PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS

CAMERON MILES
of Gray's Inn, Barrister

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> [While the present proceedings are underway, works on the dam are likely to advance to a point where the possible restoration of the flow of the Kishenganga/Neelum to its natural channel will be rendered significantly more difficult and costly to the potential prejudice of any prescriptions that may be made by the Court in its Award.[150]

Reading between the lines, this paragraph seems to suggest that the Court was well aware of the situation, and resolved to take action accordingly. Consequently, whilst the Court did not feel bound under the terms of Paragraph 28 of Annexure G to utilize urgency and prejudice as prerequisites for the grant of provisional measures, it still saw such considerations as compelling intervention on an interim basis.

V Investor-State Arbitration

A Prejudice Before Investor-State Arbitration Tribunals

1 ICSID Arbitration

At one point in its history, it seemed that ICSID Article 47 would make express mention of a requirement of irreparable prejudice and urgency: a proposal to this effect was put forward during the negotiating of the ICSID Convention.[151] Although this notion was eventually defeated, and Article 47 assumed the skeletal form of Article 41 of the ICJ Statute, it has nonetheless become clear through the ICSID jurisprudence that provisional measures will be awarded only where a substantial threat to rights *pendente lite* can be established[152] (referred to occasionally as the requirement of 'necessity'[153]).

Considerations of harm – but not of irreparability – are visible in some of the early ICSID provisional measures decisions. In *Amco v Indonesia*, the

[150] *Kishenganga* (2011) 150 ILR 311, 357. [151] II-1 *ICSID History* 815.

[152] *ICSID Commentary*, 775–6; Loretta Malintoppi, 'Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order', in C Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Cambridge: Cambridge University Press, 2009) 157, 161–4; Gabrielle Kaufmann-Kohler and Aurélia Antonietti, 'Interim Relief in International Investment Agreements', in K Yannica-Small (ed), *Arbitration under International Investment Agreements: An Analysis of the Key Procedural, Jurisdictional and Substantive Issues* (Oxford: Oxford University Press, 2010) 507, 540–1. Also: *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22 (Procedural Order No 1, 31 March 2006) §61.

[153] See e.g. *Churchill Mining PLC v Indonesia*, ICSID Case No ARB/12/14 (Procedural Order No 3, 4 March 2013) §42: 'the requirement of necessity [. . .] implies the existence of a risk of irreparable or substantial harm'.

Within the context of the 2010 UNCITRAL Rules, a lesser standard reaffirmed *Behring International v Iranian Air Force* and *Paushok v Mongolia* appears to have prevailed.[197] Article 26(2)(b)(i) expressly provides that provisional measures may be awarded so as to prevent 'current or imminent harm', with the absence of the qualifying adjective 'irreparable' clearly implying that interim relief and monetary compensation for prejudice suffered are not mutually exclusive. This is reaffirmed in Article 26(3)(a) which refers to '[h]arm not adequately reparable by an award of damages'. This phrasing was, in turn, drawn from Article 17A(1)(a) of the 2006 UNCITRAL Model Law, which as mentioned contemplates a standard of prejudice beneath that of strict irreparability.

B Urgency Before Investor-State Arbitration Tribunals

1 ICSID Arbitration

(a) General Considerations of Urgency As with irreparable harm, urgency is mentioned nowhere in the text of Article 47 of the ICSID Convention, but has nonetheless developed over time to become a vital prerequisite of interim relief in the investor-state context: as Schreuer et al. have noted, 'it is clear that provisional measures will only be appropriate where a question cannot await the outcome of an award on the merits'.[198] That being said, some tribunals have not addressed urgency expressly, instead referring only to a burden on the applicant to demonstrate why its application should be granted.[199] Recent practice, however, has been for tribunals to refer to urgency as a distinct concept. In *Saipem v Bangladesh*, the Tribunal noted that 'Article 47 [. . .] requires that the requested measure be both necessary and urgent'.[200] In *Phoenix Action v Czech Republic*, it was said that '[i]t is common understanding that provisional measures should only be granted in situations of absolute necessity

[197] David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford: Oxford University Press, 2nd edn, 2012) 521–2; Kaufmann-Kohler and Antonietti, 'Interim Relief', 543–4.

[198] *ICSID Commentary*, 775, approved in *Biwater Gauff v Tanzania*, Procedural Order No 1, ICSID Case No ARB/05/22, §68.

[199] See e.g. *Emilio Agustín Maffezini v Spain*, Procedural Order No 2 (1999) 5 ICSID Reports 393, 394.

[200] *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/7 (Decision on Jurisdiction and Provisional Measures, 21 March 2007) §174.

and urgency, in order to protect rights that could, absent those measures, be definitively lost'.[201] In *Plama v Bulgaria*, it was declared that '[t]he need for provisional measures must be urgent and necessary to protect the *status quo* or avoid the occurrence of irreparable harm or damage'.[202] It is, moreover, tolerably clear that urgency in the ICSID context has developed along similar lines to those set out by the ICJ in *Great Belt*,[203] with the Court's discussion in that decision referred to in cases such as *Occidental v Ecuador*[204] and *Millicom v Senegal*.[205] Further elaboration was provided by the Tribunal in *Biwater Gauff v Tanzania*, which said:

> 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 measures 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 measures 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. The Arbitral Tribunal also considers that the level of urgency required depends on the type of provisional measure that is requested.[206]

(b) Risk of Materialization and Axiomatic Urgency When assessing the likelihood that prejudice will arise prior to the likely date of disposal, ICSID tribunals have clearly indicated that the possibility of materialization must be more than fanciful. In a comparatively early decision, the tribunal in *Azurix v Argentina* held that urgency as a prerequisite is 'related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award'.[207] Adopting a more rigourous standard, the tribunal in *Occidental v Ecuador* noted that the mere possibility of future harm was not sufficient to justify relief:

[201] *Phoenix Action v Czech Republic*, ICSID Case No ARB/06/6 (Provisional Measures, 6 April 2007) §32. In identical terms, see *Occidental v Ecuador*, ICSID Case No ARB/06/11, §43.
[202] *Plama v Bulgaria*, ICSID Case No ARB/03/24, §38.
[203] *ICSID Commentary*, 777; Kaufmann-Kohler and Antonietti, 'Interim Measures', 535.
[204] *Occidental v Ecuador*, ICSID Case No ARB/06/11, §59.
[205] *Millicom International Operations BV and Sentel GSM SA v Senegal*, ICSID Case No ARB/08/20 (Provisional Measures, 9 December 2009) §48.
[206] *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 1, §76.
[207] *Azurix Corporation v Argentine Republic*, ICSID Case No ARB/01/12 (Provisional Measures, 6 August 2003) §33.

a foregone conclusion. In such cases, a court or tribunal must tread very carefully to avoid ordering interim relief that might resolve the dispute between the parties or be otherwise irreversible.[187]

B Proportionality in Provisional Measures

In ordering interim relief, an international court or tribunal is impliedly elevating the interests of one party over another. Consequently, relief must be finely balanced to ensure that it does not unduly inconvenience the party that bears the burden of executing any measures so ordered. Put another way, if it has been determined that a right is in need of protection, then provisional measures should fulfill this objective in a manner that does not unnecessarily burden the respondent.[188] This general principle is not unique to international law, but is well known (but not identically expressed) in domestic forms of interim relief[189] and international commercial arbitration.[190] That being said, the question takes on additional relevance in an international setting, where state sovereignty might be restrained. Consequently, in *Paushok v Mongolia*, the Tribunal declared 'proportionality to be one of the five 'internationally recognized' prerequisites to the award of interim relief,[191] stating that 'the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties'.[192] Similarly, the tribunal in *Saipem v Bangladesh* said:

> [T]he Tribunal considers that under Article 47 of the ICSID Convention a tribunal enjoys broad discretion when ruling on provisional measures, but should not recommend provisional measures lightly and should weigh the parties divergent interests in light of all the circumstances of the case.[193]

[187] Rüdiger Wolfrum, 'Provisional Measures of the International Tribunal for the Law of the Sea', in P C Rao and R Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (The Hague: Kluwer, 2001) 173, 184.

[188] Luttrell, 'In the round', 405.

[189] See e.g. the 'balance of convenience' to be assessed when determining whether to award an interim injunction in English law: *American Cyanamid v Ethicon Ltd* [1975] AC 396, 405–10 (Lord Diplock).

[190] See e.g. UNCITRAL Model Law 2006, Art 17A(1)(a), which requires the tribunal to be satisfied that '[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted'. In similar terms, see also 2010 UNCITRAL Rules, Art 26(3)(a).

[191] *Paushok v Mongolia*, UNCITRAL, §45.

[192] Ibid, §79.

[193] *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/7 (Decision on Jurisdiction and Recommendations on Provisional Measures, 21 March 2007) §175 (emphasis added).