁴ *Id.* at 311.

⁴⁵ It should be noted that the ICSID Rules require parties to consent that a party may apply to a national court for interim relief. This is to maintain compatibility between the interim measures regime and the exclusive jurisdiction that an ICSID tribunal enjoys over a dispute submitted to ICSID arbitration pursuant to article 26 of the ICSID Convention.

Indeed, the first sentence of article 26 of the ICSID Convention, which states that, "*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*", prevents parties that have validly consented to ICSID arbitration from seeking relief before any other forum, "*unless otherwise stated*". It also aims at preventing interference with the ICSID arbitration process by domestic courts once the arbitration proceedings have been instituted. However, the phrase "*unless otherwise stated*", allows parties to deviate from the exclusive remedy rule of article 26 by agreement. (SCHREUER, *supra* note 12, at 351-352).

Accordingly, rule 39(6) of the ICSID rules which states that, "*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*", permits parties to agree that national courts may order provisional measures before or after the institution of ICSID arbitration proceedings.

In the first situation, parties will approach national courts if the need for an urgent remedy arises before the constitution of the tribunal.⁴⁶ Additionally, the process of constituting a tribunal could be further delayed by challenges to the appointment of an arbitrator, or the recalcitrance of a party in appointing an arbitrator.⁴⁷ Such delay could further aggravate prejudice to the party seeking the provisional measures of protection. As mentioned above, to provide parties requiring urgent relief prior to the constitution of the tribunal with an alternative to national courts, arbitral rules such as the ICC, SCC, LCIA and SIAC IA Rules now contain emergency arbitrator provisions, giving parties arbitrating under these rules the option of turning to an emergency tribunal before the tribunal hearing the merits of the dispute is constituted.⁴⁸ However, given that not all arbitral rules contain emergency arbitrator provisions, parties arbitrating under the ICSID, ICSID Arbitration Additional Facility, and UNCITRAL (both 1976 and 2010) rules would still need to approach national courts for urgent relief.

The second situation arises when the arbitral tribunal lacks the jurisdiction, or power, to grant the measures requested. This could occur, for example, if the interim measure sought relates to matters solely within the jurisdiction of a state, such as criminal sanctions, or if the measure sought involves *ex parte* relief, or third parties.⁴⁹ Investment arbitral tribunals are unlikely to have the power to grant *ex parte* relief, as this would be in breach of procedural fairness requirements. Similarly, tribunals do not have jurisdiction over third parties that have not consented to the arbitration agreement.

Mareva injunctions and *Anton Piller* orders are illustrations of when parties may need to approach courts rather than tribunals, as such orders may implicate third parties or need to be sought *ex parte*.⁵⁰ A *Mareva* injunction freezes a party's assets to prevent it from dissipating the assets before the arbitral proceedings have concluded, and frustrating satisfaction of the eventual award if this goes against the dissipating party. A *Mareva* injunction also takes effect against third parties such as banks, to prevent them from assisting in the dissipation of the assets. *Anton Piller* orders allow a party to secure and preserve property by entering and searching the opposing party's premises. Such property could include documentary evidence, or items implicated in the dispute, such as counterfeit goods. *Mareva* injunctions and *Anton Piller* orders are usually sought under very urgent circumstances. For maximum efficacy, they are also typically sought *ex parte* without notice to the opposing party, to preclude the opposing party from pre-empting the orders by disposing of the assets or goods before the orders are granted. When such relief is sought therefore, the parties would have to approach national courts for assistance.

⁴⁶ Roth, *supra* note 20, at 433.

⁴⁷ D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 TEX. INT'L L.J. 71, 83 (1995).

⁴⁸ ICC Rules, art. 29 (2012 and 2017); SCC Rules, app. II (2010 and 2017); LCIA Rules, art. 9B (2014); SIAC Investment Arbitration Rules, art. 27.4 & sched. 1 (2017).

⁴⁹ REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, *supra* note 17, at 7.14 – 7.21. It should also be noted that the UNCITRAL Model Law (1985 with 2006 amendments) allows the tribunal to make preliminary orders which may in practice have a similar effect to *ex parte* relief. Article 17B (1) states: "...a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested." Article 17B (2) states: "The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure."

⁵⁰ Redfern, *supra* note 47, at 83 – 84.

The ICSID case of *Atlantic Triton v. Guinea*⁵¹ is an illustration of when a party required urgent relief before the tribunal was constituted and had to turn to a national court. Furthermore, given that a tribunal would not have had jurisdiction to grant the provisional measure sought, the need for court intervention was all the more important. In that case, the Norwegian claimant had obtained, prior to the commencement of ICSID proceedings, provisional relief from a French court of first instance to arrest three of the respondent State's vessels docked in a French port, as security for its claim.⁵² Admiralty jurisdiction is typically the exclusive domain of national courts and arbitrators have no power to order the arrest of vessels, even to secure claims in arbitration. Additionally, no emergency procedure was available. Ship arrests are usually situations of urgency, as the arrest has to be made before the ship sails out of reach into international waters. The claimant, therefore, had to approach a national court for assistance.

ii. Enforcement by national courts of provisional measures granted by arbitral tribunals

National courts also play an important role in enforcing certain types of provisional relief granted by arbitral tribunals. In such cases, while the arbitral tribunal has jurisdiction to grant the relief, it lacks the coercive powers to enforce this relief.

The enforcement of provisional measures by national courts generally depends on the applicable national laws. The drafters of the UNCITRAL Model Law (1985 with 2006 revisions) [**Model Law 2006**]⁵³ recognised that national laws could be inadequate or “differ widely”,⁵⁴ and sought to improve on and harmonise this state of affairs.⁵⁵

The Model Law 2006 provides a strong framework for the enforcement of provisional measures ordered by arbitral tribunals, by providing that such measures are final and binding on the parties, and are to be enforced upon application to the competent court.⁵⁶ It also provides exhaustive grounds for the refusal of enforcement of a provisional measure,⁵⁷ such as the violation of precepts of natural justice, or of the applicable public policy.⁵⁸ Notably, the Model Law 2006 provides that although a court may refuse to enforce a provisional measure which is incompatible with the powers conferred on the court, that court may reformulate the provisional measure, without modifying its substance, to adapt it to the court's powers for the purposes of enforcement.⁵⁹ The practical application of the Model Law 2006 must therefore be welcomed.

⁵¹ *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1.

⁵² SCHREUER, *supra* note 12, at 397, 785-786; LAWRENCE COLLINS, *ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS* 77 (1994).

⁵³ The Model Law may have been developed primarily for the purposes of commercial arbitration, but the drafters of the Model Law contemplated its application to other types of arbitration as well, Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 [*hereinafter* “Explanatory Note to the Model Law”], Note B.1.10 states: “[w]hile the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration.”

⁵⁴ Explanatory Note to the Model Law, Note A.2.8.

⁵⁵ *Id.* Notes A.1, A.2., B.1.

⁵⁶ UNCITRAL Model Law, art. 17 H.

⁵⁷ *Id.* art. 17 I.

⁵⁸ *Id.* art. 36.

⁵⁹ *Id.* art. 17 I(1)(b)(i); *See also* Roth, *supra* note 20, at 435.

Before examining specific cases of enforcement by national courts of interim measures ordered by tribunals, it should be noted that state courts are also obliged under international law to enforce provisional measures granted by investment arbitral tribunals.

A domestic court's refusal to enforce provisional relief could place the State in breach of its international treaty obligations. Investment arbitration proceedings are brought pursuant to treaties. These are international instruments that carry with them the weight of States' international obligations. On the premise that a State has consented to arbitrate pursuant to a certain set of rules, an arbitral order is thus backed by the imperative of an international treaty.

Article 27 of the Vienna Convention on the Law of Treaties⁶⁰ provides that a State Party may not invoke provisions of its internal law to justify its failure to perform a treaty obligation. Article 3 of the ILC Articles⁶¹ echoes the Vienna Convention, stipulating that the breach of an international obligation is wrongful even if this would violate a provision of the State's own law. Article 4(1) of the ILC Articles attributes conduct of the State's legislative, executive and judicial organs to the State itself. A domestic court in the respondent State in investment arbitration proceedings is therefore obliged to enforce orders for provisional measures made against that State. Domestic courts in third party States may also be obliged to enforce such orders, if the third party State is a signatory to, and enforcement is sought pursuant to, the New York Convention (as discussed below).

Typically, national courts have enforced provisional measures granted by investment tribunals, where the measures granted injunct either parallel proceedings or acts instituted by the host State against the investor. From a practical perspective, the investor is likely to approach the arbitral tribunal for the grant of such relief, as it is unlikely to have much success before the national courts of the host State.

a. The enforcement of an injunction precluding civil acts taken by the host State against the investor

In *JKX v. Ukraine*,⁶² the investor claimant obtained emergency relief under the 2010 SCC Rules. This relief, rendered in the form of an award, enjoined the State from collecting royalties on gas production from the investor at a higher rate than was previously in place.⁶³ The investor sought to enforce the emergency award in Ukraine and succeeded at first instance before the Perchersk District Court on June 9, 2015. This was reportedly because the relief was rendered in the form of an "award" and thus was enforceable pursuant to the New York Convention⁶⁴ (see discussion on enforcement under the New York Convention below). The State appealed to the Kiev City Court of

⁶⁰ Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969).

⁶¹ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001).

⁶² *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum JV v. Ukraine*, SCC (Jan. 14, 2015).

⁶³ Decision of the Panel of judges of the civil division of the Specialized Higher Court of Ukraine for Civil and Criminal Cases, Feb. 24, 2016, on the application of *JKX Oil & Gas plc, Poltava Gas B.V., Joint Venture Poltava Petroleum Company to the State of Ukraine*, at 3.

⁶⁴ Olga Perepelynska, *Enforceability of Emergency Arbitrator Awards in Ukraine*, CIS ARB. FORUM, (Dec. 7, 2015), <http://www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine/>.

Appeal, which overturned the first instance decision on September 17, 2015. In turn, the claimant appealed the Kiev court's decision to the Supreme Court of Ukraine, which, in a decision dated February 24, 2016, did not uphold the Kiev City Court of Appeal's decision, but instead remitted it back for reconsideration. The Supreme Court held that in Ukraine, a court could only refuse to recognise or enforce an arbitral award on the grounds enumerated in Article V of the New York Convention,⁶⁵ and that the Kiev City Court of Appeal had not *inter alia*, taken these grounds into account in overturning the first instance decision.⁶⁶ In *JKX*, therefore, the Supreme Court of Ukraine was willing to consider the enforcement of provisional relief granted by an arbitral tribunal, and to grant the provisional relief, the protection of the New York Convention.

b. The enforcement of injunctions precluding criminal proceedings taken by the host State against the investor

In *City Oriente v. Ecuador*,⁶⁷ the ICSID tribunal ordered that the State, in relation to matters arising in connection with the contract and Ecuadorian domestic law that were the subject of the arbitration proceedings, refrain from:⁶⁸ (i) instituting or prosecuting any action against the claimant and its employees and officers; (ii) demanding further amounts from the claimant; and (iii) altering the *status quo* agreed upon under the disputed contract; until the conclusion of the ICSID proceedings. The Second Chamber for Criminal Matters of the Ecuadorian Supreme Court enforced these orders on June 9, 2008, and directed that the Office of the General Prosecutor of Ecuador should refrain from bringing embezzlement charges against the claimant's executives.⁶⁹ The Supreme Court reasoned that as Ecuador was a signatory to the ICSID Convention, it had to comply with decisions rendered by an ICSID tribunal.⁷⁰

IV. Difficulties Regarding the Enforcement of Provisional Measures

A. Difficulties at the level of the tribunal

As mentioned above, an arbitral tribunal's authority to enforce provisional measures is restricted by its lack of coercive powers. This necessitates the parallel intervention of courts to effectively enforce provisional orders and assist with the arbitral process.⁷¹ The powers of the tribunal to enforce provisional measures are limited, because (i) adverse inferences do not necessarily have great

⁶⁵ See *supra* note 61 at 4. The text of Article 36 of the Law of Ukraine on International Commercial Arbitration is materially identical to Article 36 of the UNCITRAL Model Law (1985 without the 2006 amendments). The grounds on which recognition or enforcement may be refused, contained in Article 36 of the UNCITRAL Model Law (1985 without 2006 amendments), are identical to those listed in Article V of the New York Convention (see Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, ¶ 50).

⁶⁶ At the time of drafting this Article, no further reports on the enforcement proceedings had yet been published. The Final Award in the *JKX* case was released on February 6, 2017. However as the Final Award is not public, it is not clear if the Final Award had any bearing on the emergency measures ordered; see *Tribunal Award – Update, JKX Oil & Gas plc* (Feb. 7, 2017), <http://otp.investis.com/clients/uk/jkx/rns/regulatory-story.aspx?cid=519&newsid=842356>.

⁶⁷ *Petroecuador* [1], ICSID Case No. ARB/06/21.

⁶⁸ *Id.*, Decision on Provisional Measures (Nov. 19, 2007) Part IV, ¶ 1.

⁶⁹ INTERIM MEASURES IN INTERNATIONAL ARBITRATION 226 (Lawrence W. Newman & Colin Ong eds., 2014); *International Arbitration, First Post-2002 ICSID Award Favoring Argentina in Metalpar Case*, (1) ARB. NEWSLETTER (Pagbam Attorneys at Law) July 2008, <http://www.pagbam.com.ar/wp-content/uploads/2008/07/PAGBAM---Arbitration-Newsletter-n-1-July-083.pdf>.

⁷⁰ *Id.*

⁷¹ Bismuth, *supra* note 17, at 773.

coercive force; and (ii) it is ambiguous as to whether a tribunal has the power to award damages to sanction parties' non-compliance with provisional measures.

i. The limited effect of adverse inferences

Adverse inferences may not serve as a sufficient deterrent against the breach of preliminary measures because arbitrators are unwilling to draw sweeping inferences. The inferences drawn are typically narrow and limited to very specific issues only, and may not ultimately have a bearing on the determination of the final merits of the dispute.⁷² As argued by Yesilirmak, “*the tribunal should not hold a party liable on the substance of a case just because the party is uncooperative in regard of the tribunal’s ruling on a provisional measure.*”⁷³

In *United Parcel Services v. Canada*, the NAFTA tribunal repeatedly warned Canada that its failure to produce certain documents would lead to the tribunal drawing an adverse inference against Canada.⁷⁴ Notwithstanding the tribunal’s orders and warnings, Canada failed to produce the documents and the tribunal drew the adverse inferences as it had indicated. However, the adverse inferences drawn operated on only one element of the breach of national treatment claim made by the claimant. Indeed, while the tribunal had drawn adverse inferences towards establishing the first requirement of the claim and found that Canada had treated the claimant differently from Canada’s national investors, this was not sufficient for the claimant to succeed on its claim in full. The claimant still had to prove the second requirement of its national treatment claim – that the foreign and national investors were “in like circumstances” – but failed to do so. Ultimately, Canada’s failure to produce the documents did not prevent it from prevailing on the entire claim.⁷⁵

The effect of adverse inferences on the outcome of the case is further limited by the fact that international arbitral tribunals would rightly privilege direct evidence over indirect evidence. In *OPIC Karimun Corp v. Venezuela*, while the tribunal was inclined to draw adverse inferences against Venezuela for the non-production of documents, a majority of the tribunal considered that, “*such inferences fall well short of the direct evidence that would be needed to establish intent in the face of the ambiguities of the Investment Law. The majority of the Tribunal are of the view that inferences alone, absent direct evidence, are not sufficient to establish [...] an intention on the part of Venezuela to consent to ICSID jurisdiction, as required by Article 25 of the ICSID Convention.*”⁷⁶

In *Flemingo DutyFree Shop v. Poland*, the claimant requested the tribunal to draw adverse inferences from the respondent’s repeated breach of the tribunal’s document production orders, and alleged that such documents, if produced, would have provided the claimant with more precise data for the calculation of its damages.⁷⁷ While the tribunal acknowledged that the respondent had blatantly

⁷² Bedrosyan, *supra* note 27, at 247.

⁷³ ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 242 (2005).

⁷⁴ *United Parcel Services v. Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal Relating to Canada’s Claim of Cabinet Privilege (Oct. 8, 2004), ¶ 15.

⁷⁵ *Id.* Award on the Merits (May 24, 2007), ¶ 173 *et. seq.*

⁷⁶ *Opic Karimun Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award (May 28, 2013), ¶ 146.

⁷⁷ *Flemingo DutyFree*, Award (Aug. 12, 2016), ¶ 625.

violated its document production orders, it also held that the claimant did not, in fact, need such data for the calculation of its actual losses.⁷⁸ The tribunal found that the data contained in the documents might have been useful to the claimant to support its claim for “loss of chance”.⁷⁹ However, as the tribunal had already rejected the claimant’s claims for loss of chance, a determination of whether adverse inferences should be drawn against the respondent was unnecessary.⁸⁰

Most tribunals are hesitant to draw deeper inferences that could have a stronger bearing on the merits of the dispute. Empirically, a Queen Mary 2012 survey found that tribunals would rarely draw explicit adverse inferences from a party’s failure to produce documents; and one reason for this hesitation given by survey respondents was that arbitrators were afraid such inferences would be a ground for challenging the award.⁸¹ Nevertheless, the survey also found that many private practitioners were in favour of arbitrators making greater use of this power, as long as suitable advance warnings were given to the parties before doing so.⁸² Adverse inferences are thus limited in their ability to sanction non-compliance with provisional measures for the non-production of evidence by a recalcitrant party.

ii. *Ambiguity regarding tribunals’ powers to award damages to sanction non-compliance with provisional measures*

It has been suggested that arbitrators have the authority to sanction non-compliance of provisional measures by an award of damages.⁸³

However, the authority of arbitral tribunals to award damages to sanction non-compliance with provisional measures is the subject of debate. It has been submitted that, “*non-compliance does not imply ipso jure the responsibility of the recalcitrant party*”, damages might be awarded only if such non-compliance causes aggravated harm; and that “[g]iven the cautious but anticipatory and prospective assessment of one of the parties’ behaviour in which the granting of provisional measures lies, as well as the potential doubts on the jurisdiction of the tribunal, arbitrators’ determinations are based on hypotheses and it would seem excessive to attach responsibility to non-compliance regardless of whether or not it has resulted in additional prejudice.”⁸⁴ Tribunals are thus generally hesitant to award damages to enforce compliance or sanction non-compliance with provisional measures.

⁷⁸ *Id.* ¶ 932.

⁷⁹ *Id.*

⁸⁰ *Id.* ¶¶ 448-932.

⁸¹ Queen Mary University of London and White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, <http://www.arbitration.qmul.ac.uk/docs/164483.pdf> at 21. It should be noted that the subject matter of this survey was commercial rather than investment arbitration. However, the survey would still be of relevance as the manner in which arbitral tribunals treat the available evidence, apply evidentiary rules, and draw adverse inferences would not ordinarily vary based on whether the proceedings relate to commercial or investment arbitration.

⁸² *Id.*

⁸³ Karrer, *supra* note 19, at 102. *See also*, Mouawad & Silbert, *supra* note 21, at 423.

⁸⁴ Bismuth, *supra* note 17, at 802.

B. Difficulties at the level of the national courts

An aspect that contributes to uncertainty in the enforcement of provisional measures before national courts stems from the varied terminology used by international arbitration rules, practitioners and authors. The terms provisional, interim, conservatory, protective, preliminary or urgent measures, can all be used to denote protection sought and/or granted to a party before a final decision on the merits. Moreover, such protection may be “granted,” “ordered” or “recommended” in the form of an “interim award,” “partial award,” “decision” or “procedural order”.⁸⁵ These semantic differences have given rise to some ambiguity as regards (i) the form of provisional measures; and (ii) the finality of provisional measures.

i. Ambiguity as to the form of the provisional measures

The ICSID Convention,⁸⁶ the New York Convention,⁸⁷ and a number of national arbitration statutes⁸⁸ apply only to the recognition and enforcement of arbitral “awards”. The term “awards” in the ICSID Convention and the New York Convention, in particular, has created uncertainty as to the enforcement of provisional measures under these instruments.

a. The enforcement of ICSID provisional measures

There previously was some level of uncertainty as to whether provisional measures granted by ICSID tribunals were binding on the parties, because both Article 47 of the ICSID Convention,⁸⁹ and Rule 39(1) of the ICSID Arbitration Rules,⁹⁰ provide that arbitral tribunals may “recommend” provisional measures. The tentative nature of the word “recommend” was thought to imply that ICSID tribunals lacked the power to order provisional measures that would bind the parties.⁹¹ Further, the legislative history to the ICSID Convention “*suggests that a conscious decision was made not to grant the tribunal the power to order binding provisional measures.*”⁹² Indeed, the drafters of the ICSID Convention had deliberately restricted the powers of ICSID tribunals to recommend provisional measures in order to eliminate difficulties relating to enforcement, such as when a provisional measure might conflict with municipal law.⁹³

In response, ICSID tribunals developed a line of jurisprudence suggesting that provisional measures ordered by ICSID tribunals are indeed binding. In *Maffezini v. Spain*⁹⁴, the tribunal found that the

⁸⁵ “Recommend” is used by the ICSID Convention, art. 47, the ICSID Rules, r. 39(1), and the ICSID Arbitration Additional Facility Rules, art. 46; “grant” is used by the UNCITRAL Rules 2010, art. 26(1) and the SCC Rules, art. 37(1); “take” is used by the UNCITRAL 1976 Rules, art. 26(1); “order” is used by the ICC Rules, art. 28(1) and the LCIA Rules, art. 25; and “issue” is used by the SIAC Investment Arbitration Rules, art. 27(1).

⁸⁶ ICSID Convention, arts. 53 & 54.

⁸⁷ New York Convention, art. I(1).

⁸⁸ See e.g. the US Federal Arbitration Act and the Netherlands Arbitration Act; Mouawad & Silbert, *supra* note 21, at 417.

⁸⁹ ICSID Convention, 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.*”

⁹⁰ ICSID Arbitration Rules, r. 39(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.*”

⁹¹ Bismuth, *supra* note 17, at 792; SCHREUER, *supra* note 12, at 766.

⁹² *Id.* at 764.

⁹³ *Id.* at 766.

⁹⁴ Emilio Agustín Maffezini v. Kingdom of Spain., ICSID Case No. ARB/97/7.

word “recommend” used in Rule 39 of the ICSID Arbitration Rules is equivalent to the word “order” used elsewhere in the Rules. The tribunal did not believe that the States party to the ICSID Convention meant to create a substantial difference in the effect of the words “recommend” and “order”, and it consequently found that, “[t]he Tribunal’s authority to rule on provisional measures is no less binding than that of a final award.”⁹⁵ Today, most ICSID tribunals concur with the *Maffezini* tribunal in finding that provisional measures “recommended” by arbitral tribunals pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules are, in effect, “ordered” by tribunals, and parties are under a legal obligation to comply with them.⁹⁶

While ICSID tribunals, for the most part, agree that provisional measures are binding on the parties, the debate as to whether such measures are enforceable by national courts remains open. Schreuer, for instance, expresses scepticism: “[i]t is uncertain whether a domestic court could be induced to enforce a provisional measure by an ICSID tribunal that is only couched in the form of a recommendation.”⁹⁷ A factor contributing to this uncertainty is the fact that the automatic recognition and enforcement mechanism contained in Articles 53 and 54 of the ICSID Convention expressly extends only to “awards”, thereby possibly excluding “recommendations”. Whether a court will refuse to enforce a provisional award solely because it is couched as a recommendation, remains largely untested. Most interactions between national courts and ICSID provisional measures have not been in the context of enforcement *per se*; rather the practical implications of provisional measures have often arisen before courts in a more oblique manner.

To illustrate, in *MINE v. Guinea*,⁹⁸ the Court of First Instance of Geneva lifted attachments against the respondent’s property and used a provisional measure by the ICSID tribunal recommending that MINE discontinue all local proceedings as one of the reasons for lifting the attachments.⁹⁹ Thus, although the court was not asked to enforce the provisional measure itself, it appears that the court was to some extent persuaded that the provisional measure had effect.

Another example is the recent case of *Hydro S.r.l. v. Albania*,¹⁰⁰ where the tribunal ordered that the State suspend criminal and extradition proceedings instituted against two of the claimants until the

⁹⁵ *Id.* Procedural Order No. 2 (Oct. 28, 1999), at ¶ 9.

⁹⁶ Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures [French] (Sept. 25, 2001), ¶¶ 17-25; Tokios Tokelés, ICSID Case No. ARB/02/18, Order No 1 Claimant’s Request for Provisional Measures (July. 1, 2003), ¶ 4; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures (Aug. 17, 2007), ¶ 58; Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), ¶¶ 67-76; Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Claimant’s Request for Provisional Measures (Dec. 13, 2012), ¶ 120; Quiborax v. Bolivia, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶¶ 578-582; Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18, Decision on Provisional Measures (Jan. 25, 2016), ¶ 75; United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24, Decision on Respondent Application for Provisional Measures (May 12, 2016), ¶ 109.

⁹⁷ SCHREUER, *supra* note 12 at 766.

⁹⁸ *MINE v. Guinea*, ICSID Case No. ARB 84/4, Geneva Tribunal of First Instance Decision (Mar. 13, 1986).

⁹⁹ SCHREUER, *supra* note 12, at 766.

¹⁰⁰ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB15/28 [*hereinafter* “Hydro S.r.l. v. Albania”].

conclusion of the ICSID arbitration.¹⁰¹ Albania had previously requested the extradition of the two claimants from the United Kingdom. Following the tribunal's decision, Albania appeared before a first instance English court seeking to adjourn the extradition proceedings *sine die*.

The English court stayed the extradition proceedings, declining Albania's application to adjourn the extradition proceedings *sine die*. The English court reasoned that the extradition proceedings could not continue because the provisional measures were binding on Albania (both the claimant and Albania agreed that the State was bound by the provisional measures).¹⁰² Continuance of the proceedings would be a breach of an international law obligation,¹⁰³ although the English court did not specify which international law obligations would be breached. The English court refused to adjourn the proceedings *sine die* because of the prejudice caused to the two individual claimants, in that they would remain on bail and be subject to the conditions of bail indefinitely.¹⁰⁴ This would infringe the claimants' liberty for an unspecified amount of time.¹⁰⁵

In the light of the English court's decision, the ICSID tribunal revoked its order on provisional measures,¹⁰⁶ and recommended in lieu thereof that Albania should, until the issuance of a final award, take no steps to recommence extradition proceedings and take all necessary action to maintain the suspension of the extradition proceedings.¹⁰⁷ The tribunal acknowledged that the principal objective of the provisional measures was to allow the claimants to fully participate in the arbitration; this had been secured by the English court's order staying the extradition proceedings,¹⁰⁸ notwithstanding that the English court had not explicitly granted enforcement of the provisional measures, an application for the enforcement of which had not been placed before it.

b. Enforcement of provisional measures under the New York Convention

While the New York Convention confines its application to awards, it does not define what constitutes an award. Practitioners and academics have distilled the following requirements in connection with an award: the award must result from an agreement to arbitrate; the award must conform to certain formalistic characteristics; and the award must resolve a substantive issue and not a procedural matter.¹⁰⁹ It has been held that an order does not amount to an award pursuant to the New York Convention.¹¹⁰ Consequently, provisional measures that are issued in the form of an

¹⁰¹ *Id.* Order on Provisional Measures (Mar. 3, 2016), ¶ 5.1.

¹⁰² *Government of Albania v. Francesco Becchetti and Mauro de Renzis*, Decision of District Judge Tempia (May 20, 2016), ¶ 43.

¹⁰³ *Id.* ¶ 54.

¹⁰⁴ *Id.* ¶ 55.

¹⁰⁵ *Id.* ¶¶ 54–56.

¹⁰⁶ This was in response to the Respondent's application that the Tribunal revoke its order.

¹⁰⁷ *Hydro S.r.l. v. Albania*, ICSID Case No. ARB15/28, Decision on Claimants' Request for a Partial Award and Respondent's Application for Revocation or Modification of the Order on Provisional Measures (Sept. 1, 2016), ¶ 5.1.

¹⁰⁸ *Id.* ¶ 1.32.

¹⁰⁹ BORN, *supra* note 39, at 2917–2919; JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1267 – 1268 (2012); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, *supra* note 17, at 9.05 – 9.13.

¹¹⁰ The Supreme Court of Queensland, Australia, in *Resort Condominiums Int'l. Inc. v. Bolwell*, [1995] 1 Qd R 406 (Austl.). (Although this is a commercial arbitration case, it provides valuable guidance on the approach of a national court with respect to the enforcement of a provisional measure under the New York Convention).

award rather than an order may be more easily enforceable.¹¹¹ Orders are distinct from awards, as they are less formalistic, shorter and contain less legal reasoning than awards. Furthermore, an order may be signed only by the president of the tribunal, but awards must be signed by the entire tribunal.¹¹²

However, when deciding whether a decision is an award or an order, regard will be given to the “quality” of the decision rather than mere nomenclature, *i.e.* the procedure employed in the rendering of the decision, its form and elements, and its effect on a disputed issue.¹¹³ If the decision amounts to a final disposition of a particular issue, it could be enforced as an award by French, English and certain American courts, regardless of the nomenclature used.¹¹⁴ Nonetheless, different jurisdictions remain divided on the matter of an “award” as opposed to an “order”, and there may be national courts that remain hesitant to enforce provisional measures that have been issued in the form of an order.¹¹⁵

ii. Ambiguity as to the finality of provisional measures

The prevailing view is that for a decision to constitute an award, it must amount to a final expression of the tribunal’s decision on a substantive matter.¹¹⁶ Provisional measures are, however, by definition temporary. In finding that the provisional measures ordered would lapse on the issuance of a final award, the *Micula* tribunal relied on Professor Schreuer’s articulation of the temporary nature of a provisional or provisional measure: “*The provisional nature of interim measures implies that they are recommended only for the duration of the proceedings. [...] Provisional measures will lapse automatically upon the rendering of the tribunal’s award. They will also lapse upon the discontinuance of the proceedings in accordance with [ICSID] Arbitration Rules 43-45. Although neither Art. 47 [of the ICSID Convention] nor Arbitration Rule 39 [of the ICSID Arbitration Rules] say so explicitly, this is a consequence of their provisional nature.*”¹¹⁷

The element of finality may be the biggest obstacle to the enforcement of provisional measures under the New York Convention and under certain other national legislations. As provisional measures do not resolve a dispute *in fine*, one view is that provisional measures are not recognisable and enforceable under the New York Convention.¹¹⁸ Article V(I)(e) of the New York Convention stipulates that an award may not be recognised or enforced if it has not become binding on the parties. Although Article V(I)(e) of the New York Convention does not employ the term “*final*”, by virtue of being open to ordinary means of recourse¹¹⁹ or susceptible to modification or cancellation

¹¹¹ Mouawad & Silbert, *supra* note 21, at 418.

¹¹² *Id.* at 417.

¹¹³ Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?*, 18 (5) J. INT’L. ARB. 511, 526 (2001).

¹¹⁴ Sherwin & Rennie, *supra* note 19, at 326; Bismuth, *supra* note 17, at 790.

¹¹⁵ *See, e.g.*, the position of the Australian courts in *Resort Condominiums Inc. v Ray Bowell and Resort Condominiums Pty. Ltd.*, Oct. 29, 1993 (Sup. Ct. Queensland), 20 Y.B. Comm. Arb. 628, holding that “*the reference to ‘arbitral award’ in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties.*”

¹¹⁶ Mouawad & Silbert, *supra* note 21, at 419.

¹¹⁷ Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013), ¶ 1307.

¹¹⁸ Nathalie Voser, *Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach*, 1(2) DISP. RESOL. INT’L 187 (2007).

¹¹⁹ Tijana Kojovic, *supra* note 113, at 522.

at any time by an arbitral tribunal,¹²⁰ it is generally understood that provisional measures are not yet binding on the parties.

Some authors, however, beg to differ that provisional awards are not final and therefore not enforceable. Gary Born affirms that, “[...]the better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards in the [New York] Convention and most national arbitration regimes. Provisional measures are “final” in the sense that they dispose of a request for relief pending the conclusion of the arbitration.”¹²¹ V.V. Veeder concurs, by reasoning as follows: “If an award can be enforced under the Convention, then why not an interim order made by the same arbitral tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common-sense.”¹²² Another author opines that, “[a]n interim award on provisional relief resolves whether the request for provisional measure should be granted or not. It represents a final determination of the issue thus defined. The fact that the ruling can be revoked or modified by a subsequent interim decision with different terms or by the final award on the merits should not matter for the purpose of enforcement. “Finality” of an interim award should be observed on its own terms.”¹²³

Although practitioners and academics may be divided on whether provisional measures represent a final determination of an issue, they agree that the function of such measures is to ultimately protect the final outcome of arbitral proceedings; this ought to be a factor clearly in favour of the enforcement of provisional measures, notwithstanding the splitting of hairs on whether such measures are “final” or not.

V. Conclusion

Investment arbitrations span many years and involve a variety of disputing parties, from individuals and wealthy multi-national corporations to powerful (or less powerful) states. Furthermore, billions of dollars of tax payers’ or investors’ money could be at stake. The role that provisional measures play in avoiding jeopardy to such high-stake proceedings, before a final determination of the dispute has been made, cannot be understated. In light of the potential power of provisional measures, the fact that their efficacy hinges largely on voluntary compliance by parties is unsatisfactory.

That both courts as well as arbitral tribunals can award provisional measures (depending on the nature of the measures sought) should, in theory, be advantageous to a party seeking interim relief. However, in the absence of a clear regime for enforcement, provisional measures could well represent a sword with blunt edges. A clear consensus as to the means available to arbitral tribunals to enforce such measures themselves and agreement as to the form in which such measures should

¹²⁰ See *Millicom International Operations B.V. and Sentel GSM S.A. v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures (Dec. 9, 2009), ¶ 38; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures [French], (Sept. 25, 2001), ¶ 14.

¹²¹ BORN, *supra* note 39, at 2514-2515. See also, Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 CROAT. ARB. Y.B. 73, 85 (2016).

¹²² See V. V. Veeder, *Provisional and conservatory measures*, paper presented at the “New York Convention Day” in New York on June 10, 1998 to celebrate the 40th anniversary of the Convention, published in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 22 (1999); See also Savola, *supra* note 121, at 86.

¹²³ Kojovic, *supra* note 113, at 523; See also Savola, *supra* note 121, at 85.

be issued could go a long way towards harnessing the power of provisional measures more effectively. Moreover, enhancing the ability of existing international arbitration instruments to aid in the enforcement of provisional measures, as was done with Articles 17(H)¹²⁴ and (I)¹²⁵ of the Model Law 2006, would bring welcome clarity and structure to the enforcement regime for provisional measures.

¹²⁴ Art. 17 (H) of the UNCITRAL Model Law provides that an interim measure issued by an arbitral tribunal shall be recognised as binding, as follows:

- (1) 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, subject to the provisions of article 17 I.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

¹²⁵ Art. 17 (I) of the UNCITRAL Model Law provides for strict grounds for the refusal to recognise and enforce an interim measure:

- (1) Recognition or enforcement of an interim measure may be refused only:
 - (a) At the request of the party against whom it is invoked if the court is satisfied that:
 - (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
 - (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
 - (b) If the court finds that:
 - (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
 - (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.