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Provisional Measures and Investment Treaty Arbitration

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Dan Sarooshi

(★) (*)

Abstract

An ICSID tribunal has a broad discretion under Article 47 of the ICSID Convention to grant provisional measures to a party where the Claimant can establish that its request is both urgent and necessary. As to what constitutes necessity, there is also considerable discretion given to an ICSID Tribunal to make this decision, and indeed there are no requirements stipulated in Article 47.

The central argument being made here in relation to this issue of necessity is that ICSID tribunals are bound to interpret the scope of their power to grant provisional measures in Article 47 of the ICSID Convention solely within the context of the Convention, and that ICSID Tribunals should not consider themselves bound in any way by decisions of other courts or tribunals, including decisions of the ICJ. Indeed it is more appropriate for ICSID Tribunals to adopt the lower threshold test of a 'significant harm or threat' to the parties rights when deciding whether provisional measures are 'necessary' rather than using the ICJ's higher threshold of 'irreparable prejudice'.

I. INTRODUCTION

In the context of a judicial system, the competence of a court to grant provisional measures requested by a party in a specific case is considered as part of the inherent powers of a court. (1) They are important for the court to ensure that one of the parties to a case does not take action to undermine significantly or vitiate the other party's legal rights such that the court's future judgment in the case may be

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rendered meaningless. (2) Indeed Lawrence Collins has argued that provisional measures may be considered as one of 'those general principles of law common to all legal systems'. (3)

The importance of this power to grant provisional measures (4) has also been recognised in the context of international arbitration, (5) and there are a number of rules of arbitration (for example, Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention'); Article 26 of the 2010 UNCITRAL Arbitration Rules; and Article 28 of the 2012 International Chamber of Commerce Arbitration Rules) which expressly give the respective arbitral tribunals the power to grant binding provisional measures at the request of a party.

In the case of ICSID Tribunals they have developed a considerable practice of granting binding (6) provisional measures to parties in cases pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. (7) Article 47 provides as follows:

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> 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. (8)

This provision stipulates that the sole basis for an ICSID Tribunal having the competence to grant provisional measures is where it is necessary 'to preserve the respective rights of either party', but it nonetheless gives Tribunals a broad discretion in being able to decide this matter since it is left for them to decide whether 'the circumstances so require' in a particular case.

There are a number of well-established 'circumstances' where an ICSID Tribunal may find that the grant of provisional measures should be granted, and these include the following: (i) to require the parties to cooperate in the proceedings and to furnish all relevant evidence; (9) (ii) to take early measures to secure compliance with an eventual award; (10) (iii) to stop the parties from resorting to self-help or seeking relief through other remedies; (11) (iv) to prevent a general aggravation of the situation through unilateral action; (12) or (v) to preserve the status quo between the parties.

A number of decisions by ICSID Tribunals have approved these as potential grounds for making a

provisional measures order. For example, in *Biwater Gauff (Tanzania) Ltd v. Tanzania*, Procedural Order No. 3, ICSID Case No. ARB/05/22, 29 September 2006, the ICSID Tribunal stated the following:

> 135. It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute. Both may be seen as a particular type of provisional measure...or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process. Both concerns have a number of aspects, which can be articulated in various ways, such as the need to:
>
> –preserve the Tribunal's mission and mandate to determine finally the issues between the parties;
> –preserve the proper functioning of the dispute settlement procedure;
> –preserve and promote a relationship of trust and confidence between the parties;
>
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> –ensure the orderly unfolding of the arbitration process;
> –ensure a level playing field;
> –minimise the scope for any external pressure on any party, witness, expert or other participant in the process;
> –avoid 'trial by media'.
> ...
> 144. It is true that the risks to the integrity of these proceedings, and the danger of an aggravation or exacerbation of this dispute, have yet to manifest themselves in concrete terms. ...
>
> 145. The Tribunal disagrees, however, with the suggestion that actual harm must be manifested before any [provisional] measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect). Among other things, its mandate extends to ensuring that potential inhibitions and unfairness do not arise; equally, its mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties. (13)

Moreover, the ICSID Tribunal in *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* stated:

> 60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or *substantive* rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. ...
>
> 62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the [Permanent Court of International Justice] case of the *Electricity Company of Sofia and Bulgaria*. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need '*to preserve the status quo between the parties pending* [the] *final decision on the merits*' and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention '*is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award*'.
>
> 63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v.*

> *Morocco* and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged '*the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.*' [(14)] (Original emphasis.)

The existence of these circumstances will not by themselves suffice for an ICSID Tribunal to be able to grant provisional measures. ICSID Tribunals have in practice adopted two principles to guide their decision whether 'the circumstances' in a particular case 'so require' a grant of provisional measures 'to preserve the respective rights of either party': first, whether the need for such orders is
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'urgent'; [(15)] and, second, are such orders 'necessary' in order to protect the rights of the parties in the case pending the final award. [(16)]

This article will explore the contours of the scope of discretion of ICSID Tribunals to make provisional measures orders by focusing on two inextricably linked issues relating to these principles: First, what is the exact content and scope of these principles of 'urgency' and 'necessity' as used by ICSID Tribunals in deciding whether to grant provisional measures? Second, in examining the scope and application of these principles to what extent, if at all, should ICSID Tribunals take into account decisions of other courts and tribunals when deciding whether to grant provisional measures?

II. THE PRINCIPLES USED BY ICSID TRIBUNALS IN DECIDING WHETHER TO GRANT PROVISIONAL MEASURES

Within the context of ICSID arbitration, there is no concept of *stare decisis* such that an ICSID Tribunal is bound to follow the ruling of an earlier ICSID Tribunal on an issue. To the contrary, there have been a number of conflicting decisions by ICSID Tribunals on a variety of issues, and indeed one of the issues considered in this article – the test for determining what is 'necessary' for the grant of provisional measures – has been the subject of contrary decisions by ICSID Tribunals.

The lack of *stare decisis* in the area of ICSID arbitration has been stated in terms by, for example, the Tribunal in *El Paso v. Argentina,* Decision on Jurisdiction, ICSID Case No. ARB/03/15, 27 April 2006 which stated at paragraph 39:

> ICSID arbitral tribunals are established ad hoc, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of stare decisis. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.

Despite this formal position it will often be the case in practice, as the above quote states, that an ICSID Tribunal will take into account prior decisions by ICSID Tribunals, even going so far as to quote and rely on these decisions. However, the second element contained in the above quote relating to ICSID Tribunals taking into account precedents established by other international tribunals is considerably more problematic and is dealt with below in Section 2.2.1.

Subject to this caveat regarding *stare decisis*, ICSID Tribunals have consistently stated that a provisional measures order must be both 'urgent' and 'necessary' in
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order to be granted to a party. [(17)] For example, as the ICSID Tribunal in *Saipem SpA v. Bangladesh* stated in its decision on jurisdiction and provisional measures:

> It is generally acknowledged that, by providing that the Tribunal may recommend any provisional measures 'if it considers that the circumstances so require', Article 47 of the ICSID Convention requires that the requested measure *be both necessary and urgent*. [(18)] (Emphasis added.)

The remainder of this section shall first address the issue of urgency and then turn to consider the question of necessity.

(a) The urgent nature of an ICSID provisional measures order

In terms of the requirement of urgency, ICSID Tribunals have employed a low threshold to allow this requirement to be satisfied easily in practice. The threshold involves the determination whether in the circumstances of the specific arbitration there is a need for action to protect the rights being claimed which cannot wait until the final award in the case. It will be for the party seeking the provisional measures to establish this by evidence. As the ICSID Tribunal stated in the provisional measures phase in *Biwater Gauff (Tanzania) Ltd v. Tanzania*:

> As far as urgency is concerned, however, whilst it was common ground that this is a requirement, for its own part the Arbitral Tribunal considers that the requirement needs more elaboration. In the Arbitral Tribunal's view, the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and *may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award.* In most situations, this will equate to 'urgency' in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award — even if the grant is to be some time hence. [(19)] (Emphasis added.)

The rationale for this approach was provided by the decision of the ICSID Tribunal in *Azurix Corp v. The Argentine Argentina* which stated: 'Given that the purpose of the measures is to preserve the rights of the parties, the urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award.' [(20)]

It is clear that ICSID Tribunals do not want this requirement of urgency to constitute a serious barrier to the grant of provisional measures orders where their grant would otherwise be necessary. As such, the requirement of urgency in practice is often conflated with the issue of whether the grant of provisional

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measures is necessary. [(21)] If they can be considered as being necessary in advance of the final award then there is a good argument that they will be considered as being 'urgent'.

It is arguably for this reason that the Tribunal in *Quiborax v. Bolivia* relied on a particular interpretation of the purpose of provisional measures to contend as follows:

> The Tribunal agrees with Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, *they are urgent by definition.* [(22)] (Emphasis added.)

Using even broader language, the ICSID Tribunal in *City Oriente v. Ecuador* stated, 'where the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, *then the urgency requirement is met by the very own nature of the issue.*' [(23)] (Emphasis added.)

Let us now turn to consider the second principle governing the grant of an ICSID provisional measures order: whether it is 'necessary'.

(b) When is an ICSID provisional measures order 'necessary'?

A particular issue which arises when considering the concept of necessity is whether the considerable case-law and approach taken by the International Court of Justice ('ICJ') to the concept of necessity in the context of its grant of provisional measures should be taken into account by ICSID Tribunals: in particular, whether the ICJ's interpretation that necessity requires the existence of a high threshold – a situation which would cause 'irreparable' prejudice or damage to the interests of one of the parties – should also be used by ICSID Tribunals.

The ICJ has in its jurisprudence adopted a relatively high threshold for determining whether it is 'necessary' in a particular case to grant a request to order provisional measures. The approach of the ICJ is that there must be 'irreparable' harm or prejudice that will be caused to the rights of the parties before the Court will decide that a provisional measures order is 'necessary'.

As the ICJ stated in the *Nuclear Tests (NewZealand v. France)*, Interim Protection, Order of 22 June 1973:

> the power of the Court to indicate interim measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of
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> dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the matters in issue before the Court. (24)

The ICJ made clear in the *LaGrand* case (*Germany v. United States of America*), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, p.9 at para.23 that it equates necessity with irreparable prejudice, and that this is a precondition for its grant of provisional measures when it stated:

> the Court will not order interim measures in the absence of 'irreparable prejudice...to rights which are the subject of dispute ...' (*Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p.103; *United States Diplomatic and Consular Staff in Tehran*, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 19, para.36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p.19, para.34); *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, p.257, para.36). (25)

The *LaGrand* case was the first time that the ICJ had expressly stated that its provisional measures orders were binding. (26)

The question whether ICSID Tribunals should adopt the ICJ's high threshold of 'irreparable' prejudice arises, in part, because Article 47 of the ICSID Convention was likely modelled on the prior and near identical language of Article 41 of the Statute of the International Court ('ICJ Statute'), (27) the latter providing as follows:

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

On this basis the ICSID Tribunal in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* stated that Article 47 'is not an innovation in the history of international jurisdiction; it is directly inspired by Article 41 of the Statute of the International Court of Justice, hence the particular importance that can be accorded to the judgments given in the past by that Court' (28) in that matter.

The question also arises because several decisions by ICSID Tribunals have adopted this 'irreparable' harm or damage test as a precondition for the grant of provisional measures. In each case this adoption has been done simply on the basis
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that this was the test that had been espoused by the ICJ or that it was part of a so-called international jurisprudence on provisional measures.

In *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, the ICSID Tribunal purported to limit the necessity principle in Article 47 of the ICSID Convention to cases where 'there is a threat or possibility of irreparable harm to the rights invoked.' The Tribunal in *Tokios Tokelés* provided no rationale for this approach other than simply stating at paragraph 8 of its Order the following:

> The *international jurisprudence* on provisional measures indicates that *a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked.*' This test

> is in conformity with the practice of the International Court of Justice ('ICJ') under Article 41 of its Statute, on which Article 47 of the ICSID Convention is modeled. [(29)] (Emphasis added.)
>
> Similarly, in *Phoenix Action v. Czech Republic*, the ICSID Tribunal stated:
>
> The circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and that need is urgent. The *international jurisprudence on provisional measures* [i.e. the approach of the ICJ] indicates that a provisional measure is necessary where the actions of a party [according to the ICJ in the Aegean Sea case] 'are capable of causing or of threatening irreparable prejudice to the rights invoked.' [(30)] (Emphasis added.)

Moreover, in *Occidental v. Ecuador* the ICSID Tribunal simply adopted the 'irreparable prejudice' standard on the basis that it had been adopted by the ICJ when it stated at paragraph 59 the following:

> the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm. *The jurisprudence of the International Court of Justice dealing with provisional measures is well established*: a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked'. (Emphasis added.)

There are, however, three reasons why this approach emphasizing 'irreparable prejudice' as a precondition for a finding of necessity should not be followed by ICSID Tribunals. First, there is no such thing as an 'international jurisprudence' on provisional measures such that various interpretations given by international courts or tribunals of their own very different statutes or rules of procedure should be considered as binding or even as persuasive authority to be followed by ICSID Tribunals. Second, the construction given to the concept of necessity in the context of ICSID should be different to that of the ICJ because of the different nature of the types of cases in which the ICJ may be involved as compared to the nature of investor-State claims before ICSID Tribunals. Third, there is significant support provided by decisions of ICSID Tribunals that the ICJ's irreparable prejudice
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standard is too high and inappropriate in the context of ICSID arbitration. The remainder of this section proceeds by examining each of these reasons in turn, and then turns to consider in Section 2.2.3 an alternative approach which is more appropriate in the context of ICSID arbitration than the ICJ's 'irreparable prejudice' test.

(i) The lack of an 'international jurisprudence' on provisional measures

Contrary to the assertion by the ICSID Tribunals in *Tokios Tokeles* and *Phoenix Action*, there is no such thing as an 'international jurisprudence' on provisional measures such that various interpretations given by international courts or tribunals of their own very different statutes or rules of procedure should be considered binding or even as persuasive authority to be followed by ICSID Tribunals.

Consider, for example, the approach of ICC Tribunals that have an extremely broad power to grant provisional measures. An ICC Tribunal may under Article 28(1) of the 2012 ICC Arbitration Rules 'order any interim or conservatory measure *it deems appropriate*.' [(31)] (Emphasis added.) There are no restrictions, as exist in the case of ICSID, limiting the grant of provisional measures to preserving the rights of the parties or the like. This is not surprising since very often in ICC arbitrations the parties will be commercial entities and not sovereign States as in ICSID arbitration. This difference has the consequence that in the case of ICSID the scope of authority given to Tribunals is more limited when compared to the ICC: ICSID tribunals should grant PMs only where it necessary 'to preserve the respective rights of either party' [(32)] while the ICC can grant any 'measure it deems appropriate'. [(33)]

In addition, under the ICC Rules either party to a dispute before an ICC Tribunal may seek the grant of provisional measures from a competent domestic court. Article 28(2) of the 2012 ICC Arbitration Rules provides as follows:

> Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

This position again is wholly different from that of ICSID where recourse to domestic courts is prohibited in terms by Article 26 of the ICSID Convention. This provision states in relevant part:
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> 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.

Article 26 of the ICSID Convention establishes the autonomy and exclusivity of ICSID arbitration from local administrative or judicial remedies since consent by both parties to ICSID arbitration is deemed as being consent to arbitration 'to the exclusion of any other remedy', a position in stark contrast to that of the ICC Rules on provisional measures.

The consequence of Article 26 is that the parties to an ICSID dispute will only generally be able to seek a grant of provisional measures from an ICSID tribunal and not from national courts. (34) Once an ICSID arbitration has commenced then the ICSID Tribunal will be the only forum that can hear the dispute pursuant to Article 26 of the ICSID Convention. As such, the protection of the parties' rights by means of provisional measures assumes an even greater importance in the ICSID context than in other international courts or tribunals where a party can take measures in other *fora* to try and protect their rights, (35) and so the necessity for such measures should be construed broadly in the case of ICSID.

These substantive differences between the grant of provisional measures by ICSID Tribunals compared to those granted by ICC Tribunals provide evidence why there is no such thing as an 'international jurisprudence' on provisional measures.

Moreover, the lack of an 'international jurisprudence' on provisional measures is also demonstrated by Article 17A(1) of the UNCITRAL Model Law which expressly takes a different approach from that of the ICJ's 'irreparable prejudice' test. Article 17(1) provides:

> It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be 'significant' and that it exceeds greatly the damage caused to the party affected thereby. (36)

To conclude, there is no such thing as an 'international jurisprudence' on provisional measures. In any case, even were this to exist, it would not in any way bind ICSID Tribunals such that they would have to follow such an approach. Bearing this in mind the next section proceeds to explain why the potentially different nature of ICJ cases from ICSID arbitrations means that ICSID Tribunals should use a different test when deciding whether it is necessary in a particular case to grant provisional measures.

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(ii) The different nature of ICJ cases compared to ICSID arbitrations and provisional measures

The second reason why an element of the ICJ test of what is necessary for the grant of provisional measures – the so-called irreparable prejudice requirement – is not applicable or even persuasive as a way of constructing necessity in the context of ICSID is because of the wholly different nature of the types of cases in which the ICJ may be involved as compared to the investor-State claims that come before ICSID Tribunals.

The ICJ hears cases only between States, and in relation to subject-areas in some cases that can have a direct impact on the lives of tens of thousands, if not more, of the citizens of the disputing States.

Consider, for example, the fact that the ICJ is regularly involved in cases involving the legality of the

use of military force between States [37] as well as boundary cases. Taking the use of force cases as an example, the ICJ is often asked in these cases to grant provisional measures orders requiring a State to desist from deploying its military forces in a particular way or in a specific area of territory whose title is being contested between States. [38] Indeed the ICJ has granted provisional measures in a number of cases involving issues relating to the legality of the use of force by States. [39]

In such cases it is entirely appropriate that the ICJ employs a high threshold – that of irreparable prejudice to one of the States in the dispute – in deciding whether to grant provisional measures, especially where the issue of title of territory is uncertain.

Moreover, in the case where the ICJ is considering whether to grant provisional measures in cases relating, for example, to the use of force this will often be subject to a number of broader political factors which may lead the ICJ to be more cautious in its grant of such measures than are at play in the context of ICSID. This arises, in part, from the role of the ICJ as the principal judicial organ of the United Nations [40] which has as one of its objectives the peaceful settlement of disputes as a contribution to international peace and security. [41] The ICJ will, for
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example, often have to balance its judicial function in granting provisional measures as against the central role of the UN Security Council in resolving cases involving the use of military force, [42] and so the test for provisional measures which the ICJ has to use must necessarily be restrictive to ensure that it does not affect the resolution of the dispute by other UN organs since once the ICJ has become involved in a case by granting provisional measures then other UN organs will be reluctant to become involved in resolving the dispute in a manner contrary to the ICJ's provisional measures order.

As Shabtai Rosenne states in his study *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (2005):

> The situation following the dissolution of...Yugoslavia provided significant instances of attempts to invoke Court procedures alongside the Security Council and other judicial and arbitral proceedings in a grave crisis in which major use of armed force was characteristic. This first occurred in 1993 when Bosnia and Herzegovina brought the Application of the Genocide Convention case against Yugoslavia and simultaneously requested provisional measures. Bosnia claimed that the Court should reinterpret Security Council resolution 713...which had imposed an arms embargo.... That the Court refused to do, because had it done this without the consent of the Security Council, it would have immediately thrown itself into direct confrontation with the Security Council with no apparent advantage to anyone....On occasion a carefully worded refusal by the Court [ICJ] to indicate provisional measures has laid a basis for satisfactory negotiations to settle the dispute, or prevent it from growing more serious.... [Other ICJ provisional measures cases] show several things. They indicate that a State is prepared in very special circumstances to invoke [ICJ] procedures, especially its power to indicate provisional measures of protection, even if it has only a slender chance of establishing prima facie jurisdiction over the merits. On the other hand, the Court, while taking up these cases, has shown itself careful not to trespass on the authority of the Security Council to deal with a crisis situation involving the use of armed force if to do so would exceed the judicial function in a particular case. At the same time the Court will not hesitate to act even if the general situation is on the active agenda of the Security Council, provided that it is satisfied that its action comes within the judicial competence in that case. This is emphasized by the last case in this series, the Armed Activities on the Territory of the Congo (Congo v. Uganda) case, where the Court indicated as provisional measures virtually the same measures as had been ordered by the Security Council under Chapter VII of the Charter a few days earlier in its resolution 1304 (2000), 16 June 2000. [43]

This consideration by the ICJ of use of force cases does not, of course, mean that the ICJ has not engaged in cases involving the treatment by a host State of foreign owned property, and indeed the ICJ in a landmark early decision in the *Anglo-Iranian Oil Company* case, [44] granted provisional measures to the UK which were

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very far-reaching and indeed would not be dissimilar to the kind of provisional measures order a Claimant investor may currently seek from an ICSID Tribunal.

The *Anglo-Iranian Oil Company* case arose out of the adoption by the Iranian Government of several laws purporting to nationalize the oil industry in Iran. The ICJ found in the provisional measures phase of the case that any interference with the rights of the Anglo-Iranian Oil Company ('AIOC') pursuant to the 1933 concession between the Government of Iran and the AIOC would constitute irreparable prejudice to the rights of the AIOC guaranteed to it by the various Iran-UK treaties, these latter rights being the subject of the claims in the case. It was on this basis that the ICJ granted the following provisional measures that were intended to keep the AIOC in operation in Iran and free from any government action or interference that could affect the rights that were the subject of the claims in the main proceedings:

1.That the Iranian Government and the United Kingdom Government should each ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision on the merits which the Court may subsequently render;

2.That the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

3.That the Iranian Government and the United Kingdom Government should each ensure that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, Limited, as they were carried on prior to May 1st, 1951;

4.That the Company's operations in Iran should continue under the direction of its management as it was constituted prior to May 1st, 1951, subject to such modifications as may be brought about by agreement with the Board of Supervision referred to in paragraph 5 ... [(45)]

The ICJ even went on to establish as a provisional measure a mechanism – a Board of Supervision – in order to ensure that the Anglo-Iranian Oil Company was not subject to government action or interference in contravention of the Court's provisional measures order as set out in the first four paragraphs of its order. The terms of this fifth paragraph of the ICJ's provisional measures order are as follows:

5.That, in order to ensure the full effect of the preceding provisions, which in any case retain their own authority, there should be established by agreement between the Iranian Government and the United Kingdom Government a Board to be known as the Board of Supervision composed
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of two Members appointed by each of the said Governments and a fifth Member, who should be a national of a third State and should be chosen by agreement between these Governments, or, in default of such agreement, and upon the joint request of the Parties, by the President of the Court. The Board will have the duty of ensuring that the Company's operations are carried on in accordance with the provisions above set forth. It will, inter alia, have the duty of auditing the revenue and expenses and of ensuring that all revenue in excess of the sums required to be paid in the course of the normal carrying on of the operations and the other normal expenses incurred by the Anglo-Iranian Oil Company, Limited, are paid into accounts at banks to be selected by the Board on the undertaking of such banks not to dispose of such funds except in accordance with the decisions of the Court or the agreement of the Parties. [(46)]

The consequence of the *Anglo-Iranian Oil Company* case more generally is that it provides a basis for requesting provisional measures from an ICSID Tribunal to ensure that a host State refrains from taking action against a foreign investor that affects the ability of the investor to continue to operate its business pursuant to the specific BIT rights on which it is relying in the main ICSID proceedings, [(47)] but it does not mean that the 'irreparable prejudice' test that the ICJ employed in the case should automatically be applied to ICSID arbitrations. As already explained,
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this ICJ test was developed to meet the needs of all types of cases encompassing a very broad range of States' rights that may be in dispute before the ICJ, and in this context a test with a high threshold provides reassurance to States that their rights will not be prejudged in advance of the ICJ's decision on the merits in a case.

The final reason why the nature of ICJ cases are different from ICSID arbitration such that a different standard for the grant of provisional measures is appropriate derives from the fact that all submissions and hearings in ICJ cases are public [(48)] while ICSID arbitration submissions and proceedings remain largely confidential. This has led ICSID Tribunals to grant provisional measures – with no express or implicit reference to an 'irreparable prejudice or harm' standard – at the request of one of the parties to ensure the confidentiality of submission or other documents connected with the arbitration. For example, in *Biwater Gauff (Tanzania) Ltd v. Tanzania*,

Procedural Order No. 3, ICSID Case No. ARB/05/22, 29 September 2006, the ICSID Tribunal made no reference to an 'irreparable prejudice or harm' standard when it went on to grant a provisional measures order that imposed an obligation on both parties to refrain from disclosing to third parties a number of specified documents related to the ICSID arbitration. (49) Instead the Tribunal in *Biwater Gauff* stated at paragraph 112 that its 'determination of this application for provisional measures entails a careful balancing between two competing interests: (i) the need for transparency in treaty proceedings such as these, and (ii) the need to protect the procedural integrity of the arbitration.' (50)

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(iii) The different approach taken by ICSID Tribunals: a 'significant harm' test as a basis for determining necessity

There is significant support provided by decisions of ICSID Tribunals in favour of the argument made in this article that the ICJ's 'irreparable prejudice' standard is too high and inappropriate in the context of ICSID arbitration.

The ICSID Tribunal in *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador* arbitration, ICSID Case No. ARB/06/21, *Decision on Revocation of Provisional Measures and Other Procedural Matters*, 13 May 2008, stated:

70....*the Tribunal has verified that neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require that provisional measures be ordered only as a means to prevent irreparable harm.* The only requirement arising from the wording of Rule 39 is the traditional urgency requirement; this requirement was analyzed by the Arbitral Tribunal in paragraphs 67 et seq. of the Decision dated November 19, 2007, and the Tribunal concluded that it has effectively been fulfilled.

...

72.Now, is there a second requirement [in addition to an urgency requirement] to be fulfilled stating that provisional measures must be necessary to prevent irreparable harm? Rule 39 only refers to 'circumstances that require such measures'. It is the opinion of the Tribunal that this wording requires only that provisional measures must not be ordered lightly, but only as a last resort, after careful consideration of the interests at stake, weighing the harm spared the petitioner and the damage inflicted on the other party. *It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.* (Emphasis added.)

Thus instead of the ICJ test of 'irreparable harm or prejudice' which is necessary for the grant of provisional measures, it is sufficient for the grant of provisional measures in the ICSID context if there is a risk of significant harm being caused to a party.

Moreover, the ICSID Tribunal in *City Oriente* went on to disagree in express terms with the approach by the Tribunal in the *Tokios Tokelés* arbitration in the following terms:

82.First, it [the decision of the Tribunal in *Tokios Tokelés*] appears to be an isolated decision, and no other case has been cited where an ICSID
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Arbitral Tribunal has embraced the interpretation of Article 47 of the Convention proposed in Procedural Order No. 3 of the *Tokios Tokelés* case.

83.Second, the *Tokios Tokelés* Tribunal itself had previously granted in [an earlier Order]...a first request for provisional measures filed by Claimant, and in that Procedural Order No. 1, the tribunal made no reference whatsoever to any hypothetical requirement of irreparable harm and ordered the stay of any judicial procedure liable to affect the final award or aggravate the existing dispute.

This approach of a lower threshold for the grant of provisional measures than the ICJ 'irreparable prejudice' test was also followed by the ICSID Tribunal in *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador),* which first observed that the parties in the case before it disagreed 'on the required intensity of the harm: 'irreparable', i.e. not compensable by money, for the Respondents, as opposed to 'significant' for the Claimant.' (51) After citing the *Occidental v. Ecuador* arbitration that was relied upon by the Respondent who argued for the higher 'irreparable prejudice' standard, the ICSID Tribunal went on to quote with approval Article 17A(1) of the UNCITRAL Model Law which states that it 'is not so essential that provisional measures be necessary to prevent irreparable harm', but only that the potential harm must be 'significant'. (52)

Moreover, in *Biwater Gauff (Tanzania) Ltd v. Tanzania*, Procedural Order No. 1, ICSID Case No. ARB/05/22, March 31, 2006, the ICSID Tribunal stated:

> Relevant Factors: The requirements that must be satisfied for the recommendation of provisional measures under Article 47 of the ICSID Convention are now well-settled, and were not materially in dispute as between the parties (e.g. urgency, necessity, a right that requires protection; *circumstances threatening the right* ....). (53)

It is significant that the considerably broader test of 'circumstances threatening the right' of the parties was used by the ICSID Tribunal in *Biwater Gauff* rather than the 'irreparable prejudice' approach espoused by the ICJ.

Similarly, in *Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, the ICSID Tribunal stated:

> Article 47 and Rule 39 recognise that the rights which a party asserts and seeks to preserve and protect in an arbitral proceeding may be effectively destroyed or seriously prejudiced by the action of the other party taken before a Tribunal is able to reach a final decision on the merits of the dispute between them. Thus power is conferred on the Tribunal to restrain such action in order to preserve the effectiveness and integrity of the proceeding and avoid severe aggravation of the dispute....But the Article [47 of the ICSID Convention] does not lay down a test of
> P 378
> irreparable loss and the authorities do not warrant so narrow a construction (see paragraphs 55–58 below)....Provisional measures will be granted if necessary, at the time of the decision, to preserve the effectiveness and integrity of the proceedings and avoid severe aggravation of the dispute. (54)

This ICSID specific approach adopted by the ICSID Tribunals in *City Oriente*, *Burlington Resources, Biwater Gauff*, and *Perenco Ecuador* all of which use a lower threshold than 'irreparable prejudice' – whether it is 'significant harm' to parties rights or even a 'threat' to parties rights – is entirely appropriate and should be followed by other ICSID Tribunals for the reasons set out above in Sections 2.1-2.2. (55)

III. CONCLUDING REMARKS

An ICSID tribunal has a broad discretion under Article 47 of the ICSID Convention to grant provisional measures to a party where the Claimant can establish that its request is both urgent (i.e. should be granted at some point before the award) and necessary. As to what constitutes necessity, there is also considerable discretion given to an ICSID Tribunal to make this decision, and indeed there are no requirements stipulated in Article 47.

The central argument being made here in relation to this issue of necessity is that ICSID tribunals are bound to interpret the scope of their power to grant provisional measures in Article 47 of the ICSID Convention solely within the context of the Convention, and that ICSID Tribunals should not consider themselves bound in any way by decisions of other courts or tribunals, including decisions of the ICJ. Indeed it is more appropriate for ICSID Tribunals to adopt the lower threshold test of a 'significant harm or threat' to the parties rights when deciding whether provisional measures are 'necessary' rather than using the ICJ's higher threshold of 'irreparable prejudice'.

References

★)

Dan Sarooshi: Professor of Public International Law, Faculty of Law, University of Oxford; Barrister, Essex Court Chambers, London; and Senior Research Fellow, The Queen's College, Oxford

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© Professor of Public International Law, Faculty of Law, University of Oxford; Barrister, Essex Court Chambers, London; and Senior Research Fellow, The Queen's College, Oxford. Email: DSarooshi@essexcourt.net or Dan.Sarooshi@law.ox.ac.uk. This article is a revised version of a paper given by the author to the Houston International Arbitration Club (Oct. 2012), and he is grateful for the comments provided by the organizers and participants. He is also grateful for the useful comments provided by Professor William Park and the anonymous reviewers from the Editorial Board.

1)

See Shabtai Rosenne *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* 9 (Oxford U. Press 2005); and Chester Brown, 'The Inherent Powers of International Courts and Tribunals' 76 Brit. YB Intl. L. 195 (2005).

2)

See, e.g., the following statement by the International Court of Justice in *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 Jul. 1991, [1991] ICJ Rep 12, 19: '[t]he essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*'; and *Separate Opinion of President Jiménez de Aréchaga in Aegean Sea Continental Shelf (Greece v. Turkey) case*, Interim Protection, Order of 11 Sep. 1976 [1976] ICJ Rep 3, 15–16.

3)

Lawrence Collins, '*Provisional and Protective Measures in International Litigation*', 234 *Recueil des Cours* 9 at 23 (1993).

4)

See, e.g., the statement by the ICSID Tribunal in *Libananco v. Turkey:* '[n]or does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process', *Libananco Holding Co. v. Republic of* Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 Jun. 2008, para.78; and Martins Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in Ian Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law*(Juris Publishing 2012).

5)

On the important role that provisional measures play more generally in international arbitration, V.V. Veeder has stated: '...an interim order can be at least as, or even more important than, an award. In the absence of an enforceable interim measure, it is sometimes possible for a recalcitrant party to thwart the arbitration procedure—completely and finally. An enforceable interim measure can maintain the status quo until the award is made and it can also secure assets out of which an award may be satisfied where a recalcitrant debtor is deliberately dissipating assets to render itself eventually judgment-proof.' (V.V. Veeder, 'Provisional and conservatory measures' in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (UN Publication, 1999) p. 21.

6)

While the term 'recommend' is used in Art. 47 of the ICSID Convention to refer to provisional measures, the binding nature of the provisional measures indicated by ICSID Tribunals has been well established, see *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Provisional Measures, Procedural Order No. 2, 28 Oct. 1999, para. 9; *Víctor Pey Casado Fondation Président Allende c. la République du Chili*, ICSID Case No. ARB/98/2, Provisional Measures, 25 Sep. 2001 (English translation in (2001) 16 ICSID Review – Foreign Investment Law Journal 565) paras.17–26; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 Jul. 2003, para.4; *Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 Aug. 2007, para.58; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador*), ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paras.66–77; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 Feb. 2010.

7)

Rule 39 of the ICSID Arbitration Rules provides as follows: '(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures. (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1). (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations. (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations. (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution. (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.'

8)

On the competence of the Annulment Committee to grant provisional measures, see *Libananco Holdring Co. v. Republic of* Turkey, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Provisional Measures, 7 May 2012, para. 15.
9)

R. Dolzer and C. Schreuer, *Principles of International Investment Law*263 (Oxford U. Press 2008).
10)

Ibid.
11)

Ibid.
12)

Ibid.
13)

Further, in *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24, 6 Sep. 2005, the ICSID Tribunal stated at para.38 as follows: 'Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Art. 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult.'
14)

Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 Jun. 2009.
15)

See Section 2.1 below.
16)

See Section 2.2 below.
17)

As Rudolph Dolzer and Christoph Schreuer state in their authoritative *Principles of International Investment Law*'[t]*he guiding principles for the indication of provisional measures are urgency and necessity*.' (R. Dolzer and C. Schreuer, *Principles of International Investment Law*263 (2008).)
18)

*Saipem S.A. v. People's Republic of Bangladesh***,** ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007, para.174.
19)

Biwater Gauff (Tanzania) Ltd v. Tanzania, Procedural Order No. 1, ICSID Case No. ARB/05/22, 31 Mar. 2006, para.76.
20)

Azurix Corp v. The Argentine Argentina, Decision on Provisional Measures, 6 Aug. 2003, para.33.
21)

This broad approach to the power has also been affirmed by Thomas Buergenthal, President of the ICSID Tribunal (now Judge of the International Court of Justice) in the provisional measures phase of the case *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 3, 5 Nov. 1998, when he stated: '*the Tribunal considers that the provisional measures envisaged under Article 47 of the ICSID Convention are not exceptional measures in the sense that they require more than a showing that they are necessary to preserve the rights of the parties ....*' (page 2)
22)

Quiborax SA v. Bolivia, Decision on Provisional Measures, ICSID Case No. ARB/06/2, 1 Feb. 2010, para.153.
23)

City Oriente v. Ecuador, Decision on Provisional Measures, 19 Nov. 2007, para.69.
24)

ICJ. Reports 1973, 135, 139, para.22.
25)

See also, e.g., *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 Jun. 2003, ICJ Reports 2003, 107, para. 22; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 Oct. 2008, ICJ Reports 2008, 353, 392–393, para. 129; and *Aegean Sea Continental Shelf* case, ICJ Reports 1976, 3, 11, para. 32.
26)

Jorg Kammerhofer, '*The Binding Nature of Provisional Measures of the International Court of Justice: the 'Settlement' of the Issue in the LaGrand Case*', 16 Leiden J. Intl. L. 67–83 (2003).

27)

Christoph Schreuer *et al.*, *The ICSID Convention, A Commentary* (CUP, Cambridge 2009), 759.
28)

Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures of 25 Sep. 2001, at para.2.
29)

Tokeles v. Ukraine, Procedural Order No 3., para.8.
30)

Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, 6 Apr. 2007, para.33.
31)

Article 28(1) of the 2012 ICC Rules.
32)

Article 47 of the ICSID Convention.
33)

Article 28 of the 2012 ICC Rules.
34)

This unusual restriction applies both before and after the tribunal is constituted and is a reflection of the intent that the ICSID system be self-contained. See Christoph Schreuer *et al.*, *The ICSID Convention, A Commentary* (CUP, Cambridge 2009), 351–352.
35)

Consider, for example, litigation in domestic courts that can be instituted by parties to a case being heard in international courts (even the ICJ) or in other arbitral tribunals.
36)

As quoted in *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador),* ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 Jun. 2009, para.81.
37)

Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua' 14 Eur. J. Intl. L. 867 (2003).
38)

Consider, for example, the following provisional measures Order by the ICJ in the *Request for Interpretation of the Judgment of 15 Jun. 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* case: 'Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone' (*Request for Interpretation of the Judgment of 15 Jun. 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Request for the indication of Provisional Measures, Order 18 Jul. 2011, para. 69, available at www.icj-cij.org.)
39)

Consider, for example, the following: *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 Oct. 2008, ICJ Reports 2008, 353; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Provisional Measures, Order of 1 Jul. 2000, ICJ Reports 2000, 128, para.43; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria),* Provisional Measures, Order of 15 Mar. 1996, ICJ Reports 1996, 24, para.48.
40)

Article 92 of the UN Charter (signed 26 Jun. 1945, entered into force 24 Oct. 1945) 1 UNTS 16.
41)

Article 1(1) of the UN Charter.
42)

The fact that the UN Security Council is dealing with a specific matter, or an aspect of it, does not preclude the ICJ from granting provisional measures. As the ICJ stated in the Provisional Measures phase of the case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*: 'Security Council Resolution 1304 (2000), and the measures taken in its implementation do not preclude the Court from acting in accordance with its Statute and with the Rules of the Court' (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case, Provisional Measures, ICJ Reports 2000, 126 at para. 36.
43)

Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* 219–220 (Oxford U. Press 2005).
44)

Anglo-Iranian Oil Company case, Order of 5 Jul. 1951, ICJ Reports 1951, 89.
45)

Anglo-Iranian Oil Company case, Order of 5 Jul. 1951, ICJ Reports 1951, 89 at 93–94.

46)

Ibid.

47)

ICSID Tribunals have granted provisional measures to a Claimant in order to prevent a host State from taking action that would significantly affect the Claimant's ability to continue to operate its business. For example, the ICSID Tribunal in *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador),* ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 Jun. 2009, stated that '[t]here is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs [production sharing contracts for the exploration and exploitation of oil fields in the Amazon Region] are in force and, subject to the controversy about the Law 42 payments, appear to be performed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.' (*Ibid*., para.65. Emphasis added.) The ICSID Tribunal in making this finding dismissed Ecuador's arguments about its duty to enforce municipal law as part of its sovereign rights. The ICSID Tribunal stated 'the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Art. 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.' (*Ibid.*, para. 65.)

Moreover, the Claimant in *Burlington* sought to constrain Ecuador from demanding, or seeking to procure, any payments that were allegedly due under a new Ecuadorian law ['Law 42']. This Law 42 purported to increase the tax burden on companies (such as the Claimant) who had concluded an oil concession with Ecuador by imposing a new tax on so-called extraordinary revenues. The ICSID Tribunal in *Burlington* found that a 'balanced solution likely to preserve each Party's rights' would be to establish an escrow account where all the funds purportedly due under the contested Law 42 could be held pending the Tribunal's Award. The Tribunal went on to state: 'The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would reasonably expect both Parties to continue the performance of the PSCs under their terms.' (*Ibid*., para. 87).

48)

The ICJ website (www.icj-cij.org) contains for all contentious cases and advisory opinions a complete record of written and oral submissions by the parties before the Court, and of course all Orders, Judgments, and Advisory Opinions by the Court in these cases.

49)

Biwater Gauff (Tanzania) Ltd v. Tanzania, Procedural Order No. 3, ICSID Case No. ARB/05/22, 29 Sep. 2006, at para.163.

50)

Moreover, in *EDF (Services) Ltd v. Romania*, Procedural Order No 2, ICSID Case No ARB/05/13, 30 May 2008, the ICSID Tribunal stated as follows: '49. In the Tribunal's view, the circumstances of the case are such that no harm presently exists for the integrity of the arbitral process. However, it is evident that for the press, a case which has been characterized by the article in the Financial Times as a '$100m corruption suit' is of such a great appeal that it would not be surprising were the pressure on everyone involved in this arbitration to increase in the near future. 50. The Tribunal will not tolerate a situation in which the course of the arbitral process is in any way put at risk of derailment by some sort of parallel process conducted by and through the press. As stated by the Tribunal in the *Biwater Gauff v. Tanzania* case, although in somewhat different circumstances, 'It is self-evident that the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure. This is all the more so in very public cases, such as this one, where issues of wider interest are raised, and where there is already substantial media coverage, some of which already being the subject of complaint by the parties' (*Gauff* Order, para.136). 51. The Tribunal shares this position, which finds support in a number of previous decisions. Thus, in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on hearing of Respondent's objection to competence and jurisdiction, 5 Jan. 2001), the Tribunal, after recognizing that there is no general obligation on the parties under the ICSID Convention and the Rules the effect of which would be to preclude discussing the case in public, held that 'it would be of advantage to the orderly unfolding of the arbitral process if during the proceedings the parties were to limit public discussion to what is considered necessary' (para.26). Likewise, in *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB (AF)/97/1), Decision on a Request by the Respondent for an Order prohibiting the Claimant from revealing information regarding the Case, 27 Oct. 1997), the Tribunal held that information to the public should be avoided, 'subject only to any externally imposed obligation of disclosure by which either of them may be legally bound' (para.10).'

51)

Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 Jun. 2009, para.75.

52)

Ibid., para.81.

53)

Biwater Gauff (Tanzania) Ltd v. Tanzania, Procedural Order No. 1, ICSID Case No. ARB/05/22, 31 Mar. 2006, para.75.

54)

Perenco Ecuador Ltd v. Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), Decision on Provisional Measures, ICSID Case No ARB/08/6, 8 May 2009, at para.43.

55)

Cf. the approach of the ICSID Tribunal in *Plama Consortium Limited v. Bulgaria*, Provisional Measures Order, ICSID Case No ARB/03/24, 6 Sep. 2005, where the ICSID Tribunal stated that 'irreparable prejudice' is only one of a number of potential bases for a finding of necessity, although in practice the outcome of this approach is the same. An ICSID Tribunal does not have to make a finding of 'irreparable prejudice' before it can make a grant of provisional measures. The ICSID Tribunal in *Plama Consortium* stated: 'The need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage. Provisional measures are appropriate to preserve the exclusivity of ICSID arbitration to the exclusion of local administrative or judicial remedies as prescribed in Art. 26 of the ICSID Convention. They are also appropriate to prevent parties from taking measures capable of having a prejudicial effect on the rendering or implementation of an eventual award or which might aggravate or extend the dispute or render its resolution more difficult.' (*Plama Consortium Limited v. Bulgaria*, Provisional Measures Order, ICSID Case No ARB/03/24, 6 Sep. 2005, para.38. Emphasis added.)

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