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# NOTE

# *Provisional Measures During Suspension of ICSID Proceedings*

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**Abstract**—The purpose of provisional measures in the context of arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) is to preserve the theoretically existing rights of the requesting party in circumstances of urgency and necessity pending the final determination of the dispute. Under the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), proceedings are 'suspended' when a vacancy arises on an ICSID tribunal (ie when the tribunal is truncated), and also when a proposal to disqualify an arbitrator is made. A question arises as to whether an ICSID tribunal is empowered to order provisional measures during the period when proceedings are suspended in these circumstances. The authors conclude that it is evident from the object and purpose of Article 47 of the ICSID Convention, as supplemented by ICSID Arbitration Rule 39, and the relevant interpretative context, that a suspension of proceedings does not extend to the consideration of a request for provisional measures. This conclusion is reinforced by the fact that under ICSID Arbitration Rule 39(2) tribunals are required to accord priority to requests for provisional measures. Nevertheless, the most appropriate course of action will often be for the tribunal to issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request for provisional measures after the suspension has ended.

## I. INTRODUCTION

The purpose of provisional measures in the context of arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) is to preserve the theoretically existing rights of the requesting party in circumstances of urgency and necessity pending the final determination of the dispute. Consequently, the power to issue such measures is of fundamental importance to the arbitral process. Under the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules),

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proceedings are 'suspended' when a vacancy arises on an ICSID tribunal (ie when the tribunal is truncated), and also when a proposal to disqualify an arbitrator is made. A question arises as to whether an ICSID tribunal is empowered to issue provisional measures during the period when proceedings are suspended. Suspension of proceedings is increasingly common, especially in light of the increasing frequency of parties proposing the disqualification of an arbitrator. As such, it would seem that the question posed will inevitably fall to be decided in the near future.

This note considers whether a tribunal is capable of issuing provisional measures during a period of suspension. It focuses primarily on suspensions following a vacancy arising on a tribunal.

In reviewing these matters, we begin by setting out the legal framework in relation to the suspension of ICSID proceedings and requests for provisional measures (see Section II). Thereafter, in Section III, we consider the status of an ICSID tribunal during a period of suspension. It will be shown that ICSID tribunals continue to exist (ie are not deconstituted) during such a period, and are expressly required by the applicable procedural regime to discharge certain functions. The question is whether determining provisional measures requests is such a function. This is addressed in Section IV where we argue that it is evident from the object and purpose of the provisional measures facility in Article 47 of the ICSID Convention, as supplemented by ICSID Arbitration Rule 39, and the relevant interpretative context, that a suspension of proceedings does not extend to the consideration of a request for provisional measures. This conclusion is reinforced by the fact that under ICSID Arbitration Rule 39(2) tribunals are required to accord priority to requests for provisional measures. Nevertheless, in Section V, we argue that the most appropriate course of action will often be for the tribunal to issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request for provisional measures following the filling of the vacancy.

The power to issue provisional measures during a period of suspension following a proposal to disqualify an arbitrator is briefly considered in Section VI. Finally, in Section VII we propose an amendment to ICSID Arbitration Rule 39 to reflect our thesis, so as to ensure clarity in relation to these matters.

## II. THE LEGAL FRAMEWORK

### A. *Suspension of Proceedings*

The ICSID Convention itself does not provide for the suspension of proceedings. However, the ICSID Arbitration Rules provide two instances where the 'proceeding' is 'suspended'. First, proceedings are suspended pursuant to ICSID Arbitration Rule 10(2) when a vacancy arises on a tribunal following the disqualification, death, incapacity or resignation of an arbitrator, and remain suspended until that vacancy is filled.[3]

[3] See also Convention on the Settlement of Investment Disputes between States and National of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) art 56.

Second, when a proposal to disqualify an arbitrator is made under Article 57 of the ICSID Convention,[4] proceedings are suspended pending the decision on that challenge pursuant to ICSID Arbitration Rule 9(6). In cases where the tribunal is composed of more than one arbitrator and a minority of its members' appointments have been challenged by a party, the other members are empowered to decide on the disqualification request.[5] If the other members are equally divided as to their decision (and in cases where the proposal is to disqualify a sole arbitrator or a majority of the tribunal's members), the Chairman of ICSID's Administrative Council is empowered to decide on the proposal.[6]

### B. *Provisional Measures*

An ICSID tribunal's power to issue provisional measures is pursuant to Article 47 of the ICSID Convention. Article 47 provides: '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.' Article 47 is supplemented by ICSID Arbitration Rule 39, which *inter alia* requires that the tribunal accords priority to the consideration of such a request.[7] The scope of the power to issue provisional measures has been considered extensively elsewhere[8] and need not be repeated for the purposes of this note.

Further, ICSID Arbitration Rule 39(1) provides that a request for provisional measures may be 'request[ed]' '[a]t any time after the institution of the proceeding'. Nevertheless, the issue is whether any such request can be *decided upon* at any time after the institution of the proceeding, and particularly during a period of suspension. Neither the ICSID Convention nor the ICSID Arbitration Rules expressly address this question. However, for the reasons set out below, we consider that ICSID tribunals are empowered to issue provisional measures during a period of suspension.

## III. THE TRIBUNAL'S STATUS DURING A PERIOD OF SUSPENSION ARISING FROM A VACANCY

As noted above, Article 47 of the ICSID Convention provides that any provisional measures can only be issued by the tribunal.[9] Consequently, in analysing whether provisional measures can be ordered during a period of suspension arising from a

[4] ibid art 57 provides that a party to an ICSID arbitration may propose the disqualification of any of the tribunal's members on the basis of facts indicating a manifest lack of the qualities required by art 14(1) of the Convention (ie high moral character, recognized competence in the fields of law, commerce, industry or finance, capable of being relied upon to exercise independent judgment) or owing to ineligibility in terms of arts 37–40 of the Convention. As regards the latter, in practice the most likely characteristic to be challenged relates to the shared nationality of the challenged arbitrator with a party to the dispute.

[5] See ibid art 58 and ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) r 9(4).

[6] See ICSID Convention (n 3) art 58 and ibid ICSID Arbitration Rules.

[7] ICSID Arbitration Rules (n 5) r 39(2).

[8] See eg Dan Sarooshi, 'Provisional Measures and Investment Treaty Arbitration' (2013) 29(3) Arb Intl 361 and Caline Mouawad and Elizabeth Silbert, 'A Guide to Interim Measures in Investor-State Arbitration' (2013) 29(3) Arb Intl 381.

[9] See also ICSID, 'Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 1968' (1993) 1 ICSID Rep 63, 99 Note A (ICSID Arbitration Rules 1968) ['it is the Tribunal that must make the recommendation (for provisional measures)'].

vacancy on the tribunal, it is important to first consider whether the tribunal continues to exist during that period. In considering this, two arguments can be made:

- Under the first, the proceedings are suspended but the tribunal remains in existence during the suspension.
- Under the second, the proceedings are suspended *and* the tribunal itself is deconstituted and then reconstituted at the beginning and end of the period of suspension respectively. Under this argument, since there is no tribunal during the suspension, there is no body capable of ordering provisional measures during that period.

For the reasons set out below, our view is that the first argument is correct. As such, the question is: what parts of the proceedings are suspended? In particular, is the tribunal's power to order provisional measures caught by the suspension? Those questions are considered in Section IV below.

### A. *Deconstitution and Reconstitution of the Tribunal*

There is no reference to deconstitution or reconstitution of tribunals in the context of suspensions in the ICSID Convention or the ICSID Arbitration Rules. In fact, there is no express reference to deconstitution whatsoever in the Convention or the Rules.

As regards the notion of reconstitution, the only express reference is in an entirely separate context: namely, in the procedures relating to the interpretation or revision of rendered awards. In such situations, the tribunal has already issued its final award in the case and consequently its mandate had been brought to an end; the tribunal must therefore implicitly have been deconstituted (ie ceases to exist as an entity) 45 days after the date on which the award was rendered.[10] Thus, ICSID Arbitration Rule 51(2) provides a means for the original arbitral tribunal to be 'reconstituted' to address a party's request for interpretation or revision of the award.[11] This language is, of course, entirely appropriate in that context because the arbitration must have come to an end 45 days after the issuance of the final award.

However, the arbitration has not come to an end when proceedings are suspended pending the filling of a vacancy on a tribunal. In such circumstances,

[10] It appears from the ICSID Arbitration Rules that the tribunal ceases to exist 45 days after the rendering of the award as opposed to the date of rendering the award itself. This is because under r 49, any request for a supplementary decision on, or the rectification of, the award made in that period is to be determined by the original tribunal itself. Unlike with r 51(2), there is no reference to the tribunal being 'reconstituted' for this process so it must remain in existence until the expiry of the 45-day period.

[11] Of course, it is possible that an application for interpretation or revision of an award be made within 45 days after the date on which the award was rendered and also that within those 45 days the Secretary-General transmits the notification to the tribunal and the parties that the members of the tribunal are willing to consider the application. In those circumstances, ICSID Arbitration Rule 51(2) would be engaged and the tribunal would be 'deemed to be reconstituted'. However, this reconstitution would not be strictly necessary because the tribunal would not have been deconstituted by that point. As such, in those circumstances, the reference in ICSID Arbitration Rule 51(2) to the tribunal being 'reconstituted' should rather be understood as an extension of the still-existing tribunal's mandate to cover the interpretation or revision proceedings. Although this double-usage of the term 'reconstituted' is not ideal, it is justifiable on the basis that it avoids the need to express the same rule for applications for interpretation or revision filed (and where agreement is notified) both within and after the 45-day period. In any event, it does not detract from our thesis because the notion of reconstitution in the circumstances described in no way implies that the tribunal has ceased to exist prior to the reconstitution.

the proceedings are simply halted temporarily. Support for this position can be found in the fact that the term 'suspended' is adopted in ICSID Arbitration Rules 9(6) and 10(2), while the term 'discontinuance' is used elsewhere in ICSID's rules.[12] Whereas 'discontinuance' carries a sense of finality (which is effected in ICSID procedure),[13] 'suspended' suggests a mere temporary delay in the proceedings. Indeed, as will be seen below, in the context of ICSID arbitration a suspension does not even apply to all matters before the tribunal: it is expressly required to continue to deliberate on certain issues.

### B. *The Continued Operation of the Tribunal During Suspension Following a Resignation of a Tribunal's Member*

Under Rule 10, the ICSID Secretary-General is required to notify the parties of a resignation[14] and the proceedings are deemed to be suspended upon the issuance of this notification.[15] Thereafter, in the event that the resigning arbitrator was appointed by one of the parties, ICSID Arbitration Rule 8(2) requires that '*the Tribunal* shall promptly consider the reasons for his resignation and decide whether it consents thereto'.[16] Thus, the scheme of the ICSID Arbitration Rules is such that the tribunal remains in existence during the period of suspension, and is required to make a determination during that period as to whether or not it consents to the resignation. Professor Schreuer appears to acknowledge this when he writes, '[s]ince the resigning member ceases to be a member upon submitting the resignation, the . . . Tribunal will consist only of the remaining members'.[17]

Similarly, where proceedings are suspended pursuant to ICSID Arbitration Rule 9(6) following a proposal to disqualify an arbitrator, the remaining members of the tribunal will often be required to decide on the disqualification request,[18] thereby confirming that the tribunal must remain in existence when the proceedings are suspended in such circumstances.

Consequently, the ICSID Arbitration Rules specifically *require* tribunals to undertake various tasks while proceedings are suspended. For such tasks to be performed, the tribunal must remain in existence when proceedings are suspended. In addition, it is possible to observe that several ICSID tribunals have permitted various other aspects of the arbitration to continue during periods of suspension (although that has not included determining requests for provisional measures).[19]

[12] Specifically, see ICSID Arbitration Rules (n 5) rr 43–45 and ICSID Administrative and Financial Regulation (2006) art 14(3)(d). We note that the distinction between suspension and discontinuance can also be found in the International Court of Justice's Rules of Court: see arts 79 and 88–89, respectively. For further discussion on this matter, see s IV.D below.

[13] ibid.

[14] See ICSID Arbitration Rules (n 5) r 10(1).

[15] See ibid r 10(2).

[16] (emphasis added). Such determination being relevant to the procedure for filling the vacancy left by the resigning arbitrator: see ICSID Convention (n 3) art 56(3).

[17] Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 1195 para 39 of the commentary to art 56.

[18] See Section II.A above.

[19] See Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer 2012) para 2-093. Based on a review of this practice, Daele concludes that a suspension [under ICSID Arbitration Rules (n 5) r 9(6)] is 'not absolute'.

### C. *Conclusion Regarding the Existence of the Tribunal*

Therefore, there is nothing in the ICSID Convention or ICSID Arbitration Rules to suggest that a tribunal ceases to exist during a period of suspension. In fact, tribunals are required to continue to perform certain functions during a period of suspension, which demonstrates that they must continue to exist (otherwise they would not be able to carry out those functions). Thus, in light of the foregoing analysis, our conclusion is that the tribunal itself remains in existence during a period of suspension following a vacancy. It is only the 'proceeding' that is suspended. The scope of proceedings that are suspended is considered in the following section.

Our conclusion can be compared with the approach taken by the ICSID Secretary-General. In our experience, the wording adopted by the ICSID Secretary-General following the filling of a vacancy on a tribunal is that: 'the tribunal is deemed to have been reconstituted as of today in accordance with ICSID Arbitration Rule 12' (the authors' paraphrasing).[20] However, as discussed above, the term 'reconstituted' is not used in the ICSID Convention or the ICSID Arbitration Rules in the context of suspensions. A difficulty with this term is that it can be used in two senses: to reconstruct (which is consistent with the second of the arguments posited at the beginning of this section), or to change the form and organization of an institution (which is consistent with the first of the arguments posited at the beginning of this section).[21] Although it is unclear as to which sense is intended by the ICSID Secretary-General when the term 'reconstituted' is used in this context, given that the ICSID Convention and ICSID Arbitration Rules clearly do not provide that the tribunal ceases to exist, it may be presumed that the ICSID Secretary-General's use of this term is merely intended in the sense that the tribunal has undergone a change in its composition.

## IV. THE SCOPE OF PROCEEDINGS COVERED BY A SUSPENSION ARISING FROM A VACANCY

If the tribunal remains in existence during a period of suspension of the proceedings, it is necessary to determine the scope of proceedings covered by the suspension. The very nature of a suspension of proceedings implies that the tribunal must be precluded from undertaking certain activities. The obvious contenders for what activities are suspended include the proceedings in relation to the tribunal's jurisdiction or competency, the merits of the dispute, and issues of quantum; it is highly likely that these proceedings would be caught by the suspension. However, it is submitted that a suspension of proceedings does not preclude the tribunal from deciding on provisional measures requests brought before or during the suspension period, which are inherently urgent in nature.

This submission is based on: the object and purpose of the provisional measures mechanism (Section IV.A); the presumption of exclusivity of proceedings during an ICSID arbitration (Section IV.B); the procedures governing provisional measures requests made prior to the constitution of a tribunal (Section IV.C);

[20] On this point, see also *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Claimant's Request for Provisional Measures (13 December 2012) para 17.

[21] See Catherine Soanes and Angus Stevenson, *Oxford Dictionary of English* (2nd edn, OUP 2009).

the contrasting use of the terms 'suspended', 'suspend', 'discontinuance' and 'stays' in ICSID arbitration procedure (Section IV.D); and by existing international practice within and outside of ICSID (Section IV.E). Each will be considered in turn. In addition, Section IV.F will address the most likely argument against our submission, which is based on ICSID Arbitration Rule 12.

## A. *The Object and Purpose of Provisional Measures*

A consideration of the object and purpose of the provisional measures facility in the ICSID Convention is a useful place to begin this analysis. First, it is to be noted that the mandate afforded to tribunals by Article 47 of the ICSID Convention is to 'recommend any provisional measures which should be taken to *preserve the respective rights of either party*' (emphasis added). According to the ICSID Convention's *travaux préparatoires*, the inclusion of what became Article 47 was to grant tribunals 'the power to prescribe provisional measures designed to preserve the *status quo* between the parties pending its final determination on the merits'.[22] They also indicate the intention that '[i]f a dispute was properly before the arbitral tribunal, it would seem reasonable to empower it to order the parties not to take action which would make it impossible to comply with a later award'.[23] This intention was echoed in the notes to the 1968 version of ICSID Arbitration Rule 39, which stated that Article 47 'is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award'.[24] The importance of the object and purpose of the provisional measures mechanism to the present discussion is best assessed in light of Article 26 of the ICSID Convention, which is discussed in the following subsection.

## B. *ICSID Convention Article 26 and Arbitration Rule 39(6)*

Article 26 of the ICSID Convention provides as follows: '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 . . .'. It is said that Article 26 'creates a presumption'[25] that 'once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID'.[26] This presumption will only be rebutted when the parties have agreed to allow concurrent recourse to a separate forum.

Historically, the application of Article 26 to exclude the availability of recourse to domestic courts for provisional measures was a subject of uncertainty and subject to significant debate.[27] Fortunately, this matter was clarified in 1984

[22] ICSID, *History of the ICSID Convention*, vol II (ICSID 1968) 216.
[23] ibid 515.
[24] ICSID Arbitration Rules 1968 (n 9) 99 Note A.
[25] Schreuer and others (n 17) 380 para 110 of the commentary to art 26.
[26] ibid 351 para 1 of the commentary to art 26.
[27] See ibid 394–400 paras 162–78 of the commentary to art 26. See also Gabrielle Kaufmann-Kohler and Aurélia Antonietti, 'Interim relief in International Investment Agreements' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: An analysis of the Key Procedural, Jurisdictional and Substantive Issues* (OUP 2010) 507, 549.

by the adoption of what is now ICSID Arbitration Rule 39(6), which provides 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.

Thus, a party to ICSID arbitration is only permitted to seek provisional measures from a domestic court if the parties have expressly agreed to permit such an action.

Consequently, it is to be presumed that in the majority of ICSID arbitrations, a party's only option to obtain provisional measures is to make a request to the tribunal under Article 47 of the ICSID Convention. Given this exclusivity in the majority of ICSID arbitrations, and the intention to empower tribunals to prevent parties from taking actions which would make it impossible to give effect to a later award, it would be contrary to all reason to bar consideration of a provisional measures request during a period of suspension. Therefore, any interpretation of Article 47 of the ICSID Convention and ICSID Arbitration Rules 9(6), 10(2) and 39 that prohibits an ICSID tribunal from hearing a request for provisional measures during a suspension would be entirely contrary to the object and purpose of the provisional measures mechanism provided by the Convention.

### C. *ICSID Arbitration Rule 39(5)*

The structure of ICSID Arbitration Rule 39 further supports our thesis that a suspension of proceedings does not preclude the tribunal from deciding on a request for provisional measures. Specifically, it should be noted that Rule 39(5) addresses situations where provisional measures are requested prior to the constitution of the tribunal at the outset of proceedings. It provides that in such circumstances, the ICSID Secretary-General may fix the time limits for the parties to present their observations on the request. The intention behind this is to allow the tribunal to consider the request as soon as it is constituted. In essence, it streamlines the procedure in the absence of the tribunal. However, no equivalent mechanism is included to allow the Secretary-General to fix time limits when the proceedings are suspended. In our view, the reason for this is that no special mechanism is required in such circumstances: the remaining members of the tribunal are able to decide on the request immediately.

### D. *'Suspended', 'Suspend', 'Discontinuance' and 'Stays' in ICSID Arbitration*

The use of the term 'suspended', when contrasted with other terms used in ICSID's rules and procedures, is also an important indication as to its scope. We have already contrasted the term 'suspended' with the term 'discontinuance' as evidence that the tribunal continues to exist and act during a period of suspension.[28] In addition, the term 'suspended' as used in the context of ICSID Arbitration Rules 9(6) and 10(2) can further be contrasted with the term 'stay the

[28] See s III.A above.

proceeding' in ICSID Administrative and Financial Regulation 14 and also with the use of the term 'suspend' in Rule 41(3), each of which are considered below.

(i) *'Stay the proceeding'*

ICSID Administrative and Financial Regulation 14 addresses the requirement incumbent on the parties to an ICSID arbitration to make advanced payments to cover the fees and expenses of the tribunal's members and affiliated costs. The Regulation provides that if a party fails to make a payment required of it within 30 days, ICSID's Secretary-General 'shall inform both parties of the default and give an opportunity to either of them to make the required payment'. [29] If the payment is still not made within 15 days, Regulation 14(3)(d) provides that the Secretary-General 'may move that the . . . Tribunal stay the proceeding'.[30] Further, should the proceeding remain stayed for non-payment for more than six months consecutively, the Secretary-General may move that the tribunal discontinue it.[31]

The decision to use the words 'stay the proceeding' in this context suggests the existence of a meaningful distinction between it and the term 'suspended' used in ICSID Arbitration Rules 9(6) and 10(2). In this regard, it should be noted that a stay of the proceeding pursuant to Regulation 14(3)(d) is a necessary precursor to a discontinuance, and arguably results in an outright cessation of all the tribunal's activities. In contrast, a suspension pursuant to ICSID Arbitration Rules 9(6) or 10(2) is only ever intended to be a mere temporary delay to the proceedings because once the vacancy is filled or the disqualification proposal is rejected, the proceedings will continue. Further, as was explained above, such suspension does not prevent the tribunal from taking a number of actions, including (in our view) decisions on provisional measures requests.

(ii) *Suspension on bifurcation*

It is also helpful to compare the use of the term 'suspended' in ICSID Arbitration Rules 9(6) and 10(2) with the term 'suspend' in Rule 41(3). The latter applies where a party to the arbitration has raised an objection to the jurisdiction or competence of the tribunal to hear the dispute. In such circumstances, the tribunal can either elect to consider those objections alongside the merits, or it can decide to bifurcate proceedings and consider the objection as a preliminary matter.[32] Pursuant to ICSID Arbitration Rule 41(3), where the tribunal elects to bifurcate proceedings, it is the proceedings on the merits which are suspended pending the decision on the preliminary objection. However, there is no indication in ICSID Arbitration Rule 41(3), express or otherwise, that other parts of the proceedings come to an end upon such a suspension. Therefore, this use of the term 'suspend' is further evidence that a suspension does not cover all aspects of the proceedings.

[29] See ICSID Administrative and Financial Regulation (n 12) art 14(3)(d).

[30] It should be noted that the provisions regarding the stay of enforcement of an ICSID award during interpretation, revision or annulment proceedings [see ICSID Convention (n 3) arts 50(2), 51(4) and 52(5) and ICSID Arbitration Rules (n 5) r 54] are not relevant to this discussion.

[31] See ICSID Administrative and Financial Regulation (n 12) art 14(3)(d). The Regulation requires that the Secretary-General provides notice to the parties before doing so and requires, so far as possible, that there be consultation with the parties.

[32] See ICSID Convention (n 3) art 41(2) and ICSID Arbitration Rules (n 5) r 41(3).

## E. *Existing International Practice*

### (i) *ICSID*

Although we consider that ICSID tribunals are empowered to issue provisional measures during a period of suspension, the reported practice of the ICSID Secretariat suggests that it may not share this view. An example of the Secretariat's approach to this issue can be found in the Decision on Claimant's Request for Provisional Measures of 13 December 2012 issued in *Tethyan Copper Company Pty Limited v Pakistan.*[33]

In those proceedings, Pakistan first applied under Article 57 of the ICSID Convention to disqualify the Claimant's arbitrator, which resulted in the suspension of proceedings pursuant to ICSID Arbitration Rule 9(6). On the same day, but after Pakistan's submission was filed, the Claimant filed a request for provisional measures. As is recorded in the eventual decision on the request for provisional measures, '[t]he Secretariat informed the Parties that, in light of the suspension of the proceedings, Claimant's submission would be sent to the Tribunal once the proceedings resumed'.[34] This approach is inconsistent with our thesis and those parts of the ICSID Convention and ICSID Arbitration Rules on which it is based.

### (ii) *Other international tribunals*

The ICSID Secretariat's apparent approach is also inconsistent with the prior practice of the Tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS) in the *Mox Plant Case (Ireland v UK)*.[35] In that case, there was a question as to the division of competence in respect of the Convention as between the European Community and its Member States. Further, there was a real possibility that the European Court of Justice would be called on to determine that issue. In light of this, the Tribunal decided that 'further proceedings on jurisdiction and the merits in this arbitration will be suspended' until the European situation had been resolved.[36]

The power to issue provisional measures in disputes under the UNCLOS is contained in Article 290 of that Convention. Neither the UNCLOS nor the other procedural rules[37] applicable in the *Mox Plant Case* expressly empowered the Tribunal to issue provisional measures during the period of suspension. (Thus, the express situation was equivalent to that with ICSID arbitrations.) Nevertheless, when announcing its decision to suspend the proceedings, the Tribunal 'stated its willingness, in the circumstances [then] prevailing, to consider the possibility of prescribing provisional measures if either Party considered that such measures are necessary to preserve the respective rights of the Parties or to prevent serious harm to the marine environment'.[38] In Procedural Order No 3, the Tribunal considered

[33] *Tethyan Copper Company Pty Limited v Pakistan* (n 20).
[34] ibid para 10.
[35] See *Mox Plant Case (Ireland v UK)*, Procedural Order No 3 (24 June 2003) para 29.
[36] ibid. See also Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 51.
[37] ie United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) annex VII (Arbitration) and the Rules of Procedure for the Tribunal Constituted under annex VII to the United Nations Convention on the Law of the Sea Pursuant to the Notification of Ireland Dated 25 October 2001 <http://www.pca-cpa.org/showfile.asp?fil_id=90> accessed 15 January 2015.
[38] *Mox Plant* (n 35) para 31.

such a request from Ireland in detail and made its determinations thereon, in spite of the proceedings having been suspended.[39]

It is important to note that (at the relevant time) the Tribunal hearing the case consisted of HE Judge Thomas A Mensah (President), Prof James Crawford SC, Maître L Yves Fortier CC QC, Prof Gerhard Hafner, and the late Sir Arthur Watts KCMG QC. The vast experience of the Tribunal's members undoubtedly adds great weight to the persuasive force of the stance that it took. Arguably, it took that stance on the basis that it is in the interests of justice that provisional measures requests be considered even during periods where the tribunal's consideration of the substantive issues has been suspended.

Accordingly, the *Mox Plant* Tribunal's decision is entirely consistent with and, in our submission, supports the thesis put forward in this note.

### F. *The Counterargument Based on ICSID Arbitration Rule 12*

The best argument against our thesis would appear to be one based on ICSID Arbitration Rule 12. In relevant part, Rule 12 states: 'As soon as a vacancy on the Commission has been filled, *the proceeding* shall continue from the point it had reached at the time the vacancy occurred' (emphasis added). Some authors consider that the consequence of Rule 12 is that the ICSID Convention and ICSID Arbitration Rules do not allow truncated tribunals (ie 'tribunals operating with less than a full complement of members').[40] It is most likely true that an ICSID tribunal cannot *render an award* if truncated (in the sense that there is a vacancy).[41]

However, in our opinion, it is wrong to say that the ICSID Convention and ICSID Arbitration Rules do not allow truncated tribunals *whatsoever*: it has already been shown that truncated ICSID tribunals are expressly empowered to act in certain situations. The question is whether truncated ICSID tribunals can exercise other powers of general application that are conferred on tribunals by the ICSID Convention or ICSID Arbitration Rules but that have not been expressly extended to truncated tribunals.

One view is that a truncated ICSID tribunal can only do that which truncated tribunals have been expressly granted power to do. However, that view is not consistent with the approach taken by the ICSID Convention and ICSID Arbitration Rules. That approach can be summarized as follows: in regard to non-truncated ICSID tribunals, the rule is that they can act where the ICSID Convention or ICSID Arbitration Rules provide the power to act, or they can act pursuant to the residual discretion provided by Article 44 of the ICSID Convention.[42] In the absence of any indication to the contrary, the same approach must also be true for truncated ICSID tribunals: they can exercise any power expressly conferred on ICSID tribunals or pursuant to their residual discretion

[39] While it is true that the *Mox Plant* was not truncated at the time it issued Procedural Order No 3, as set out in Section IV.F below, truncation is not the determining factor as to the availability of provisional measures. Rather, the question is whether or not the suspension of proceedings extends to requests for provisional measures. The *Mox Plant* Tribunal's approach to that question is clear.

[40] See eg Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn, Kluwer 2011) 137.

[41] See ICSID Convention (n 3) arts 56–58 and ICSID Arbitration Rules (n 5) rr 10 and 12. This position can be contrasted with arbitration in other forums: see MA Solchi, 'The Validity of Truncated Tribunal Proceedings and Awards' (1993) 9 Arb Intl 303 and Gary Born, *International Commercial Arbitration* (Kluwer 2009) 1586–92.

[42] For the text of ICSID Convention (n 3) art 44, see n 44 below.

except insofar as the suspension of proceedings restrains them from doing so. This leads us back to the main questions considered in this section: what is the scope of a suspension of proceedings? In particular, does such a suspension prohibit a truncated tribunal from determining a request for provisional measures? For the reasons set out above, the answer is no: a truncated ICSID tribunal is able to exercise the power to issue provisional measures conferred by Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 because that power is not caught by the suspension of proceedings.

As regards ICSID Arbitration Rule 12, the authors' view is that this rule must be understood to only require that those aspects of the proceedings that were *suspended* by ICSID Arbitration Rule 10(2) be continued from the point reached at the time the vacancy arose. It does not in itself prohibit any actions being taken in the arbitration. In particular, Rule 12 does not in itself require that requests for provisional measures cannot be determined during a period of suspension. So long as such proceedings are not caught by the suspension, Rule 12 will not apply to them.

### G. *Conclusion Regarding Scope of Suspensions*

In light of the foregoing, it is submitted that the language adopted in the ICSID Arbitration Rules and the ICSID Administrative and Financial Regulations demonstrates that the scope of a suspension pursuant to ICSID Arbitration Rules 9(6) or 10(2) does not cover all aspects of the proceedings. In particular, it does not cover those procedural matters which the ICSID Arbitration Rules expressly direct the remaining members of the tribunal to undertake during the period of suspension. Nor does it cover the consideration and determination of requests for provisional measures. This is confirmed by the lack of a special mechanism for addressing provisional measures during suspension (which is to be contrasted with the existence of such a mechanism for requests made prior to the constitution of the tribunal) and the interpretative consequence of using the term 'suspended' in this context (as opposed to 'discontinuance' or 'stay'). In fact, permitting tribunals to decide on provisional measures requests is required by the ICSID Convention, since not to do so would be contrary to the object and purpose of Article 47 (especially given the presumption of exclusivity of proceedings during ICSID arbitration) and would have the potential to allow a party to fundamentally compromise proceedings. Such a lacuna could not be intended, especially given that the remaining members of a suspended tribunal are tasked with exercising other powers [for example, those under ICSID Arbitration Rule 8(2)]. The remaining members must also be responsible in such circumstances for protecting the theoretically existing rights of the parties in situations of urgency and necessity.

## V. SHOULD A TRIBUNAL DEFER A DECISION ON A PROVISIONAL MEASURES REQUEST DURING A PERIOD OF SUSPENSION ARISING FROM A VACANCY?

From a legal perspective, for the reasons given above, ICSID tribunals have the power to order provisional measures during a period of suspension arising from a

vacancy. Nevertheless, it is important to consider whether there are any practical considerations that influence how that power should be exercised.

In this regard, it should first be noted that disputing parties will generally expect that all contentious matters before the tribunal be adjudicated by a tribunal composed of three members (unless a sole arbitrator has been chosen). The exercise of the power to order provisional measures during a period where there is a vacancy on the tribunal is contrary to this expectation, even though such action is legally permissible. Given the importance that should be placed on satisfying the disputing parties' mutual expectations as regards the arbitral process (which is conducive to the effective resolution of the dispute), a tribunal with a vacancy on it should be cautious about how it exercises its power to order provisional measures during a period of suspension. In determining whether to exercise this power in such circumstances, tribunals should first consider the degree of urgency of the request.

### A. *The Degree of Urgency*

Urgency must, of course, be demonstrated in all requests for provisional measures. However, the threshold is low: it is generally accepted that all that must be shown is that the conduct complained of is likely to be taken before the tribunal will issue its final award in the arbitration.[43] Given this low threshold, there is clearly a relatively wide spectrum of urgency which is amenable to provisional measures relief. On the one hand, some requests will be of such an extremely urgent nature that there is a need for resolution of the matter within hours or days. By contrast, many requests can reasonably be disposed of by the tribunal less expeditiously, ie within a matter of weeks or months.

Where a request for provisional measures is made during a period of suspension, but the nature of the underlying conduct is such that the request can be disposed of after the suspension has ended without prejudicing the rights of the requesting party, generally the tribunal should entirely defer consideration of the request until the suspension ends. This course of action would not breach the requirement under ICSID Arbitration Rule 39(2) to accord priority to provisional measures requests. Indeed, this course of action will often be most appropriate so as to ensure that both parties are given ample (as opposed to cursory) opportunity to comment on the matter and to ensure that the tribunal has sufficient time to fully consider the matter. In such circumstances, the tribunal should (during the period of suspension) fix time limits for the parties to file their observations on the matter and address all other procedural matters related to the request so as to promote efficiency.

However, it may occasionally be the case that the nature of the conduct on which the request is based is such that to prevent an immediate prejudice to the theoretically existing rights of the requesting party, the request must be disposed of before the suspension has ended. In such circumstances, and assuming that it is accepted that tribunals may order provisional measures during a period of suspension, the members of the tribunal's duty to protect the theoretically existing rights of the parties in situations of urgency and necessity and to accord priority to

[43] See Sarooshi (n 8) 366–7 and Mouawad and Silbert (n 8) 387–93.

the provisional measures request require that the tribunal takes action prior to the suspension ending.

### B. *Interim Orders*

The question is: what action should be taken in such situations of immediate urgency? The tribunal has to balance on the one hand the parties' mutual expectation that contentious matters before the tribunal be adjudicated by a tribunal composed of three members with on the other hand the requesting party's right to protection of is theoretically existing rights of the parties in situations of urgency and necessity and to accord priority to the provisional measures request. We consider that the appropriate balance is as follows: the tribunal must take action in relation to the request prior to the suspension ending and the most appropriate action will often be to issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request following the filling of the vacancy. Although there is no express[44] power under the ICSID Convention and the ICSID Arbitration Rules to issue such interim orders, the practice of ICSID tribunals indicates that they are nevertheless empowered to make them.[45]

## VI. SUSPENSION OF PROCEEDINGS FOLLOWING A REQUEST FOR DISQUALIFICATION OF ARBITRATORS

It was argued above that the ICSID Convention and ICSID Arbitration Rules empower a tribunal to consider a request for provisional measures during a period of suspension arising from a vacancy on a tribunal, ie pursuant to ICSID Arbitration Rule 10(2). It was also argued that an interim order may often be the most appropriate course of action. These conclusions and the reasons on which they are based are in many respects equally applicable to suspensions pursuant to ICSID Arbitration Rule 9(6) following a challenge to an arbitrator. In fact, it has already been shown that tribunals continue to exist following a proposal to disqualify an arbitrator because the unchallenged members will often be required to decide on the disqualification request.

However, unlike with suspensions arising from a vacancy, here the challenged arbitrator remains a member of the tribunal pending the decision on the

[44] A textual basis for the power can nevertheless be found in the residual discretion provided by art 44 of the ICSID Convention (n 3), which provides (in relevant part) that: 'If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.' For a concurring view on this point, see J Cameron Mowatt and Celeste Mowatt, '*Border Timbers and others v Zimbabwe and von Pezold and others v Zimbabwe*' (2013) 28(1) ICSID Rev—FILJ 33, 36.

[45] Full discussion of this matter is outside of the scope of this note. For the ICSID practice, see Directions of 13 June 2012 in *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15 and *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No ARB/10/25, paras 3 and 7; *Perenco Ecuador Limited v Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) paras 28, 35 and 64; *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Letter to the Parties from the Tribunal's Secretary (16 October 2007); and *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/06/21, Letter to the Parties from the Tribunal's Secretary (24 October 2007). For commentary on the Direction in the cases against Zimbabwe, see ibid Mowatt and Mowatt 34–6. See also Matthew Coleman and Thomas Innes, 'ICJ Order on Timor-Leste's Request for Provisional Measures Against Australia and its Implications on Investor-State arbitration' *Practical Law* (12 March 2014) <http://uk.practicallaw.com/8-560-5608?q=> accessed 15 January 2015; and Kaufmann-Kohler and Antonietti (n 27) 537–8.

disqualification request. Given that ICSID Arbitration Rule 39(2) requires that tribunals accord priority to requests for provisional measures, it is arguable that any determination of a proposal for disqualification should be halted pending the consideration of any request for provisional measures by the full tribunal. However, this could potentially disadvantage a party that has applied for both a disqualification of an arbitrator and provisional measures where there are genuine reasons for removing the arbitrator. As such, in practice the most appropriate course of action will often be to issue an interim order pending the decision on the disqualification request and the filling of any vacancy that may arise as a result of it. The arguments in favour of such action being taken will be particularly strong where there is any suggestion that the proposal to disqualify the arbitrator was made to frustrate an existing (or contemplated) request for provisional measures.[46]

## VII. MOVING FORWARD: REVISION OF THE ICSID ARBITRATION RULES

While we have concluded that ICSID tribunals have the power to issue provisional measures during a period of suspension, we consider that it would be preferable to expressly recognize the aforementioned power in the ICSID Arbitration Rules so as to ensure clarity in this area. We note the recent reports that the ICSID Secretariat is in the initial stages of efforts to revise ICSID's rules and regulations.[47] In this regard, we propose the following addition to ICSID Arbitration Rule 39:

> [A] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 9(6) or 10(2), the Tribunal[48] may, during that period of suspension, determine the request and in addition or alternatively issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request.

If Sentence A was adopted (or Sentence B below), it would be necessary to add a further paragraph to Rule 39 codifying the tribunal's general right to issue interim

[46] Such a situation may have arisen in *Joseph Charles Lemire v Ukraine*. In that arbitration, the Claimant filed a request for provisional measures. The circumstances were such that that request had to be determined within one month of it being filed. However, a few days after the request was filed, the Respondent filed a proposal to disqualify the arbitrator appointed by the Claimant and proceedings were therefore suspended. The Respondent denied any suggestion that this proposal had anything to do with the Claimant's request for provisional measures. The Respondent's proposal was dismissed in time for a decision on the request for provisional measures to be taken (though the request was withdrawn following a change of the Respondent's position on the matter that gave rise to it), so it was not necessary for the Tribunal to determine the request for provisional measures during the period of suspension. It is, however, notable that the Tribunal maintained the schedule for the parties filing submissions on the request for provisional measures throughout the period of suspension. See *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) paras 18–24, 433, 445–446 and 474.

[47] See Luke E Peterson, 'Ten Years After Last Major Reforms, ICSID to Float New Amendments, Including Transparency Improvements, and Possibly Appeals Process' *International Arbitration Reporter* (3 July 2014) <http://www.iareporter.com/articles/20140703_1> accessed 15 January 2015 and Toby McIntosh, 'ICSID Secretary General Plans to Propose Transparency Changes' (*FreedomInfo.org*, 6 June 2014) <http://www.freedominfo.org/2014/06/icsid-secretary-general-plans-propose-transparency-changes/> accessed 15 January 2015.

[48] Using the term 'Tribunal' here has the following consequences. Where the suspension is due to a vacancy on the tribunal [ICSID Arbitration Rules (n 5) r 10(2)], it is the remaining arbitrators who are empowered to determine the provisional measures request. Where the suspension is due to a challenge to an arbitrator [ICSID Arbitration Rules (n 5) r 9(6)], the full tribunal (including the challenged arbitrator) is empowered to determine the provisional measures request. [See Schreuer and others (n 17) 1211 para 9 of the commentary to art 58]. As regards the second consequence, our reasons for considering it proper that the challenged arbitrator should be involved in determining the provisional measures request were set out in Section VI above.

orders in all other circumstances.[49] Doing so would prevent any argument that the inclusion of such a power in Sentence A, but not generally, indicates that the power is not available generally.

If, however, there is appetite for a more progressive development, we would propose the addition of the following two paragraphs to ICSID Arbitration Rule 39 (ie instead of Sentence A above):

> [B][50] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 9(6), the Tribunal may, during that period of suspension, determine the request and in addition or alternatively issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request.
>
> [C] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 10(2) in circumstances where the proceeding was suspended pursuant to Rule 10(2) following the disqualification, death, incapacity or resignation of an arbitrator appointed by one of the parties, the power to determine the provisional measures request and issue an interim order during that period of suspension lies with the President of the Tribunal alone. [D] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 10(2) in circumstances where the proceeding was suspended pursuant to Rule 10(2) following the disqualification, death, incapacity or resignation of the President of the Tribunal, the parties are required provisionally[51] to maintain the *status quo* pending the determination of the request, unless the remaining members of the Tribunal unanimously order otherwise.

With Sentence C, the aim is to ensure that the party whose appointed arbitrator has departed the tribunal is not prejudiced by that fact (hence only the President is empowered to make the order). With Sentence D, the intention is to guard against disagreement between the remaining, party-appointed arbitrators resulting in prejudice to the party requesting provisional measures.

## VIII. CLOSING REMARKS

This note has argued that the ICSID Convention and ICSID Arbitration Rules empower a tribunal to consider a request for provisional measures during a period of suspension. Indeed, they require that such a request be accorded priority, including when proceedings are suspended. However, the most appropriate action to satisfy this requirement will often be for the tribunal to issue an interim order requiring the parties to maintain the *status quo* pending the determination of the request, to be taken after the suspension ends.

[49] In terms of wording, the authors suggest the following: 'The Tribunal may issue an interim order requiring the parties to maintain the *status quo* pending the final determination of the request.'

[50] The only difference between Sentences A and B is the deletion of the reference to ICSID Arbitration Rule 10(2). That provision is addressed by Sentences C and D.

[51] ie akin to the automatic provisional stay of enforcement of an award when requested in an application for revision or annulment of the award: see ICSID Convention (n 3) arts 51(4) and 52(5).