

“Interim Measures: An Arbitrator’s Provisional Views” (Fordham Law School Conference paper to be published by Nijhoff) (2008).

The issue of interim measures in investor-state arbitration is of interest to arbitrators and practitioners alike. The availability of interim measures in international arbitration, even where they are sought against a State, is now well-settled. However, the circumstances in which provisional relief will be ordered are quite narrowly circumscribed, especially in instances they are sought preserve the *status quo* pending resolution of the outcome of the dispute. And although the binding nature of an interim measure recommended by an ICSID tribunal is no longer seriously in question, the sovereign character of a State party to an arbitration may, in practical terms, influence the manner in which a tribunal disposes of an application for interim measures.

# Fordham Law School Conference on International Arbitration and Mediation

## Investor-State Arbitration

“Interim Measures: An Arbitrator’s Provisional Views”

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by

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### *A Few Words of Introduction*

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The issue of interim measures in investor-state arbitration is of interest to arbitrators and practitioners. It is a topic in motion. In this paper, I will address these facets of the issues:

First: Are interim measures available in investor-State arbitration to the same extent as in international commercial arbitration?

Second: In what circumstances are interim measures recommended (ordered) in investor-State arbitrations?

Third: Are interim measures sought against a State in an investor-State arbitration any different than measures sought against a non-State party?

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In seeking to shed some light on these issues, I will refer to both the literature on the topic and my own experience as an arbitrator in investor-State arbitrations.

*Availability of Interim Measures In Investor-State Arbitrations: The Power of Consent*

The availability of interim measures in international arbitration, even where a State is Respondent, is now well-settled. A tribunal's jurisdiction to order provisional measures is, like the parties' arbitration agreement itself, a function of the parties' consent. When opting for arbitration, be it in the context of an investor-State dispute or a purely commercial one, the parties have complete freedom to shape the scope of a tribunal's jurisdiction to order provisional relief. And while parties will be well advised to draft their arbitration agreement carefully in this regard, they are always free to carve out concurrent jurisdiction of the courts in connection with such relief.

The ICSID Convention and Arbitration Rules, which represent the quintessential framework for investor-State arbitration, expressly address the operation of the parties' consent. Article 26 of the Convention, provides that "[c]onsent 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". Regarding provisional measures specifically, Article 47 of the Convention states: "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."

These two provisions have been the subject of much debate as they effectively deem an ICSID tribunal's jurisdiction to order provisional relief to be exclusive. The burden is on the parties to expressly indicate otherwise. ICSID Arbitration Rule 39 makes that very clear: "Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order

provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.”

The exclusivity of an ICSID tribunal’s power to order provisional relief is a unique feature of the ICSID Arbitration Rules. Indeed, under other recognized arbitration frameworks, it is presumed (be it explicitly or implicitly) that courts retain the power to order such relief unless otherwise specified.<sup>1</sup> Chapter Eleven of NAFTA, also designed for investor-State arbitration, provides an interesting contrast. In its early iterations in 1992, the NAFTA drafters had in fact stipulated that a tribunal could not order provisional measures.<sup>2</sup> The availability of provisional measures under NAFTA Chapter Eleven would eventually be specified under Article 1134. And while initial versions of this provision referred to the availability of provisional measures for the protection of the tribunal’s “jurisdictional exclusivity”, this language was eventually dropped.<sup>3</sup> Today, Article 1134 reads, in relevant part, 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.”

Another unique feature of ICSID and in particular Rule 39 is that it refers to the tribunal’s power to “recommend” provisional measures. This language is used in the very first paragraph of Rule 39, which states: “At any time after the institution of the proceeding, a party may request

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<sup>1</sup> See e.g. E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at para. 1320.

<sup>2</sup> See Meg Kinnear *et al.*, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) at pp. 1134-1.

<sup>3</sup> See Meg Kinnear *et al.*, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) at pp. 1134-1.

that provisional measures for the preservation of its rights be recommended by the Tribunal. [...]”.

The reality is that once the parties have provided their consent, at least in the context of an ICSID arbitration, the tribunal will have the required jurisdiction to order provisional relief in accordance with the terms of Rule 39. An ICSID tribunal’s jurisdiction is in fact wide-reaching, far more than a tribunal’s operating under NAFTA Chapter Eleven. For instance, an ICSID tribunal may recommend provisional measures on its own initiative or recommend measures other than those specified in a request. Furthermore, a tribunal may at any time modify or revoke its recommendations.

One might be inclined to think that such broad powers, especially when exercised *sua sponte*, are potentially incompatible with the involvement of a sovereign State. There may also be a heightened sense of *méfiance* on the part of States due to the fact that an ICSID tribunal has the power to recommend provisional measures before it has definitely ruled on its jurisdiction over the dispute: a finding of *prima facie* jurisdiction will suffice.<sup>4</sup> And only recently, in 2006, Rule 39 was revised to allow requests for provisional measures on an expedited basis as soon as a dispute is registered with ICSID, *i.e.* even before the tribunal is constituted.<sup>5</sup>

Whilst the scope of an ICSID tribunal’s power to order provisional measures has widened over time, it is significant that the issue of State sovereignty was at the forefront of the drafters’

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<sup>4</sup> See, e.g., *Holiday Inns v. Morocco* (1978/79 ICSID Ann. Rep. 5) as cited in A.R. Parra, “The Practices and Experience of ICSID” at p. 42.

<sup>5</sup> Paragraph 5 of Rule 39 of the ICSID Arbitration Rules provides as follows: “If a party makes a request pursuant to (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.”

minds when Rule 39 was initially crafted. Their concern in respect of State sovereignty provides the explanation for the careful wording of Rule 39, premised as it is on a tribunal's power to "recommend" provisional measures, as opposed to the power to "order", or language to that effect. As noted by Redfern and Hunter, "[t]he use of the word 'recommend' in this context stems from the concern of the drafters of the ICSID Convention to be seen as respectful of national sovereignty by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis".<sup>6</sup> Schreuer informs us that "a conscious decision was made not to grant the tribunal the power to order binding provisional measures".<sup>7</sup>

In the fullness of time, however, this concern of the drafters of the Convention was set aside by less respectful ICSID tribunals. For instance, in the case of *Emilio Agustin Maffezini v. Kingdom of Spain*, the tribunal stated in no uncertain terms: "The Tribunal's authority to rule on provisional measures is not less binding than that of a final award. Accordingly, for the purposes of this order, the tribunal deems the word 'recommend' to be of equivalent value as the word 'order'".<sup>8</sup>

The issue of whether provisional measures are binding on States was long debated in the International Court of Justice as well. In the landmark *LaGrand* case initiated by Germany

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<sup>6</sup> Redfern and Hunter, *Law And Practice Of International Commercial Arbitration*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at paras. 7-12.

<sup>7</sup> *The ICSID Convention: A Commentary* (Cambridge, U.K.: Cambridge University Press, 2001) at p. 758, as cited in A. Redfern and M. Hunter, eds., *Law And Practice Of International Commercial Arbitration*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at paras. 7-12.

<sup>8</sup> Decision on Request for Provisional Measures (28 October 1999), 16 ICSID Review – Foreign Investment Law Journal (2001), 212 at paragraph 9, as cited in A. Redfern and M. Hunter, eds., *Law And Practice Of International Commercial Arbitration*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at paras. 7-12. See also *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003, at para. 4: "It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."

against the United States, it was argued by the latter that an ICJ order on provisional measures, made pursuant to Article 41 of the ICJ Statute, was not binding. This argument was rejected by the ICJ in the following terms:

“The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.”<sup>9</sup>

### *Interim Measures In Investor-State Arbitrations: A Few Examples*

It is clear that interim relief is available in investor-State arbitrations. I will now provide examples which illustrate different circumstances where interim measures were actually ordered or denied.

Rule 39 does not specify the kinds of measures that a tribunal may order, nor establish criteria for granting such measures. Paragraph 1 of Rule 39 simply states that “a party may request that provisional measures for the preservation of its rights be recommended by the tribunal” and that any such request “specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require [the] measures.”

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<sup>9</sup> *LaGrand Case (Federal Republic of Germany v. United States)*, 2001 I.C.J. Rep. 104 (June 27) at para. 102, as cited in D.F. Donovan, “The Scope And Enforceability Of Provisional Measures In International Commercial Arbitration: A Survey of Jurisdictions, The Work of UNCITRAL And Proposals For Moving Forward” in A.J. van den Berg, ed., *International Commercial Arbitration: Important Contemporary Questions* (London: ICCA Congress Series, 2002) at p. 119.



By contrast, Rule 26 of the UNCITRAL Arbitration Rules provides with greater particularity that the tribunal may order any interim measures “it deems necessary in respect of the subject-matter of the dispute, including for the conservation of goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.” Similarly, NAFTA Article 1134 provides that a tribunal constituted to hear an investment dispute under Chapter 11 of the NAFTA may order interim measures to preserve the rights of a disputing party, “including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction.”<sup>10</sup>

Several concepts emerge from a review of these rules. First, an unspoken requirement of a request for interim measures is that the tribunal seized of the request have *prima facie* jurisdiction over the dispute. This principle is now well-established on the basis of ICJ, Iran-U.S. Claims Tribunal, ICSID decisions and awards. Although the necessity of demonstrating *prima facie* jurisdiction continues to be challenged in *ad hoc* arbitrations, there is, in my view, no principled basis upon which to distinguish between *ad hoc* and institutional arbitrations in regard to this threshold requirement. The threshold is a relatively low one and an application for interim measures will not be denied simply because a jurisdictional challenge has been raised.

As explained by the ICJ in the *Fisheries Jurisdiction* case (1972), a tribunal will have *prima facie* jurisdiction when “the provision in an instrument emanating from both parties to the dispute appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court

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<sup>10</sup> Article 1134 also contains an important exclusion precluding a tribunal from ordering attachment or enjoining the application of the measure alleged to constitute a breach of the NAFTA.

might be founded.”<sup>11</sup> Judge Schwebel has pointed out that the precise meaning of “might” in this context, *i.e.* whether “might” means “possibly might” or “might well” or “might probably”, is subject to controversy.<sup>12</sup> Nevertheless, whatever “might” might mean, this threshold falls far short of requiring a party to demonstrate a likelihood of success on the merits.

The second concept apparent from this review is the class or category of interim relief available from arbitral tribunals. Interim measures are generally designed to fulfill one of three purposes: (1) to facilitate the conduct of arbitral proceedings; (2) to facilitate the enforcement of a future award; or (3) to preserve the *status quo*.<sup>13</sup> In certain civilian jurisdictions, the *référé* procedure may also be available to assist creditors in rapidly securing enforcement of their rights, either fully or in part, where those rights are not seriously in dispute.<sup>14</sup> The first two classes of relief are intended to ensure the efficiency and efficacy of the arbitral procedure, and may comprise measures related to the preservation of evidence, the attendance of witnesses, or security for costs, among others. These kinds of measures are critical to a party’s ability to secure meaningful relief, consistent with the parties’ original arbitration agreement. The more controversial measures are often those with a protective or conservatory purpose, where a party seeks to preserve the *status quo ante*.

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<sup>11</sup> See also *Armed Activities on the territory of the Condo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 241, para. 58; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006 at para. 57.

<sup>12</sup> Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994), at p. 175, citing Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua case*, I.C.J. Reports 1984 169, at p. 207.

<sup>13</sup> See Meg Kinnear *et al.*, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) at pp. 1134-2 – 1134-3.

<sup>14</sup> E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at paras. 1339-40.

As mentioned earlier, Rule 39(1) of the ICSID Arbitration Rules specifies that a party may request “provisional measures for the preservation of its rights” [emphasis added]. This language has been interpreted by arbitral tribunals as requiring that the rights in issue exist at the time the application is made. The tribunal in *Maffezini and Spain* stated concisely that “[t]he use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created (sic) in the future.”<sup>15</sup> In that case, the applicant Respondent was seeking an interim measure requiring the Claimant to post a guaranty or bond in the amount of the costs that the Respondent expected to incur in defending the case. The tribunal rejected the application on the ground the alleged rights were based on “hypothetical situations”, namely whether the Respondent would win the case and whether the tribunal would deem the Claimant’s case to be of such a nature as to require the Claimant to pay the Respondent’s costs and expenses.<sup>16</sup> The tribunal concluded that granting the requested relief in those circumstances would have risked pre-judging the Claimant’s case.<sup>17</sup>

Interim measures are intended to guarantee the protection of rights whose existence might be jeopardized in the absence of such measures.<sup>18</sup> This is not to say, however, that the rights for which interim protection is sought need be proven.<sup>19</sup> To be clear, at the interim measures stage

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<sup>15</sup> *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 at para. 13.

<sup>16</sup> *Ibid.* at paras. 15-21.

<sup>17</sup> *Ibid.* at para. 21.

<sup>18</sup> See *Occidental Petroleum Corporation, Occidental Petroleum and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures 17 August 2007 at para. 60. The author of this paper is presently the Chairman of the tribunal in this case. The rights in issue concern the Claimants’ alleged right to specific performance of their oil and gas concession. The Claimants sought interim measure of protection in connection with this alleged right. The request for interim measures was denied.

<sup>19</sup> See *LaGrand Case (Federal Republic of Germany v. United States)*, 2001 I.C.J. Rep. 104 (June 27) at para. 102 (“It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as

of a dispute the tribunal need only deal with the nature of the rights claimed, not with their actual existence or the merits of the allegations of their violation. This was the approach adopted by the tribunal in *Victor Pey Casado and Chile*, where the tribunal stated:

“For its part, the Tribunal can neither prejudge nor even, to put it correctly, ‘assume in an anticipatory fashion’. [...] It must therefore reason, at this preliminary stage of the arbitration process, on the basis not of ‘assumptions’ but of *hypotheses*, in particular that by which it may come to recognise its own jurisdiction on the substance of the case, and in such a case, the hypothesis whereby the rights that the decision may recognise for one or the other of the parties in question could be placed in danger or compromised by the *absence* of provisional measures.”<sup>20</sup>

The rights for which interim protection is sought must also reasonably relate to the “rights in dispute”.<sup>21</sup> In this regard the tribunal in *Plama Consortium Limited and the Republic of Bulgaria* stated that:

“[t]he 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.”<sup>22</sup>

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the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.”) See also *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Decision, 25 September 2001 at para. 49. The tribunal in *Pey Casado* observed on the basis of the *LaGrand* reasoning that prior to rendering final judgment, the alleged rights for which protection is provisionally sought may not be considered proven, real or actual. The English translation of the original French and Spanish language versions of this decision is available in 6 ICSID Reports 375 (2004).

<sup>20</sup> *Victor Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Decision, 25 September 2001 at para. 46. The English translation of the original French and Spanish language versions of this decision is available in 6 ICSID Reports 375 (2004).

<sup>21</sup> See *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005 at para. 40. See also *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 at paras. 123-25.

<sup>22</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005 at para. 40.

In *Plama*, the Claimant had applied for an interim relief order recommending, among other relief, that the Respondent immediately discontinue and/or cause to be discontinued all pending proceedings relating to the arbitration, and refrain from bringing or participating in any future proceedings before the Bulgarian Courts relating in any way to the arbitration.<sup>23</sup> The tribunal determined that because the claims and relief sought by the Claimant in the dispute were limited to damages, the scope of the rights relating to the dispute which deserved protection by way of provisional measures was necessarily also limited to the damage claims.<sup>24</sup> The Tribunal summarized its conclusions in regard to the Claimant's request for an order recommending that the Respondent discontinue all pending proceedings as follows:

“The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and is not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary. While under general principles of public international law, a state is responsible for actions of its courts, Claimant's Request for Urgent Provisional Measures is not based on a claim of denial of justice by those courts for which relief is sought.”<sup>25</sup>

These cases clearly show that the circumstances in which provisional relief will be ordered to preserve the *status quo* pending resolution of the outcome of the dispute are quite narrowly circumscribed.

This brings me to the third and last concept emerging from my review of the rules: that is, interim measures are only to be granted where they are necessary to preserve a party's rights; or

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<sup>23</sup> *Ibid.* at para. 2.

<sup>24</sup> *Ibid.* at para. 41.

<sup>25</sup> *Ibid.* at para. 43.

where there is an urgent need for interim relief in order to avoid irreparable harm from befalling the requesting party. In the words of a former President of the ICJ, Jumeney de Aréchaga, interim measures are necessary where the actions of a party “are capable of causing or threatening irreparable prejudice to the rights invoked”<sup>26</sup> and will be deemed urgent where “action prejudicial to the rights of either party is likely to be taken before such final decision is given.”<sup>27</sup>

In order to prove irreparable harm, a party must show that the harm threatened cannot be compensated by an order for damages. However, in the course of making this determination, the tribunal must be careful to avoid pre-judging the merits of the dispute.<sup>28</sup> As Professor Lew has cautioned:

“[I]n dealing with a request for an interim measure, an arbitral tribunal must refrain from prejudging the merits of the case. By way of illustration, an arbitral tribunal will generally refuse to grant such a measure, where the request essentially covers what is asked to be resolved in the substantial arbitration.”<sup>29</sup>

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<sup>26</sup> *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Interim Measures of Protection, Order of 11 September 1976, Separate Opinion of President Jimenez de Aréchaga, 1976 I.C.J. Rep. 3 at p. 11 (The Court denied an indication of interim measures sought by Greece prohibiting either Greece and Turkey, absent mutual consent and pending final judgment of the Court, from all exploration activity or scientific research with respect to the continental shelf areas in dispute).

<sup>27</sup> *Case Concerning Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 2001, 1991 I.C.J. Rep. 12 at p. 17 (The Court denied an indication of interim measures sought by Finland requiring Denmark to refrain from continuing or otherwise proceeding with construction works on a bridge spanning the strait of Great Belt which would otherwise impede the passage of ships to and from Finnish ports and shipyards). See also *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 at para. 8 where the tribunal held that there must be a “threat of irreparable harm” before provisional measures can be ordered. This ruling was severely criticized by another ICSID Tribunal in *City Oriente v. Ecuador*.

<sup>28</sup> See *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999 at para. 21.

<sup>29</sup> Julian D.M. Lew, “Commentary on Interim and Conservatory Measures in ICC Arbitration Cases” (2000) ICC Bulletin 11, 23, cited by Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 2004) at paras. 7-30.

In many cases there is a very fine line between granting relief to ensure that a party is not irreparably prejudiced by events during the course of an arbitral proceeding, and pre-judging the outcome of the dispute. This element of the provisional measures test is accordingly the most delicate and challenging for an arbitrator to consider when faced with an interim measures application, regardless of whether the party likely to be affected is a state or a private actor.

***Concluding Remarks:***

***A Distinction Without A Difference?***

The last issue I will to address concerns the differences, if any, of ordering provisional measures against a State entity as opposed to a private entity. The commonly-held view is that there is no justification for tailoring the arbitration process, including matters of provisional relief, on the basis of a State's particular status:

“[I]n the field of arbitration of state contracts, the trend has increasingly been for the state-party to be treated no differently than its private co-contractor. Indeed, as states become more frequently involved in commercial activities, special regimes for states and state-owned parties often appear incompatible with the requirements of international trade, such as the need to ensure the respect of agreements freely entered into by the parties.”<sup>30</sup>

This, of course, is a natural consequence of the principle of party equality, a fundamental condition of due process. The only difference lies with a State's expectations regarding the arbitral process:

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<sup>30</sup> E. Gaillard and J. Edelstein, “Recent Developments In State Immunity From Execution In France: Creighton v. Qatar”, 15 Mealy's Int'l Arb. Rep. 49 (2000).

“The expectations of States differ very considerably from those of private parties who resort to commercial arbitration. Here it may be as well to remember that, unlike the situation of the private party who chooses flexibility of the arbitral process as an escape from the strict requirements of litigation, arbitration in any form is for a State a loss of liberty, an acceptance of constraints from which it is otherwise free.”<sup>31</sup>

Nevertheless, as Oscar Schachter has observed, where the request for interim measures involves the operation of a natural resources concession, “there may be reasons of a material and social character that make it ‘impossible’ or ‘impracticable’ for the offending State to restore the situation to its prior state.”<sup>32</sup> This was essentially the concern underpinning negotiation of Article 47 of the ICSID Convention. According to Christoph Schreuer, China in particular expressed concern over the ability of a State to comply with a provisional measure for reasons of national policy.<sup>33</sup> Additionally, the ability of a state party to “impose its will” on an independent branch of government, regardless of public international law principles of state responsibility, is, as the tribunal in *Plama* intimated, in certain circumstances questionable.<sup>34</sup>

It may therefore be that although the binding nature of an interim measure recommended by an ICSID tribunal is no longer seriously in question, the sovereign character of a State party to an arbitration may, in practical terms, influence the manner in which a tribunal disposes of an application for interim measures. I end with this provisional view.

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<sup>31</sup> H. Fox, “States And The Undertaking To Arbitrate”, 37 I.C.Q.L. 1 at p. 4 (1988).

<sup>32</sup> Oscar Schachter, *International law in Theory and in Practice*, 178 Collected Courses (Academy of International Law) 188 (1982) at p. 190.

<sup>33</sup> Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge, U.K.: Cambridge University Press, 2001) at p. 758.

<sup>34</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005 at para. 40.