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# *Chapter 45: Interim/Provisional Measures*

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*Occidental v. Ecuador*, ICSID Case No. ARB/06/11 (1)

## I. INTRODUCTION

### A. Overview of Provisional Measures

This chapter focuses on provisional measures in the ICSID system. According to Article 47 of the ICSID Convention:

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.

The application of Article 47 is set out in detail in ICSID Arbitration Rule 39:

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

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(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1). ●

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

This Rule, as amended on 10 April 2006, (2) notably allows a party seeking provisional measures to introduce a request at any time after the institution of the arbitral proceedings, including before the constitution of the tribunal.

In addition, a party may request a Temporary Restraining Order ("TRO") until the tribunal renders the decision on provisional measures, in case the party considers the situation very urgent. (3) A TRO implies the existence of the same conditions as a decision on provisional measures.

Provisional measures are widely recognized as "extraordinary measures which should not be recommended lightly." (4) Arbitral tribunals hence follow a thorough analysis in order to decide whether to grant provisional measures.

If one were to try to summarize the conditions most often considered as necessary by international arbitral tribunals in order to grant provisional measures, a reference could be made to a decision on provisional measures of 2 September 2008 in which the tribunal stated that "[i]t is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) *prima facie* jurisdiction, (2) *prima facie* establishment of the case, ● (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality." (5)

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These different conditions for the exercise of the power to grant provisional measures will be examined in turn.

First, tribunals start by proceeding with a review of their *prima facie* jurisdiction, (6) which is usually not a complex task. Once jurisdiction is affirmed, arbitral tribunals refer to the relevant ICSID provisions in order to establish their authority to grant provisional measures.

Second, ICSID tribunals focus on the rights to be preserved by the party requesting the provisional measures, which is a somewhat more subtle exercise.

Interim relief may be requested to preserve *substantive rights* that are the subject matter of the dispute. (7) In this case, provisional measures are not deemed to grant to the requesting party the precise relief it is asking for in the arbitration, but should protect the possibility of such relief. In other words, "the provisional measure requested must not prejudge the merits of the case, which is further explained by the fact that it is a measure of protection and not of

enforcement." (8) Moreover, when the ownership of a right is contested, an arbitral tribunal cannot grant to the requesting party more rights than it ever possessed. (9)

However, tribunals also consider provisional measures in order to preserve *procedural rights* linked to the disputed substantive rights. (10) The most common measures granted on this ground are measures adopted to preserve the *status quo* (non-aggravation of the dispute), to protect the tribunal's jurisdiction (exclusivity of ICSID proceedings), to preserve evidence or to prevent from the non-performance of an award on costs. (11) Indeed, a number of tribunals have taken the position that the general right to preservation of the *status quo* and to the non-aggravation of the dispute ● are "self-standing" rights, which may by themselves form the subject of a provisional measures order. (12)

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Third, ICSID tribunals review whether both urgency and necessity to avoid irreparable harm require provisional measures. A provisional measure is necessary when the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked." (13) Urgency is constituted in a situation where there is a risk of definitive loss of the right claimed in the arbitration before the award is rendered. ICSID tribunals define "irreparable harm" as harm that cannot be adequately remedied by monetary compensation. The two elements of urgency and necessity, which imply the risk of an irreparable harm to the claimant's identified rights, can be subsumed under one larger requirement, as has been done in the following terms:

> [I]n order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm. (14)

Once the previously mentioned conditions are satisfied, many tribunals still verify a last condition, which is the satisfaction of a proportionality test, which will be developed in the next point.

## B. The Importance of Provisional Measures in Relation to the ICSID System and Investor-State Arbitration

Provisional measures are a common element in national as well as international adjudication and arbitration. (15) The possibility to grant provisional measures is indeed provided in various international dispute settlement rules. (16)

### 1. The Binding Character

The importance of provisional measures is confirmed by the recognition of their binding nature by ICSID tribunals. The question of the legal scope of provisional measures has been the subject of much debate, but seems to be solved today. The International Court of Justice ("ICJ") was the first to affirm the principle of their binding nature, when it declared the following in the *LaGrand* judgment: "The power to indicate provisional measures entails that such measures should be binding." (17) ● Article 47 of the ICSID Convention was modeled on Article 41(1) of the Statute of the ICJ. (18) The only difference is that the verb "recommend" is used in Article 47 of the ICSID Convention while "indicate" is used in the corresponding Article of the ICJ's Statute. With a few exceptions, (19) ICSID tribunals widely embrace the view that provisional measures have a binding nature. (20) As far as the materialization of this binding nature is concerned, ICSID tribunals concur on their authority to draw negative inferences should a party fail to comply with the ordered provisional measures. (21)

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### 2. The Specificity of the Balancing of Interest and the Proportionality Test

Provisional measures are under a tension between preserving rights to provide adequate remedy on the one hand and not prejudging the merits of the case on the other hand. The final version of Article 47 of the ICSID Convention reflects this "compromise between those who wanted powerful provisional measures and those who found them unnecessary." (22)

Moreover, some tribunals have insisted on the specificity of the analysis required for granting provisional measures in the ICSID context, because of the presence of the sovereign powers of the State. This has been adequately elaborated on in *Caratube v. Kazakhstan II*, where the tribunal explained:

> For the Tribunal, this implies that the requested measures be 'appropriate' in the circumstances of the individual case to achieve their purpose. This includes a balancing of the Parties' respective interests at stake. The fact that the Respondent is a State is relevant in this regard. Indeed, any party to an arbitration should adhere to some procedural duties, including to conduct itself in good faith; moreover, one can expect from a State to adhere in that very capacity, to at least the same principles and standards, in particular to desist from any conduct in this Arbitration that would be incompatible with the Parties' duty of good faith, to respect equality and not to aggravate the dispute. But this Tribunal must be mindful when issuing provisional measures not to unduly encroach on the State's sovereignty and activities serving public interests. (23)

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One important example – which concerns requests for a *stay of criminal proceedings* – of this self-restraint of ICSID tribunals faced with the utilization of the power of a State to enforce its criminal laws is the way they handle requests for impeaching the State to pursue criminal

investigations. Unless it is clear that it is a means to interfere in the ICSID arbitration, (24) ICSID tribunals consider that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state." (25) Even in *Quiborax v. Bolivia*, where the tribunal ordered a stay of criminal prosecution due to the very particular circumstances of the case, the tribunal did recognize the importance of non-interfering with the sovereign powers of the State to enforce its criminal laws in order to safeguard public order:

The Tribunal has given serious consideration to Respondent's argument that an order granting the provisional measures requested by Claimants would affect its sovereignty. In this respect, the Tribunal insists that it does not question the sovereign right of a State to conduct criminal cases. (26)

Another example of the cautious approach of international tribunals concerns requests for *stay of the payment of taxes*. ICSID tribunals recognize the importance of the taxing power of the State and its margin of discretion in this domain. Usually, this type of provisional measure is not granted, due to the importance of the fiscal power of the State, but in case some windfall profit taxes or excessive levies endanger the existence of the investor, they can be granted, with a mechanism of escrow account, (27) in which the investor is required to pay the contested taxes until the tribunal has determined whether such taxes violate or not the rights of the investor.

## II. THE CASE

### A. *Occidental v. Ecuador* (28)

The Decision on Provisional Measures in *Occidental v. Ecuador* is selected as a landmark decision on provisional measures.

#### 1. The Facts

In this arbitration, Occidental Petroleum Corporation ("OPC") and Occidental Exploration and Production Company ("OEPC"), the Claimants, alleged that the Republic of Ecuador, the Respondent, breached its obligations under both domestic law and general international law, as well as under the Treaty between the United States of ● America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment ("BIT"). The Claimants additionally relied on an agreement referred to as the "Participation Contract" dated 21 May 1999 between OEPC, Ecuador and Petroecuador, Ecuador's national oil company, in connection with the exploration and exploitation of hydrocarbons in "Block 15" of the Ecuadorian Amazon region.

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The dispute specifically arose because OEPC entered into a Farmout Agreement with Alberta Energy Corporation Ltd. ("AEC"), a Bermuda subsidiary of the Canadian oil and gas company "EnCana Corporation," which Ecuador considered as being in violation of both the Participation Contract and Ecuadorian law, with the consequence that the Ecuadorian Minister of Energy and Mines issued a "*Caducidad*" Decree dated 15 May 2006 ("*Caducidad* Decree"), in order to terminate the Participation Contract with OEPC.

#### 2. The Parties' Arguments

On 17 May 2006, Claimants filed a Request for Arbitration against Respondent setting forth an initial iteration of the provisional measures sought. (29) In their Application dated 18 October 2006, Claimants particularized their request for provisional measures. (30) Although Claimants' request for provisional measures was significantly modified until the hearing, their main claim was intended to preserve their alleged right to specific performance of the Participation Contract. Furthermore, Claimants requested the preservation of their right to "prevent further aggravation of the dispute."

Respondent argued that "[t]here is no right to specific performance of a natural resources concession agreement that has been terminated or cancelled by a sovereign State; the lawful remedy in the event of wrongful or illegal action by the State is payment of monetary compensation … Since the 'right' on which the Claimants' provisional measures request is based does not exist, it follows that the request must be denied." (31) Subsidiarily, Respondent also objected to Claimants' allegations of an "aggravation of the dispute" "because there is no act by, or contemplated by, Respondent that constitutes aggravation of the dispute." (32)

#### 3. The Tribunal's Analysis

After confirming its *prima facie* jurisdiction and authority to grant provisional measures, the *Occidental* Tribunal rejected both of Claimants' requests for provisional measures based on the rights to specific performance and non-aggravation of the dispute. According to the Tribunal, the requests neither related to a right to be preserved nor emerged from circumstances of necessity and urgency to avoid irreparable harm.

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### B. *Occidental v. Ecuador* in Context

In *Occidental v. Ecuador*, the Tribunal's analysis of the request for provisional measures unfolds in three parts. The Tribunal first recapitulates the test to be followed when deciding a request

for provisional measures. Second, the Tribunal clarifies the rights that can be protected by provisional measures. Third, it rejects in turn the two specific requests for provisional measures.

**1. The Test Followed by the Tribunal**

The Tribunal firstly focuses on its power to grant provisional measures and the scope of such authority. The Tribunal finds that it has *prima facie* jurisdiction to grant provisional measures. (33) Further, the Tribunal recalls that its authority to grant provisional measures is governed by Article 47 of the ICSID Convention and ICSID Arbitration Rule 39. Interestingly, the Tribunal "wishes to make clear for the avoidance of doubt that, although Article 47 of the ICSID Convention uses the word 'recommend,' the Tribunal is, in fact, empowered to order provisional measures." (34)

The test applied by the Tribunal deciding on Claimants' request for provisional measures is the following:

The Tribunal will thus examine, first, the alleged existence of rights of the Claimants deserving of protection and, second, the alleged existence of a situation of necessity and urgency relative to these rights. (35)

**2. The Rights Protected by Provisional Measures**

Secondly, the Tribunal proceeds to a clarification of the "rights" that can be protected by way of provisional measures. This is independent from the Tribunal's recognition of the existence of such rights. The Tribunal indeed considers the following:

The right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact. The Tribunal, at the provisional measures stage, will only deal with the nature of the right claimed, not with its existence or the merits of the allegations of its violation. (36)

**3. The Two Requests for Provisional Measures**

Thirdly, the Tribunal reviews the rights referred to by Claimants as the basis for their request for provisional measures.

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a. Request of Provisional Measures on the Basis of a Right to Specific Performance

With regard to the alleged right to specific performance, the Tribunal notes that Claimants are in fact seeking to be restored in their oil concession. (37)

The Tribunal recalls that the Claimants consider that they have a right to restitution in the form of reinstatement of their acquired rights derived from the Participation Contract and the Operating Agreements, which have been cancelled by Ecuador through the *Caducidad* Decree, which means that they request in fact that the decision to terminate the contract adopted by Ecuador be annulled by the Tribunal.

The Tribunal denies the provisional measures requested in relation to Claimants' alleged right to specific performance of the Participation Contract.

This is first because the Claimants failed to establish a "strongly arguable right to specific performance." (38) Specific performance in the sense of *restitutio in integrum* is indeed the primary remedy in international law, however it is not an absolute right, but rather "a conditional right, as it is precisely conditioned on the possibility of performance, and consequently hindered by its impossibility." (39)

The Tribunal notes that it is not aware of any precedent "where an ICSID tribunal has granted the kind of specific performance against a State that the Claimants seek in the present arbitration." (40) The key determination of the Tribunal is that "where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible." (41)

In accordance with Article 35 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, (42) the Tribunal further finds that specific performance would be disproportionate in the circumstances of this case: (43)

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To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation. (44)

Second and subsidiarily, the Tribunal finds that there is neither urgency nor necessity to grant the measure sought in order to avoid imminent and irreparable harm. This is because "the Tribunal is convinced ... that ... there is no imminent plan on the part of the Ecuadorian Government to hand over Block 15 and hence no risk of irreparable harm." (45)

b. Request for Provisional Measures on the Basis of the Right to Non-aggravation of the Dispute

Referring to the decision rendered in *VictorPey Casado v. Chile*, (46) the Tribunal recognizes the existence in international law of a right of non-aggravation of the dispute. However, the

Tribunal finds that the requested provisional measure does not guarantee non-aggravation of the dispute and rejects what it considers to amount to a claim for mitigation of damages. (47)

## III. *OCCIDENTAL v. ECUADOR*'S IMPACT AND CONTRIBUTION TO THE DEVELOPMENT OF INVESTMENT LAW

*Occidental v. Ecuador* contributes to the development of investment law essentially on two issues. First, this Decision brings an interesting perspective on the "rights to be preserved." Second, the landmark case affirms as a principle of international law that where a State terminated the disputed license or contract in the exercise of its sovereign powers, specific performance is an impossible remedy.

### A. The Preservation of "Theoretically Existing Rights" via Provisional Measures

The Decision on Provisional Measures in *Occidental v. Ecuador* brings an interesting perspective on the key issue of the "rights to be preserved."

In *Occidental v. Ecuador*, the Tribunal explains that the right to be preserved has to be asserted as a "theoretically existing right." (48) This requirement is twofold.

As far as the "existence" of rights to be protected is concerned, it is a widely accepted principle that the requested interim measures must be linked to the claims on the merits. (49)

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But the *Occidental* Tribunal also requires that the alleged right may be legally protected. The Tribunal details that this right is neither a right proven to exist in fact, (50) nor a "simple interest which does not entail legal protection." (51)

This requirement set by the *Occidental* Tribunal rings the bell of the "plausibility of rights" test adopted by the ICJ in order to decide requests for the indication of provisional measures, as well as by some ICSID tribunals. (52) Beyond the ICSID system, the UNCITRAL Model Law and Arbitration Rules also require as a condition for granting provisional measures that "there [be] a reasonable possibility that the requesting party ... succeed on the merits of the claim." (53)

Nevertheless, in *Occidental v. Ecuador*, the Tribunal focuses on the legal nature of the right to be preserved, in place of performing a *prima facie* analysis on the merits pursuant to the "plausibility of rights" or *fumus boni iuris* test. (54) This approach seems unique in the international arbitration practice. In its Decision on Revocation of Provisional Measures and Other Procedural Matters, the *City Oriente* tribunal indeed applied the *fumus boni iuris* test. (55) In *Burlington v. Ecuador*, another tribunal reviewed the theoretical existence of a *prima facie* right to specific performance, and considered that "at first sight at least, a right to specific performance appears to exist." (56) This analysis does not contradict the analysis performed in *Occidental v. Ecuador*, as the contract had not yet been terminated by the State, which is quite a different factual and legal situation.

The *RSM v. Saint Lucia*'s tribunal order to claimant to post security for costs – which is so far the only tribunal having adopted such an order – stresses the relevance of the "theoretically existing right" test, compared with the sole review of the *prima facie* existence of the right. (57)

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The *RSM* tribunal is satisfied that "without making any ● prejudgment of the merits, respondent's position is at least plausible, *i.e.* a future claim for cost reimbursement is not evidently excluded." (58) By contrast, security for costs would probably not fulfill the "theoretically existing right" test. The admission of security for costs as a right to be preserved is precisely questioned in the dissenting opinion of Edward Nottingham: (59)

Because Article 47 (carefully, I suggest) uses the verb 'preserve,' it is only by stretching the language beyond sensible limits that individual tribunals can find that a contingent claim to an award of costs qualifies as a 'right.'

### B. The Impossibility to Claim Specific Performance Pursuant to a State's Termination of the Disputed Contract in the Exercise of Its Sovereign Powers

The Tribunal in *Occidental v. Ecuador* has come to the conclusion that there is no such right as a right to specific performance, because a claimant can never ask an international tribunal to annul a sovereign decision to terminate a contract or to nationalize an asset, as it can only grant damages if the decision of the State is considered to be in violation of international law. (60)

This finding of the Tribunal does not question the primary nature of restitution as a remedy in international law, (61) but the Tribunal was concerned with exceptions to the availability of specific performance as a remedy in international law. (62)

The Tribunal mainly focuses on determining "whether the specific performance requested ... is possible or impossible in the circumstances of [the] case." (63)

The ruling of the *Occidental* Tribunal with regard to the impossibility of specific performance of a contract pursuant to its termination by the State in the exercise of its sovereign powers is unprecedented in investment law. But the same idea underlies other decisions. The Tribunal refers to the statement made in *CMS v. Argentina*, according to which "it would be utterly unrealistic ... to order ... to turn back to the regulatory framework existing before the emergency measures were adopted." (64) However, this declaration emerges from a final

award and does not justify a ruling on provisional measures. In *Tanesco v. Tanzania*, another ICSID tribunal ruled that a request for provisional measures could not be aimed at obtaining specific ● performance of the contract. (65) This tribunal yet focused on the scope of its jurisdiction to grant provisional measures rather than on the possibility of a right to specific performance. (66) In the *ad hoc* arbitration *Kuwait v. Aminoil*, (67) impracticability to restore the *status quo ante* following the annulment of the concession by the Kuwait decree was agreed by the parties, but not erected as a principle by the tribunal.

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The *Occidental v. Ecuador* Decision remains unchallenged by subsequent tribunals. The Tribunal observes that the *Texaco v. Libya* arbitration is the unique occurrence where a tribunal granted specific performance. (68) However, this was exceptional since the respondent State had not argued before the tribunal that specific performance was impossible.

ICSID tribunals ruling on similar matters essentially rely on the distinctive question whether the contract in dispute has been terminated when the proceedings are initiated. The *City Oriente* tribunal notices that in *Occidental v. Ecuador*, the *Caducidad* Decree, which terminated the Participation Contract, was anterior to the filing for ICSID arbitration. (69) Conversely, in *City Oriente v. Ecuador*, the request for arbitration was filed before an expiration order of the contract was issued. (70) In *Perenco v. Ecuador*, the tribunal limits itself to the following observation: "[h]ad the contracts been terminated, it may be (this Tribunal need express no opinion) that the principle articulated by the Tribunal in the Decision on Provisional Measures in *Occidental v. Ecuador*, would be applicable." (71) In *Burlington v. Ecuador*, the tribunal equally finds it "unnecessary" to consider the view that "the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State." (72) This is because the production sharing contracts entered into in this case had not been terminated before the proceedings.

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## IV. CONCLUSION

The *Occidental* Tribunal interestingly adds on to the notion of "rights to be protected" by provisional measures at ICSID. First, the Tribunal emphasizes its role in defining such rights. Second, it offers an approach emancipated from the "plausibility of rights" test, which enables it to appreciate the possible legal existence of the rights, before looking at the *prima facie* factual possibility of their existence, without prejudging the case on the merits.

The Tribunal essentially sheds light on the substance of investment law, ruling that specific performance is an impossible remedy where the State terminated a contract or license or any other foreign investor's entitlement in the exercise of its sovereign powers. This finding is both unprecedented and unchallenged in investment law. More generally, this Decision illustrates the delicate position of ICSID tribunals required to balance the investor's right and the State's sovereign powers, for the sake of legitimacy of the ICSID system and of the rule of international law.

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## References


1) *Occidental Petroleum Corporation, Occidental Exploration and Production Company v.Republic ofEcuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007) (Fortier, Williams, Stern) [hereinafter *Occidental v.Ecuador*].
2) The amendment brought to ICSID Arbitration Rule 39 allows a party seeking provisional measures to introduce the request at any time after the institution of the arbitral proceedings, even before the constitution of the tribunal. The first paragraph was accordingly modified in 2006 and a new paragraph 5 was inserted to provide for that eventuality. Art. 46 of the ICSID Additional Facility Rules provides a similar mechanism for a tribunal to grant provisional measures. This provision however was not amended in 2006 to reflect the changes brought in ICSID Arbitration Rule 39. *See* Christoph H. Schreuer with Loretta Malintoppi, August Reinisch & Anthony Sinclair, *The ICSID Convention: A Commentary* 760, ¶¶ 5-7 (2nd ed., Cambridge University Press 2009).
3) *See, e.g.*, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (29 June 2009) (Kaufmann-Kohler, Orrego Vicuña, Stern), ¶ 24 [hereinafter *Burlington v. Ecuador*].
4) *Phoenix Action Ltd. v. TheCzech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures (6 April 2007) (Stern, Bucher, Fernández-Armesto), ¶ 33 [hereinafter *Phoenix v. Czech Republic*]; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (Decision on Request for Provisional Measures) (28 October 1999) (Orrego Vicuña, Buergenthal, Wolf), ¶ 10 [hereinafter *Maffezini v. Spain*].
5) *SergeiPaushok et al. v. The Government of Mongolia*, UNCITRAL 1976, Order on Interim Measures (2 September 2008) (Lalonde, Grigera Naón, Stern), ¶ 45 [hereinafter *Paushok v. Mongolia*].

6) The *prima facie* jurisdiction test includes a review of jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione voluntatis*. *SeeQuiborax S.A. and Non-Metallic Minerals S.A. v.PlurinationalState ofBolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010) (Kaufmann-Kohler, Lalonde, Stern), ¶¶ 109-112 [hereinafter *Quiborax v. Bolivia*].
7) *See*, *e.g.*, *Burlington v. Ecuador,supra*n.3, ¶ 60; *Quiborax v. Bolivia,supra*n.6, ¶ 117.
8) *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v.Republic ofKazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures (4 December 2014) (Lévy, Aynès, Salès), ¶ 87 [hereinafter *Caratube v. Kazakhstan II*].
9) *Phoenix v.CzechRepublic*, *supra*n.4, ¶ 37 ("[P]rovisional measures are deemed to maintain the *status quo*, not to improve the situation of the Claimant before the rendering of the Tribunal's award").
10) *Plama Consortium Limited v.Republic ofBulgaria*, ICSID Case No. ARB/03/24, Order (6 September 2005) (Salans, van den Berg, Veeder), ¶ 40; *Biwater Gauff (Tanzania) Ltd. v.UnitedRepublic ofTanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006) (Hanotiau, Born, Landau), ¶ 71 [hereinafter *Biwater v. Tanzania*]; *Burlington v.Ecuador,supra*n.3, ¶ 60; *Quiborax v.Bolivia,supra*n.6, ¶¶ 117-118.
11) Gabrielle Kaufmann-Kohler & Aurélia Antonietti, "Interim Relief in International Investment Agreements" in *Arbitration under International Investment Agreements: an Analysis of the Key Procedural, Jurisdictional and Substantive Issues* 518 (Katia Yannaca-Small (ed.), Oxford University Press 2010).
12) *Quiborax v. Bolivia*, *supra*n.6, ¶ 117. *See alsoBurlington v. Ecuador*, *supra*n.3, ¶ 60; *Biwater v.Tanzania,supra*n.10, ¶ 71.
13) *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order, Separate Opinion of President Jiménez de Aréchaga, 11 September 1976, ICJ Reports 1976, p. 16.
14) *Occidental v. Ecuador,supra*n.1, ¶ 61(emphasis in original).
15) Schreuer, *supra*n.2, at 758, ¶ 1.
16) *See*, *e.g.*, ICJ Statute, Art. 41(1), ICJ Rules, Arts. 73-78; UNCLOS, Art. 290; ITLOS Rules, Art. 89(1); ECHR Rules, Rule 39; NAFTA, Art. 1134a; UNCITRAL Model Law, Art. 17A; UNCITRAL Rules, Art. 26; ICC Rules, Art. 28; LCIA Rules, Art. 25.
17) *LaGrand (Germany v.United States of America)*, Judgment (27 June 2001), ICJ Reports 2001, ¶ 102.
18) Art. 41(1) of the Statute of the ICJ provides that "[t]he Court 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."
19) *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) (Kaufmann-Kohler, Schreuer, Otton), ¶¶ 183-185; *Caratube International Oil Company LLP v. The Republic ofKazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Provisional Measures (31 July 2009) (Böckstiegel, Griffith, Hossain), ¶ 67 [hereinafter *Caratube v. Kazakhstan I*].
20) Schreuer, *supra*n.2, at 764, ¶ 18. *See*, *e.g.*, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1 on Claimant's Request for Provisional Measures (1 July 2003) (Weil, Price, Bernardini), ¶ 4 [hereinafter *Tokios Tokelės v. Ukraine*]; *Maffezini v.Spain,supra*n.4, ¶ 9.
21) Schreuer, *supra*n.2, at 768, ¶ 31. *Victor Pey Casado and President Allende Foundation v.Republic ofChile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001) (Lalive, Bedjaoui, Leoro Franco), ¶¶ 17-24 [hereinafter *Pey Casado v.Chile*].
22) Schreuer, *supra*, n.2, at 759, ¶ 3.
23) *Caratube v. Kazakhstan II,supra*n.8, ¶ 121 (citations omitted).
24) *SeeQuiborax v. Bolivia,supra*n.6, ¶¶ 139-148.
25) *Caratube v. Kazakhstan I,supra*n.19, para. ¶ 137. *See alsoTokios Tokelės v.Ukraine*, *supra*n.20, Order No. 3 (18 January 2005), ¶¶ 12-13.
26) *Quiborax v. Bolivia,supra*n.6, ¶ 164.
27) *Burlington v. Ecuador*, *supra*n.3, ¶¶ 86-88; *Paushok v. Mongolia*, *supra*n.5, ¶¶ 79-91.
28) *Occidental v. Ecuador,supra*n.1.
29) *Ibid.*, ¶ 4 (referring to Claimants' Request for Arbitration, ¶¶ 76-77).
30) *Ibid.*, ¶ 5.
31) *Ibid.*, ¶ 42 (referring to Respondent's Counter-Memorial, ¶¶ 3-5).
32) *Ibid.*, ¶ 50 (referring to Respondent's Counter-Memorial, ¶ 95).
33) *Ibid.*, ¶ 55.
34) *Ibid.*, ¶ 58 (emphasis in the original). *Seesupra* Section I-B on the binding nature of provisional measures.
35) *Ibid.*, ¶ 61.
36) *Ibid.*, ¶¶ 63-64.
37) *Ibid.*, ¶ 66.
38) *Ibid.*, ¶ 75.
39) *Ibid.*, ¶ 75.
40) *Ibid.*, ¶ 78.
41) *Ibid.*, ¶ 79.

42) ILC Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission ("ILC") at its fifty-third session in 2001 [hereinafter ILC Articles].
43) *Occidental v. Ecuador,supra*n.1, ¶¶ 84-85. The same position has been adopted in *Libya American Oil Company (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 151 (1981) (Mahmassani), at 63 [hereinafter *LIAMCO v. Libya*], as well as in *BP Exploration Company (Libya) Limited v. Libyan Arab Republic*, 52 I.L.R. 297 (1974), at 354, where the arbitral tribunal stated: "[a] rule of reason therefore dictates a result which conforms both to international law, as evidenced by State practice and the law of treaties, and to the governing principle of English and American contract law. This is that, when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages."
44) *Occidental v. Ecuador,supra*n.1, ¶¶ 84-85.
45) *Ibid.*, ¶ 87.
46) *Ibid.*, ¶ 96 (referring to *Pey Casado v.Chile,supra*n.21, ¶ 67).
47) *Ibid.*, ¶ 100.
48) *Ibid.*, ¶ 64.
49) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order (8 April 1993), ICJ Reports 1993, p. 3, ¶ 35; *Application ofthe International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Order on Provisional Measures (15 October 2008), ICJ Reports 2008, p. 353, ¶ 118; Michael E. Schneider "Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice" in *Performance as a Remedy: non-Monetary Relief in International Arbitration* 7, 33 (Michael E. Schneider & Joachim Knoll (eds.), ASA Special Series No.30 2011).
50) *Occidental v. Ecuador,supra*n.1, ¶ 64.
51) *Ibid.,* ¶ 65.
52) *Questions relating to the Obligation to Prosecute or Extradite (Belgium v.Senegal),* Order on Provisional Measures (28 May 2009), ICJ Reports 2009, p. 139, ¶ 57 ("The power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible."). The same kind of reference can be found in *City Oriente Limited v. TheRepublic ofEcuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008) (Fernández-Armesto, Grigera Naón, Thomas), ¶ 20 [hereinafter *City Oriente v. Ecuador*], where the tribunal held that the party requesting provisional measures must prove that the rights invoked are plausible.
53) UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(b); 2010 UNCITRAL Arbitration Rules, Art. 26(3)(a).
54) Kaufmann-Kohler & Antonietti, *supra*n.11, at 520.
55) *City Oriente v.Ecuador,supra*n.52, ¶ 45 ("[A]t this stage, the sole decision to be made by the Arbitral Tribunal is whether the party requesting the provisional measures, City Oriente, has been able to prove *fumus boni iuris*, an appearance of good right.").
56) *Burlington v. Ecuador,supra*n.3, ¶ 71.
57) *RSM Production Corporation v.Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014) (Elsing, Nottingham, Griffith) [hereinafter *RSM v. Saint Lucia*].
58) *Ibid.,* ¶ 74.
59) *RSM v. Saint Lucia*, *supra*n.57, Dissenting opinion of Edward Nottingham, ¶ 7.
60) *Occidental v. Ecuador,supra*n.1, ¶ 79. Pursuant to Art. 35 of the ILC Articles: "[a] State *responsible for an internationally wrongful act* is under an obligation to make restitution ..." (emphasis added).
61) *Occidental v. Ecuador*, *supra* n.1, ¶ 73. *Case Concerning the Factory Chorzów*, Claim for Indemnity, Merits, P.C.I.J. Series A, No. 17, Judgment No. 13, 48; ILC Draft Articles, Art. 34; Schneider, *supra*n.49, at 31.
62) Art. 35 of the ILC Articles provides that material impossibility and a disproportionate burden compared to compensation are the two exceptions to a responsible State's obligation to re-establish the situation which existed before the wrongful act was committed.
63) *Occidental v. Ecuador,supra*n.1, ¶ 76.
64) *Ibid.,supra*n.1, ¶ 81, referring to *CMS Gas Transmission Company v. TheArgentineRepublic*, ICSID Case No. ARB/01/8, Award (12 May 2005) (Orrego Vicuña, Lalonde, Rezek), ¶ 406.
65) *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures (20 December 1999) (Rokison, Brower, Rogers) [hereinafter *Tanesco v. Tanzania*]. Aurélia Antonietti, *ICSID and Provisional Measures: An Overview*, 21 News from ICSID 2 (2004).
66) *Tanesco v. Tanzania*, *supra*n.65, ¶ 16 ("We do not go so far as to conclude that 'provisional measures' under Rule 39 can never include recommending the performance of a contract in whole or in part: it is not necessary for us to go that far. But where what is sought is, in effect, performance of the Agreement, and where the only right said to be preserved thereby is the right to enjoy the benefits of that Agreement, we consider that the application falls outside the scope of Rule 39, and therefore is beyond our jurisdiction to grant.").

67) *The Government of the State ofKuwait v. The American Independent Oil Company (Aminoil)*, Final Award (24 March 1982) (Reuter, Sultan, Fitzmaurice), 21 ILM 5, 976, 979 (1982), "Arbitration Agreement," para. III-1 ("The Parties recognize that the restoration of the Parties to their respective positions prior to 20 September 1977 and/or the resumption of the operations under the 28 June 1948 Agreement (as amended) would be impracticable in any event, and the Company will therefore seek monetary damages instead.").

68) *Occidental v. Ecuador,supra*n.1, ¶ 79 (referring to *LIAMCO v.Libya,supra*n.43, at 63).

69) *City Oriente v.Ecuador,supra*n.52, ¶ 41.

70) *Ibid.*, ¶¶ 41 and 43.

71) *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) (Bingham, Brower, Thomas), ¶ 48.

72) *Burlington v.Ecuador,supra*n.3, ¶¶ 70-71.