

Investment Claims

Part V Remedies and Costs, 24 Interim Relief in Investment Treaty Arbitration

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the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.²³

24.26 The rights to be preserved thus do not need to be the rights in dispute but need to bear a relation to the dispute as it is defined by the claims and the relief sought.²⁴

24.27 Rights that are eligible for protection are substantive as well as procedural:²⁵ they are rights to preservation of the *status quo* and non-aggravation of the dispute, the right to the exclusivity of the ICSID proceedings, rights to the procedural integrity of the arbitral proceedings, including access to evidence (whether documents or witnesses) and the integrity of the evidence, and the right not to prejudice the execution of the award, as will be discussed later in the chapter.

B. NAFTA Proceedings

24.28 NAFTA Article 1134, quoted above, provides for interim relief to preserve the rights of a disputing party. However, in contrast to the ICSID system, it makes clear that the rights in dispute cannot be the subject matter of the provisional measures. The reason for this appears to be that 'Articles 1134 and 1135 permit a state to implement and maintain a measure even if it breaches substantive rights contained in Chapter 11A. Thereafter, even if restitution (p. 641) is ordered, a State Party may choose to pay monetary damages instead'.²⁶ In proceedings conducted in accordance with the AF Arbitration Rules as modified by the provisions of NAFTA, Chapter 11, Section B, a tribunal rejected a request to order the respondent to cease and desist from any interference with the claimant's property whether by embargo or any other means. The tribunal considered that an order in the terms requested by the claimant would not be consistent with the limitations imposed by Article 1134 'since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117'.²⁷

C. UNCITRAL Arbitration Rules

24.29 The revision of the UNCITRAL Rules has brought significant changes as to the purpose for which a tribunal may grant interim measures.

1. The 1976 UNCITRAL Rule

24.30 The heading of Article 26 of the 1976 UNCITRAL Arbitration Rules reads 'Interim Measures of Protection'. The text, however, merely relates to 'measures [the tribunal] deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods'. This text, which elicited discussions over the years, has generally been understood not to restrict the power of the arbitral tribunal to order any type of interim measure it deemed appropriate.²⁸ According to a leading commentary, Article 26(1) should not be seen as an exhaustive list and was only meant to give examples.²⁹ In other words, measures could aim at any type of protection as long as it is necessary.

24.31 The practice of the Iran-US Claims Tribunal is of limited interest in this respect, given the commercial nature of many of the cases and the numerous applications to stay duplicative proceedings. In addition to the stay of proceedings, measures ordered have dealt with the conservation of goods,³⁰ the prohibition of the sale of goods, and the return of goods.³¹