

3<sup>ème</sup> commission

Provisional Measures

*Mesures provisoires*

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## FINAL REPORT: DECEMBER 23, 2016

### I. Introduction

1. Provisional and protective measures are necessary and available in public international law, private law, public law, and arbitration. A common thread is the preservation of the status quo pending final determination of the issues between the parties. In civil and commercial matters the function may include ensuring effective relief by securing assets from which a final judgment may be satisfied.
2. The Third Commission was established at the 2009 session in Naples, and held meetings at the successive sessions in 2011 (Rhodes), 2013 (Tokyo) and 2015 (Tallinn). The Rapporteur circulated a lengthy paper on the subject on July 15, 2015, and a preliminary report on April 16, 2016. This final report contains all of the substantive material in those documents and is intended to supersede them. This report also endeavours to take account of the many helpful suggestions made by members of the Commission, which are reproduced in the *travaux*.
3. The purpose of this report is to highlight some of the principal issues which arise in this fast-developing area, with a view to the restatement of general principles. One of the principal questions for consideration by the Institut will be whether a restatement of general principles will require consideration not only of public and private international law, but also (to the extent that it is not covered by the previously mentioned topics) international commercial arbitration, and also municipal law without foreign elements.

#### *Some recent examples*

4. There can be no doubt about the practical and theoretical importance of the subject. To take examples almost at random from the very recent past, in 2015 the High Court of Australia decided that Australian courts had an inherent jurisdiction to freeze assets in Australia pending the outcome of Singapore proceedings which might result in a judgment in favour of the applicants where there was a danger that a prospective judgment would be wholly or partly unsatisfied because the assets of the prospective judgment debtor or another person were removed from Australia or were disposed of, dealt with or diminished in value: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36.

5. In the month in which this report was finalised, the International Court of Justice indicated provisional measures in *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, December 7, 2016, under which France was to take all measures at its disposal to ensure that the premises in Paris, which Equatorial Guinea claimed (which France denied) to house the diplomatic mission of Equatorial Guinea, should enjoy treatment in order to ensure their inviolability. The Court decided that it had prima facie jurisdiction; that Equatorial Guinea had a plausible right to ensure that the premises were accorded the protections granted by the Vienna Convention on Diplomatic Relations of 1961; that the measures sought were aimed at protecting the right to inviolability; that there was a real risk of irreparable prejudice to the right; but that it was not necessary to indicate additional measures aimed at ensuring the non-aggravation of the dispute.
6. Earlier in the same year, in *United Utilities (Tallinn) BV v Estonia*, May 12, 2016, an ICSID tribunal made an order the effect of which was to prevent publication by the claimants of documents filed in the arbitration. The tribunal ruled that there was prima facie jurisdiction over the merits; there was a prima facie right to confidentiality; that harm would be likely; there was sufficient urgency; and the measures granted were proportionate. In *Hydro Srl v Albania*, March 3, 2016, an ICSID tribunal recommended (inter alia) that Albania should suspend criminal and extradition proceedings against individual claimants, because those proceedings concerned the factual circumstances at issue in the arbitration; the incarceration of the individuals would affect their ability to put their cases in the arbitration; and it would be proportionate to protect the claimants' rights since the criminal proceedings would be delayed rather than terminated.
7. In *Lambert v France* the applicants were the parents, a half-brother and a sister of Vincent Lambert, who sustained a head injury in a road-traffic accident in 2008 as a result of which he was tetraplegic. They complained about the judgment by the French Conseil d'État which declared lawful the decision taken by the doctor treating Vincent Lambert to discontinue his artificial nutrition and hydration. On June 24, 2014, a chamber of the European Court of Human Rights decided to indicate to the French Government that in the interests of the parties and the proper conduct of the proceedings before it, it should stay the execution of the Conseil d'État's judgment for the duration of the proceedings before the Court. Subsequently, the Grand Chamber held that there would be no violation of Article 2 (right to life) of the Convention in the event of implementation of the Conseil d'État's judgment: (2016) 62 EHRR 2.



8. So also in the Court of Justice of the European Union the principles were recently restated by the President of the General Court in September 2015 in Case T-235/15R *Pari Pharma GmbH v European Medicines Agency (EMA)*, September 1, 2015. The judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable damage to the interests of the party seeking such relief, it must be made and produce its effects before a decision is reached in the main action.

*Examination by other institutions and the literature*

9. Following the Hague lectures by the Rapporteur of this Commission on this subject in 1991 (Lawrence Collins, *Provisional and Protective Measures in International Litigation* (1992-III) 234 Recueil des cours, 9), this important topic was taken up by the International Law Association, Committee on International Civil and Commercial Litigation, *Provisional and Protective Measures in International Litigation*: see especially its Second Interim Report, 1996, which owed much to the Hague lectures.
10. Subsequently a very large literature has developed, especially in relation to international tribunals (including human rights tribunals), provisional measures in support of arbitration, and international litigation generally: among many others see, for example Kessedjian, *Note on Provisional and Protective Measures in Private International Law and Comparative Law* (Hague Conference on Private International Law: Enforcement of Judgments Prel Doc No 10, 1998); Schroeder, *Provisional Measures in Private International Litigation* (thesis, University of London, 2006<sup>1</sup>); Rosenne, *Provisional Measures in International Law* (2005); Brown, *A Common Law of Adjudication* (2007), chap 4; Gonzalo Napolitano, *Obligatoriedad y eficacia de de las medidas provisionales en la jurisdicción internacional* (2008); Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (2010); Gemalmaz, *Provisional Measures of Protection in International Law: 1907-2010* (2011) (with an extensive bibliography); the bibliography in Born, *International Commercial Arbitration* (2nd ed 2014), 2424-2425.
11. The subject was also included in the work of the American Law Institute and UNIDROIT which culminated in the ALI/UNIDROIT Principles of

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<sup>1</sup> Thesis 1032, Institute of Advanced Legal Studies, London.

Transnational Civil Procedure (2004), Article 8 of which sets out principles for the grant of provisional relief. The question has also been taken up in the joint work of the European Law Institute and UNIDROIT for the formulation of regional rules in transnational civil procedure.<sup>2</sup>

*Scope of the work*

12. There was some discussion in the Third Commission concerning the scope of its work. Some colleagues considered that the work should include interim measures ordered by administrative or quasi-judicial bodies such as the Inter-American Commission on Human Rights, the UN Human Rights Committee, or the European Commission; or that its work should be limited to public international law; or that it should exclude international commercial arbitration; or that it should include international family law. There was no clear consensus on these issues and, in view of the fact that the subject is potentially enormous, this report is mainly limited to judicial tribunals and deals with public international law, private international law, international commercial arbitration and some universal principles of private law.

***II. The general principles: purpose of provisional measures and conditions for their use***

13. There can be little doubt that the basic principles governing the need for, and the use of, provisional measures are general principles of law. The following paragraphs give a few examples (among many) of statements of principle in international, regional, and municipal, systems of law.
14. President Jiménez de Aréchaga said in the *Aegean Sea Continental Shelf* case (*Greece v Turkey*), 1976 ICJ Rep 3, separate opinion at 15-16:

*“The 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 . . . According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision . . . is that the action of one party ‘pendente lite’ causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.”*

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<sup>2</sup> See Working Group on Provisional and Protective Measures, First Report November 2014: UNIDROIT/ELI 2014 Study LXXVIA- Doc. 1.

15. So also Judge Cançado Trindade, in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2009 ICJ Rep 139, dissenting opinion at [12], said that the generalised use of provisional measures “at both national and international levels has led a contemporary doctrinal trend to consider such measures as equivalent to a true general principle of law, common to virtually all national legal systems, and endorsed by the practice of national, arbitral, and international tribunals.”
16. Similarly in the European Court of Justice Advocate General Tesaurò said, in *Case C-213/89 R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 AC 603, 630:
 

*"the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right ..."*
17. So also in *Case T-235/15R Pari Pharma GmbH v European Medicines Agency (EMA)*, September 1, 2015 the President of the General Court said that the purpose of the procedure for interim relief was to guarantee the full effectiveness of the future decision on the main action, and consequently, that procedure was merely ancillary to the main action to which it was an adjunct, and the decision made by the judge hearing an application for interim relief must be provisional in the sense that it could not either prejudge the future decision on the substance of the case or render it illusory by depriving it of practical effect: *Case C-313/90R CIRFS v Commission* EU:C:1991:220, [24]; *Case T-203/95 R Connolly v Commission* EU:T:1995:208, [16]. The practice of the CJEU is fully discussed in Lenaerts et al, *EU Procedural Law* (2014), chap 13.
18. In *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, at [34], the tribunal “emphasised that the purpose of provisional measures is to guarantee the protection of rights, whose existence might be jeopardized in the absence of such measures.”
19. In England, in *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, at 680, Hoffmann J. said:
 

*“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an*

*injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described."*

20. So also in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR 1405, the same judge (as Lord Hoffmann) said in relation to interlocutory (or interim or restraining) injunctions (at [16]):

*"...The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*

21. In his dissenting opinion in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147, Judge Greenwood signalled some of the issues with which this preliminary report will be concerned when he said (at [3]):

*"It is in the nature of such measures that they almost always have to be ordered at short notice and without the kind of detailed examination of the legal issues or the evidence which takes place when a court makes a decision on the merits. These are necessary features of a system of interim protection. Since provisional measures are a response to an urgent risk of irreparable harm, it would be impossible to make the indication of such measures contingent upon a court first establishing that it had jurisdiction, that the rights asserted actually existed and that they were applicable on the facts of the case."*

22. In the later phase of the same case (Order of April 22, 2015 on the request for modification of the Order of March 3, 2014) Judge Cançado Trindade emphasised in his separate opinion (at [13]) "the *autonomous* (not simply 'accessory') legal regime of provisional measures of protection", comprising "the *rights* to be protected (which are not necessarily the same as in the proceedings on the merits of the concrete case), the corresponding *obligations* of the States concerned, and the *legal consequences of non-compliance* with provisional measures (which are distinct from those ensuing from breaches as to the merits of the case)." See also Judge Cançado Trindade, separate opinion (at [20] et seq) in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, 2013 ICJ Rep 354.
23. So also the decision in *Ghana v Ivory Coast*, Special Chamber of ITLOS, April 25, 2015, reflects some of the themes and principles which arise in

cases of interim measures in international (and also national) tribunals, and which will be mentioned below, including (1) that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered; (2) that a court, before prescribing provisional measures need not concern itself with the competing claims of the parties, but must only satisfy itself that the rights which the applicant claims on the merits and seeks to protect are at least plausible.

24. This echoes many of the same questions which arise in the purely national context, where the United States Court of Appeals for the Second Circuit, speaking through Judge Gerard Lynch (also a Professor at Columbia Law School) in *Benihana, Inc v Benihana of Tokyo, LLC*, 784 F 3d 887, 894 (2d Cir 2015) said:

*“A party seeking a preliminary injunction must demonstrate: (1) ‘a likelihood of success on the merits or ... sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff’s favor’; (2) a likelihood of ‘irreparable injury in the absence of an injunction’; (3) that ‘the balance of hardships tips in the plaintiff’s favor’; and (4) that the ‘public interest would not be disserved’ by the issuance of an injunction.”*

25. In *Winter v. Natural Res. Def. Council, Inc.*, 555 US 7, 20 (2008) the United States Supreme Court held that a preliminary injunction may be awarded where the plaintiff establishes: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favour; and (4) that an injunction is in the public interest. But a preliminary injunction was an extraordinary remedy never awarded as of right, and in each case the court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief: at 24.
26. It is also no doubt a general principle of law that, because of its provisional nature, an order for interim measures is subject to variation or discharge if there is a change in circumstances. To take only one possible example of many, this is a principle well recognised in the jurisprudence of the International Court: e.g. *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of November 22, 2013, 2013 ICJ Rep 354;<sup>3</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v*

<sup>3</sup> See Yee (2013) 109 AJIL 339, at 354-360.

*Australia*), Order of April 22, 2015 on the request for modification of the Order of March 3, 2014.

**III. Jurisdiction to grant interim measures and the inherent power**

27. In national systems of law the court will invariably have the power and the jurisdiction to grant interim measures in cases where it has jurisdiction over the merits of the proceedings. In Case C-391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-7091, [1991] QB 1225, [19], the European Court said:

*“The first point to be made, as regards the jurisdiction of a court hearing an application for interim relief, is that it is accepted that a court having jurisdiction as to the substance of a case ... also has jurisdiction to order any provisional or protective measures which may prove necessary.”*
28. Similarly in national systems of law, the source of the power to grant interim measures is not usually in doubt, but international and supranational tribunals have sometimes found it necessary to state the basis for the grant of interim measures where the constitutive instruments are silent or unclear.
29. Rosenne was of the view that “every international court or tribunal requires a specific provision in its constituent instrument to empower it to order provisional measures”: *The Law and Practice of the International Court* (1965), 7. Whether this is so is open to doubt. Many members of the International Court have expressed the view that the power to grant provisional measures conferred by Article 41 of the Statute is also an inherent power: e.g. Judge Fitzmaurice in the *Northern Cameroons* case, 1963 ICJ Rep 15, at 103 (“really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court – or of any court of law – being able to function at all”), and the other examples cited by Brown, *Inherent Powers of International Courts and Tribunals* (2005) 76 BYIL 195, at 217-218.
30. Neither the European Convention on Human Rights nor the statute of the European Court of Human Rights contain express provision as to the power of the Court to order interim measures. This power only exists in Rule 39 of the Rules of Court, which empowers a Chamber or, where appropriate, its President, to indicate interim measures.
31. In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25 the applicants resisted extradition from Turkey to Uzbekistan. They had sought, and obtained, provisional measures preventing their extradition. But the Turkish Government ordered their extradition. The Grand Chamber concluded by a majority that while there is no express power to order provisional measures in its Statute, the power was implicit in the

constitutive instrument of a court in order to enable it to properly function: "... It is hard to see why this principle of the effectiveness of remedies for the protection of an individual's human rights should not be an inherent Convention requirement in international proceedings before the Court" (at [124]).

32. The Iran-US Claims Tribunal, which is subject to the 1976 UNCITRAL Rules as modified and therefore has power under Article 26 to "take" interim measures, has also derived the power to order interim measures from its inherent powers: *E-Systems v Islamic Republic of Iran and Bank Melli Iran* (1983) 2 Iran-US CTR 51, at 57. See also *Rockwell International Systems, Inc v Islamic Republic of Iran, Ministry of Defence* (1983) 2 Iran-US CTR 369, at [4]-[5]: "The consistent practice of the Tribunal indicates that this inherent power is in no way restricted by the language in Article 26 of the Tribunal Rules." See Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal* (1984) 46 ZAÖRV 465.
33. In *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Procedural Order No. 2, 2008, the tribunal referred to its inherent power to prevent the exacerbation of the dispute and to maintain the integrity of the arbitral process (at [54]). See also *Libananco v Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, June 23, 2008, at [78].
34. The ILA Committee on International Commercial Arbitration, *Report on Inherent and Implied Powers* (2014), said (at 6): "Before interim relief and document production were widely embraced by international arbitration, for example, few would venture to argue that arbitrators possessed a general power to grant provisional measures or order the production of documents. Today such authority is likely to be assumed, even if not explicitly provided for by the underlying arbitration agreement or applicable arbitral rules." See also at 8-9.  
*Inherent powers and the Inter-American Commission on Human Rights*<sup>4</sup>
35. Although as a non-judicial body it is outside the scope of this report, an important example of the use of inherent powers is the practice of the Inter-American Commission on Human Rights. It is, of course, not a court, but it has functions which are in some ways analogous to a judicial tribunal. The American Convention on Human Rights does not give the Commission the power to order provisional measures, by contrast with the Inter-American

<sup>4</sup> The rapporteur is grateful to Colleague Jean Michel Arrighi for his contribution to this section, and to the other material on the Inter-American Commission on Human Rights in this report.

Court of Human Rights, which is expressly given that power by Article 63(2) of the Convention, which provides: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

36. The Commission included in its Rules of Procedure, as of 1980, the possibility of it itself issuing "precautionary measures", on its own initiative, even though that was not envisaged in either the Convention or the Commission's Statute. As amended in 2013, Article 25 of the Rules of Procedure now provides:

*"1. ... the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.*

*2. For the purpose of taking the decision referred to in paragraph 1, the Commission shall consider that:*

*a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;*

*b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and*

*c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.*

*3. Precautionary measures may protect persons or groups of persons, as long as the beneficiary or beneficiaries may be determined or determinable through their geographic location or membership in or association with a group, people, community or organization.*

*...*

*5. Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, except where the immediacy of the threatened harm admits of no delay. In that circumstance, the Commission shall review that decision as soon as possible, or at the latest during its next period of sessions, taking into account the information received from the parties.*



6. *In considering the request the Commission shall take into account its context and the following elements:*
- a. *whether the situation has been brought to the attention of the pertinent authorities or the reasons why it would not have been possible to do so;*
  - b. *the individual identification of the potential beneficiaries of the precautionary measures or the determination of the group to which they belong or are associated with; and*
  - c. *the consent of the potential beneficiaries when the request is presented by a third party unless the absence of consent is justified.*
- ....
8. *The granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of any right protected by the American Convention on Human Rights or other applicable instruments.*
9. *The Commission shall evaluate periodically, at its own initiative or at the request of either party, whether to maintain, modify or lift the precautionary measures in force. At any time, the State may file a duly grounded petition that the Commission lift the precautionary measures in force. Prior to taking a decision on such a request, the Commission shall request observations from the beneficiaries. The presentation of such a request shall not suspend the precautionary measures in force.*
- ...
12. *The Commission may present a request for provisional measures to the Inter-American Court in accordance with the conditions established in Article 76 of these Rules. Any precautionary measures issued with respect to the matter shall remain in effect until the Court notifies the parties of its resolution of the request.*
- ...”
37. In the last 30 years, precautionary measures have been invoked to protect thousands of persons or groups of persons at risk by virtue of their work or affiliation. They include human rights defenders, journalists, trade unionists, vulnerable groups such as women, children, Afro-descendant communities, indigenous peoples, displaced persons, LGTBI communities and persons deprived of their liberty. They have also been used to protect witnesses, officers of the court, persons about to be deported to a country where they might be subjected to torture or other forms of cruel and inhuman treatment, persons sentenced to the death penalty, and others. The Commission has also ordered precautionary measures to protect the right to health and the right of the family. It has

also resorted to precautionary measures in situations involving the environment, where the life or health of persons or the way of life of indigenous peoples in their ancestral territory may be imperilled, and in other situations. The Commission has ordered precautionary measures to protect a wide array of rights, such as the rights to health and to family when the conditions of gravity, urgency and a risk of irreparable harm are present. It has also had occasion to order measures to avoid harm to life or health as a result of environmental contamination.

38. In recent years, some States have questioned the competence of the Commission to adopt these precautionary measures,<sup>5</sup> given that neither the OAS Charter, nor the Commission's Statute, nor the American Convention on Human Rights expressly grant such competence. Nevertheless, in general States have abided by them. Each year the Commission reports on them to the OAS General Assembly.
39. In 2015 the Commission issued 37 “precautionary measures” against OAS member states which are not parties to the Convention (such as the United States or Cuba), against countries which have denounced that Convention (Venezuela), and against countries which are parties to it (such as Mexico or Colombia).

***IV. Attachment of assets: distinction between attachment as a protective measure in aid of proceedings in other countries and attachment to obtain jurisdiction***

40. Some countries have allowed the attachment of assets of the defendant within the jurisdiction not only to serve as a method of security for the ultimate judgment, but also to serve as the basis for jurisdiction in a case where the defendant is abroad and where the case may have no other connections with that country.
41. The best known provisions allowing presence of assets as a basis for personal jurisdiction in unrelated matters are the arrest in Article 23,

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<sup>5</sup> The Inter-American Convention on Forced Disappearance of Persons of 1994 is a special case because Article XIII provides: “For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures”. Consequently the States which are parties to the Convention have recognised the Commission’s power to order precautionary measures as regards the forced disappearance of persons.

German Code of Civil Procedure (ZPO) and the Scottish procedure of arrestment. The German and Scottish jurisdiction based merely on the presence of assets were branded as exorbitant by the Brussels Convention 1968 and the subsequent Brussels and Lugano scheme. In France the Cour de cassation had effectively endorsed the concept of the *forum arresti* in its decision in *Nassibian*, Civ I, 6 Nov 1979 but this line of authority was reversed in *Sté Cobenham*, Civ I, 17 Jan 1995 and *Sté Strojexport*, Civ I, 11 Feb 1997: see Audit and d'Avout, *Droit international privé* (7<sup>th</sup> ed rev 2013, para 411).

42. The equivalent in the United States was called quasi-in-rem jurisdiction, which was declared unconstitutional by the US Supreme Court in *Shaffer v Heitner*, 433 US 186, but the Supreme Court said (at 210) that “a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where litigation can be maintained consistently with [due process requirements].” Attachment as security is available under state law: see *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY 2d 541 (NY Ct App 2000); Collins (1999) 115 Law Quarterly Rev 601. In *Sojitz Corp v Prithvi Information Solutions Ltd*, 921 NYS 2d 14, 17 (App Div 2011) it was held that it was constitutionally permissible under recently introduced provisions of the New York CPLR for a New York court to order attachment as security in aid of arbitration in Singapore. To demonstrate entitlement to a provisional remedy in aid of arbitration, the applicant must show that any award issued by the arbitrator would otherwise be rendered ineffectual if the relief was not granted.
43. But whereas “post judgment enforcement involves a proceeding against a person,” and therefore “requires only jurisdiction over persons,” prejudgment attachment “operates solely on property, keeping it out of a debtor's hands for a time,” and maintaining it as security for a potential judgment: *Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825, 829 (NY Court of Appeals, 2009). See also Bermann, *Provisional Relief in Transnational Litigation*, 35 Columbia J Transnational L 553, 586 (1997).
44. In *Barclays Bank, SA v Tsakos*, 543 A 2d 802 (DC Ct App 1988), Barclays obtained an attachment of an apartment in Washington, D.C. in aid of court proceedings in France and Switzerland to recover a \$1.4 million loan. The court held that the trial court could exercise quasi-in-rem jurisdiction over the defendants even though personal jurisdiction was unavailable. See also *Carolina Power & Light Co v Uranex*, 451 F Supp 1044, 1048 (ND Cal 1977) (“where the facts show that the presence of defendant's property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient arena for defendant to

litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible.”); *Cameco Industries, Inc v Mayatrac, SA*, 789 F Supp 200 (D Md 1992) (quasi-in-rem jurisdiction asserted over bank account in forum state pending resolution of suits in other jurisdictions); *Banco Ambrosiano, SpA v Artoc Bank & Trust Ltd*, 464 NE 2d 432 (NY Ct App 1984) (quasi-in-rem jurisdiction over out-of-state defendants whose sole contact with New York was maintenance of New York bank account that was used to perpetrate fraudulent transactions); *Sojitz Corp v Prithvi Information Solutions Ltd*, 921 NYS 2d 14, 17 (NY App Div 2011) (application of the security exception by a New York state appellate court to attachment in aid of arbitration in Singapore).

45. Where a court has jurisdiction over the substance of a case, it also plainly has jurisdiction to grant interim measures to preserve the position pending adjudication of the merits: e.g. for England, *Masri v Consolidated Contractors International Co SAL (No.2)* [2008] EWCA Civ 303, [2009] QB 450.
46. If proceedings are pending, or are contemplated, in a foreign country, the claimant may wish to preserve its position by seeking interim relief in a country in which there are assets available to satisfy a judgment granted in the foreign country to whose jurisdiction the defendant is amenable, and the claimant may be advised to seek interim relief to prevent the defendant from making itself judgment-proof. There is thus obvious practical good sense in ensuring that the courts at the place where the defendant's assets are situated are empowered to grant provisional measures in aid of foreign proceedings on the merits, even where such courts would otherwise have no original jurisdiction over the defendant.
47. Accordingly the Brussels Convention made provision in Article 24 for a court which did not have jurisdiction over the merits of the claim to have jurisdiction to order provisional and protective measures, subsequently in Article 31 of the Brussels I Regulation and in Article 35 of the recast Brussels I Regulation.
48. The European Court has held in Case C-261/90 *Reichert v Dresdner Bank (No.2)* [1992] ECR I-2149 that the expression “provisional, including protective, measures” is to be given an autonomous interpretation, and means measures which are intended to maintain the status quo in order to protect rights pending their final adjudication.
49. In *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-7091, [1999] 2 QB 1225 the European Court considered the controversial question (on which see Huet, 1989 Clunet 96) whether an interim order requiring payment on account of a claim (in that case a contractual claim)

is to be classified as a provisional measure within the meaning of Article 24 of the Brussels Convention. It accepted that an interim payment may be necessary to ensure the efficacy of the decision on the substance. But it recognised that such an order may pre-empt the decision on the substance, and that if the plaintiff could obtain it at the court of his domicile (as has happened in France) the jurisdictional rules of the Brussels Convention could be circumvented. Accordingly, an interim payment of a contractual consideration did not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded was guaranteed if the plaintiff was ultimately unsuccessful on the substance, and, second, the measure sought related only to specific assets of the defendant located or to be located within the territorial jurisdiction of the court to which the application for provisional measures was made. See also Case C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277.

50. The procedure in *Van Uden* and *Mietz* was the Kort Geding procedure in the Netherlands: see Marmisse & Wilderspin, *Rev Crit*, 1999, 669. It is not finally settled whether the similar référé-provision procedure falls under the scope of what is now Article 35 of the recast Brussels I Regulation: see Mayer & Heuzé, *Droit international privé*, 10th ed (2010), para 354, n 202; Bureau & Muir-Watt, *Droit international privé*, 2nd ed (2010), para 151; Audit & d'Avout, *Droit international privé*, 7th ed (2013), paras 410, 587. See especially Nuyts, in Dickenson & Lein (eds), *Brussels I Regulation Recast* (2015), paras 12.25—12.26.
51. In Case C-104/03 *St Paul Dairy Industries NV v Unibel Exser BVBA* [2005] ECR I-3481 the European Court ruled that an application for a witness to be heard before the proceedings, with the aim of enabling the applicant to decide whether to bring a case, was not a provisional or protective measure for the purposes of Article 24 of the 1968 Convention. The aim of Article 24 was to avoid loss caused by delays inherent in international proceedings, and to preserve the status quo. The application in question did not pursue those aims, and the order sought could circumvent the jurisdictional rules of the 1968 Convention, and lead to a multiplicity of proceedings, and could also circumvent the rules for the taking of evidence in Council Regulation (EC) 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.
52. Recital (25) of the recast Brussels I Regulation states: “The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the

European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights<sup>11</sup>. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.”

*England: a case study*

53. In *The Siskina* [1979] AC 210 plaintiff cargo-owners had a claim against a one-ship Panamanian company for damages for wrongful detention of their cargo in Cyprus. After discharge of the cargo the defendants' only asset, their ship, sank and their underwriters in London were due to pay the insurance proceeds there. The bills of lading provided that the courts of Genoa, Italy, would have exclusive jurisdiction over cargo claims. The plaintiffs sought to assert jurisdiction in England on the basis that their claim for a freezing injunction was an injunction “sought ordering the defendant to do or refrain from doing anything within the jurisdiction” (*i.e.* not to remove or dispose of the insurance proceeds pending the outcome of the Genoese proceedings) within the meaning of the English procedural rules for obtaining jurisdiction over persons abroad (what is now CPR, PD6B, para.3.1(2), on which see Dicey, Morris and Collins, *Conflict of Laws* (15th ed 2012), paras 8-025 et seq. 11R-157 et seq.). The House of Lords held that the English court had no jurisdiction to grant such an injunction against foreign defendants otherwise than in support of a cause of action in respect of which the defendant was amenable to the jurisdiction.
54. This decision has been much criticised (see Collins, *Essays in International Litigation and the Conflict of Laws* (1994), 3-34; Collins (1996) 112 *Law Quarterly Rev* 28) and has not been accepted in other parts of the Commonwealth, especially those where offshore funds are frequently held: see *Solvalub Ltd v Match Investments Ltd* [1998] ILPr 419, *Krohn GmbH v Varna Shipyard* [1997] JLR 194, *State of Qatar v Sheikh Khalifa bin Hamad al Thani* [1999] JLR 118 (Jersey); *Re Secilpar* (2003-05) MLR 352 (Isle of Man); *Black Swan Investment ISA v Harvest View*, 2010 BVIHCV 2009/399 and *Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd*, 2011 (British Virgin Islands); *Deloitte & Touche, Inc v Felderhof* 2011(2) CILR 36 and *VTB Capital Plc v Universal Telecom Management*, Court of Appeal, 2013 (Cayman Islands, where the discretion to grant an injunction in aid of foreign proceedings has now been put on a statutory basis: Grand Court

(Amendment) Law, 2014); *Tsoi Tin v Tan Haihong* (Eastern Caribbean Supreme Court, 2014).

55. As indicated at the outset of this report, the High Court of Australia has decided that Australian courts have an inherent jurisdiction to freeze assets in Australia pending the outcome of Singapore proceedings which might result in a judgment in favour of the applicants where there was a danger that a prospective judgment would be wholly or partly unsatisfied because the assets of the prospective judgment debtor or another person were removed from Australia or were disposed of, dealt with or diminished in value: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015] HCA 36.
56. In anticipation of the accession of the United Kingdom to the Brussels Convention, and also to deal with the unsatisfactory state of English law as it had developed, section 25(1) of the Civil Jurisdiction and Judgments Act 1982 was enacted to empower the High Court to grant interim relief where proceedings within the scope of the Brussels Convention (and later the original and revised Lugano Conventions and the Brussels I Regulation) had been or were to be commenced in another Contracting State. Section 25(1) came fully into force in 1997, and allows interim relief to be granted in aid of foreign proceedings (not limited to proceedings in EU or Lugano Convention states). But it does not apply to proceedings in England in aid of an attachment in New York in support of arbitration proceedings: *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880 [2008] 1 WLR 665.
57. The court may properly grant interim relief under section 25 in particular where either: (a) there are assets of the defendant in England which may be enjoined (or documents in England which may be disclosed), in which event the court's jurisdiction to grant interim relief is (save in exceptional cases) limited to the assets or property in England; or (b) the defendant is present in England and thus properly amenable to the enforcement jurisdiction of the English court in respect of asset freezing injunctions or other *in personam* orders addressed to him.
58. The Court of Appeal in *Motorola Credit Corp v Uzan (No 2)* [2003] EWCA Civ 752 [2004] 1 WLR 113 at [115] said that there were five particular considerations which had to be borne in mind in relation to the question whether it was inexpedient to make an order under section 25: first, whether the making of the order would interfere with the management of the case in the primary court, *e.g.* where the English order would be inconsistent with an order in the primary court or would overlap with it; secondly, whether it was the policy of the court in the primary jurisdiction not itself to make worldwide freezing/disclosure

orders; thirdly, whether there was a danger that the orders made would give rise to disharmony or confusion and/or the risk of conflicting, inconsistent or overlapping orders in other jurisdictions, in particular the courts of the State where the person to be enjoined resided or where the assets affected were located; fourthly, whether at the time the order was sought there was likely to be a potential conflict as to jurisdiction making it inappropriate and inexpedient to make a worldwide order; fifthly, whether, in a case where jurisdiction was resisted and disobedience was to be expected, the court would be making an order which it could not enforce.

59. But the procedure could not be used by United States authorities to seize assets in England in aid of proceedings in the United States to forfeit assets which had allegedly been involved in money laundering offences in the United States. The United States proceedings were *in rem*, rather than in *personam* proceedings, with the result that any judgment obtained in those proceedings would not be enforceable in England, being a judgment *in rem* relating to property situated outside the territorial jurisdiction of the United States courts; and that, in any event, it would not be enforceable at common law in England because it would amount to the enforcement of a foreign penal law: *Blue Holding (1) Pte Ltd v United States* [2014] EWCA Civ 1291, [2015] 1 WLR 1917.

***V. Exclusive jurisdiction clauses: do they prevent action in other countries for security?***

60. Most countries give effect to exclusive forum selection or jurisdiction agreements.<sup>6</sup> Do they prevent proceedings for security or other provisional measures in other countries than those of the chosen court?
61. In *Sanko Steamship v Newfoundland Refining Co. Ltd*, 411 F Supp 285 (SDNY 1976), affd 538 F 2d 313 (2d Cir 1978), cert den 428 US 858, the plaintiff shipowners sued for breach of a time charter and sought a pre-judgment attachment in New York. The charter provided for the jurisdiction of the English courts (with an option for either party to elect for arbitration in London). The court held that the effect of the decision of the Supreme Court in *M/S Bremen v Zapata Offshore Co.* (which upheld the validity and enforceability of foreign jurisdiction agreements) was that the defendants were entitled to a dismissal of the action, and with the dismissal, the lifting of the attachment.

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<sup>6</sup> This section deals with private law issues. Conflicts of jurisdiction can also occur between international tribunals, but they raise different problems: e.g. *Ireland v United Kingdom (MOX Plant case)* (potential conflict between ITLOS and ECJ).



62. But this decision has not generally been followed and federal courts will now allow attachment as security for the ultimate judgment, even if the parties have agreed to litigate the substance of the dispute abroad. In *Polar Shipping Ltd v Oriental Shipping Corp*, 680 F 2d 627 (9th Cir 1982), which involved a similar jurisdiction/arbitration clause, the Court of Appeals for the Ninth Circuit held that, in the absence of express intent to the contrary, a foreign court selection clause in the charter agreement neither precluded the shipowner from commencing an action in the federal District Court to obtain security by maritime attachment, nor prohibited the District Court from ensuring the availability of security adequate to satisfy a favourable judgment by the selected forum. The court concluded: “because the scope and enforcement of a forum selection clause is a matter of contract, the intent of the parties governs the extent to which the non-selected court may exercise its jurisdiction.” But the non-designated forum “should exercise its jurisdiction only to the extent necessary to ensure that the plaintiff has an adequate remedy.” *Polar* has been followed in numerous decisions: see e.g. *Staronset Shipping Ltd v North Star Nav. Inc*, 659 F Supp 189 (SDNY1987); and other decisions cited in, e.g. *Denak Depoculuk Ve Nakliyecilik AS v IHX (HK) Ltd*, WL 497357 (SDNY 2009).
63. In England exclusive jurisdiction clauses are generally to be construed so as not to exclude applications for ancillary relief made in other jurisdictions, but for relief to be truly ancillary it had to be supportive of the proceedings in the principal jurisdiction: *Bankgesellschaft Berlin AG v First International Shipping Corp Ltd* [2001] CP Rep 62.
64. But the jurisdiction clause may be worded as to prevent actions in other jurisdictions for interim measures. The issue here is: what are the consequences of provisional measures taken in the “wrong” forum, i.e. in a court which is not the court chosen as the jurisdiction in which disputes are to be determined, or, in a case where there is an arbitration agreement, in a court which is not a court sitting in the country which is the seat of the arbitration. Can the defendant resort to the “right” forum to, e.g., obtain damages for any loss caused by the relief?
65. *Mantovani v Carapelli* [1980] 1 Lloyd’s Rep 375 was a case of an arbitration clause rather than a jurisdiction clause. It was held that that the London arbitration clause prevented an action in the Italian courts to obtain security, and damages were awarded.
66. In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, [2014] Bus LR 873, the UK Supreme Court accepted that breach of an exclusive jurisdiction agreement by suing in tort in a foreign country could found a claim for damages. See also *Kallang*

*Shipping SA Panama v AXA Assurances Senegal (The Kallang)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124. Cf *AMT Futures Ltd v Marzillier* [2015] EWCA Civ 143, [2015] Q.B. 699 (English jurisdiction clause; lawyers sued for inducement of breach of contract by advising clients to sue in Germany: place of damage was Germany).

**VI. Binding character of interim measures in international tribunals**

67. It is important to note that both in international law and in national law there is a difference between the binding character of orders for interim measures (i.e. whether they must be obeyed) and their res judicata effect (i.e. whether they are conclusive in subsequent proceedings). Because of their provisional nature, orders for provisional measures do not create a res judicata. In national legal systems there is never any doubt about their binding character, even if methods of enforcement for disobedience may vary.
68. The position in international law has sometimes been more controversial. The question of the binding character may arise because of the absence of a power in the constitutive instruments, or because it is expressed in a way which is ambiguous as to the legal consequences. Sometimes there is no doubt. For example, the effect of UN Convention on the Law of the Sea, Article 290(1), (6), is that the parties are bound to comply with provisional measures prescribed by ITLOS (and any other court or tribunal that is engaged in a dispute concerning the application or interpretation of the Convention): *M/V "SAIGA" (No 2) (St Vincent and the Grenadines v Guinea)*, Order of March 11, 1998, [48].
69. But Article 41 of the Statute of the International Court gives a power to "indicate" provisional measures, and the European Convention on Human Rights and the Statute of the European Court of Human Rights contain no express power, which is found only in the Rules of Court.

*International Court of Justice*<sup>7</sup>

70. Although the question had been the subject of debate (see especially Sir Hersch Lauterpacht's cautious view in *Development of International Law by the International Court* (1958), 253-254), the question of the binding character of decisions of the International Court was not finally settled

<sup>7</sup> See *Rosenne's Law and Practice of the International Court 1920-2015* (5th ed Shaw, 2016), vol III, 1421 et seq; Oellers-Frahm, in Zimmermann, Tomuschat, Oellers-Frahm & Tams *Statute of the International Court of Justice. A Commentary* (2nd ed 2012), 1026 et seq; Torres Bernárdez, *Medios procesales a la disposición de las partes en el procedimiento contencioso de la Corte Internacional de Justicia*, in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Vol. VIII/IX, 2004/2005.

until *LaGrand (Germany v United States)*, 1999 ICJ Rep 1, where the Court said (at [102]-[103]):

*“It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of ‘the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute’. Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented.”*

71. In *Avena and others (Mexico v United States of America)*, Mexico requested the indication of provisional measures directing the United States not to proceed with a planned execution of Mexican nationals. The Court indicated measures (2003 ICJ Rep 77), and subsequently found that it had jurisdiction and that the United States was in breach of the Vienna Convention on Consular Relations: 2004 ICJ Rep 12. Subsequently, after one of the executions had taken place, the Court found that the United States had breached the obligation incumbent upon it under the Order for provisional measures, and reaffirmed the obligation to comply with such orders: *Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals (Mexico v United States)*, 2009 ICJ Rep 3, at [61].
72. See also *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147 at [53]; Frowein, *Provisional Measures by the International Court of Justice – The LaGrand Case*, 61 ZARÖV 55 (2002); Rosenne, *Provisional Measures in International Law* (2005) at 47.

*Res judicata*

73. On the res judicata effects of an order for provisional measures, there is often some confusion. The fact that an order is binding (until revoked or varied) does not give it the character of res judicata. See Rosenne, *Provisional Measures in International Law* (2005): The fact that a provisional measures order is binding does not mean that it “is the equivalent of an interim judgment, something not encountered in international litigation unless the constituent instrument of the court or tribunal or the agreement to submit a dispute to litigation provides for it. It is not the equivalent of a final judgment if only for the reason that it is not final and without appeal, but ... is the subject to a built-in rebus sic stantibus condition, which is not the case for a final decision, nor does it come within the scope of Art 94 (2) of the Charter providing for recourse to the Security Council in the event of non-compliance with a judgment” (at 11-12).
74. Thus in *City Oriente Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures, May 13, 2008, the tribunal said: “The decisions on provisional measures do not constitute res judicata, so that the provisional measures ratified hereby may be amended, expanded or revoked at the request of either party at a later stage of the proceedings” (at [96]).

*Iran-United States Claims Tribunal*

75. The Iran-United States Claims Tribunal has issued “requests” imposing provisional measures which it regards as binding. For example in *E-Systems v Islamic Republic of Iran and Bank Melli Iran* (1983) 2 Iran-US CTR 51, the tribunal stated: “[t]he Tribunal requests the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran until the proceedings in this case before the Tribunal have been completed.” In the Concurring Opinion of Judges Holtzmann and Mosk: “[o]ne might have preferred to express the obligatory nature, of the Interim Award by use of the word ‘orders’ instead of ‘requests’. It must be recalled, however, that this is addressed to one of the Governments which established the Tribunal by international agreement. It is to be presumed that such Government will respect the obligation expressed in the Interim Award stating what it ‘should’ do. Accordingly, we join with those who consider the term ‘requests’ is adequate in this context. In these circumstances we consider that a ‘request’ is tantamount to and has the same effect as an order.” The Tribunal followed this decision with several others, all upholding the use of “requests” in its power to indicate binding provisional measures on the parties: see Brower & Brueschke, *The Iran-United States Claims Tribunal* (1998), 223-226. See also

*Rockwell International Systems Inc v. Islamic Republic of Iran* (1983), 2 Iran-US CTR 369; *Behring International v Islamic Republic of Iran* (1983) 3 Iran-US CTR 173.

*ICSID*

76. The ICSID Convention provides in Article 47 that “[e]xcept 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.” In *Maffezini v Spain* (Procedural Order No. 2), October 28, 1999, the tribunal said (at [9]) that “[w]hile there is a semantic difference between the word ‘recommend’ as used in Rule 39 and the word ‘order’ as used elsewhere in the Rules to describe the Tribunal’s ability to require a party to take a certain action, the difference is more apparent than real ... The Tribunal does not believe the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order’” (at [9]).
77. In *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No ARB/98/2, September 25, 2001, the tribunal relied on *Maffezini* for its conclusion that the question of the binding nature of provisional measures is no longer controversial. The tribunal also drew an analogy with the case law of the International Court on the interpretation of Article 41 of its Statute and with the case law of the Iran-US Claims Tribunal. See also *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005; *Occidental Petroleum Corp v Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007; *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, May 8, 2009.
78. But that does not make the order res judicata: see *SGS v Pakistan*, Procedural Order No. 2, October 16, 2002, 8 ICSID Rep 396: “it is scarcely necessary to add that this like any procedural order on provisional measures may be revisited on the application of either party and after hearing the other party, should circumstances change materially during the pendency of the jurisdictional phase of this proceeding.”

*European Court of Human Rights*

79. Under Rule 39 of the Rules of Court a Chamber, or its President, may “indicate” interim measures.

80. Most common requests are in deportation and extradition cases. Generally the European Court of Human Rights espouses a policy of restraint in respect of interim measures (see e.g. *Saadi v Italy* (2009) 49 EHRR 30, at [142]). The Court applies three criteria in assessing requests for interim measures: (i) the situation must be imminent and exceptional and there must be no suspensive domestic remedy available; (ii) there must be a high degree of probability that the impugned act would result in a breach of the Convention; and (iii) there must be a risk of irreparable harm. See Buquicchio-de Boer, *Interim Measures by the European Commission of Human Rights* in de Salvia and Villiger (eds), *The Birth of European Human Rights Law, Liber Amicorum Carl Aage Norgaard* (1998), 230-233; Bantekas and Oette, *International Human Rights: Law and Practice* (2103), s. 7.6.1.
81. Failure to comply with such an indication is a violation of a State's duty not to hinder the exercise of the right of individual petition enshrined in Article 34. In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, in concluding that Turkey, by not complying with interim measures "indicated" to it, had breached the Convention, the Court noted (at [117]) that in *LaGrand* the "ICJ brought to an end the debate over the strictly linguistic interpretation of the words 'power to indicate' in the first paragraph of Article 41 and 'suggested' in the second paragraph by concluding, with reference to the Vienna Convention, that provisional measures were legally binding". The European Court of Human Rights also considered the views of several other international courts and adjudicative bodies, concluding that the binding nature of provisional measures was now the subject of near-universal agreement and based on the importance of interim measures in ensuring the "effective exercise" of the right of individual petition. The Court "reiterates in that connection that Article 31(1) of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose, and also in accordance with the principle of effectiveness" ([123]). See also *Aoulmi v France* (2008) 46 EHRR 1 at [111]; *Olaechea Cahuas v Spain* (2009) 48 EHRR 24: non-compliance with interim measures a violation of Article 34 notwithstanding the fact that the ability of the applicant to pursue his claim was not hampered by the breach; *Paladi v Moldova* (2008) 47 EHRR 15, at [87]-[92].
82. There have now been many cases in which States have been found to be in violation of orders for interim measures. In *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9 the Court gave an indication under Rule 39, informing the Government that the applicants should not be removed or transferred from the custody of the United Kingdom until further

notice. On the afternoon of the same day, the Government informed the Court and the applicants' solicitors that the applicants had been transferred to the Iraqi authorities. In their letter to the Court the Government stated: "... the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court; and further that this action should not be regarded as a breach of Article 34 in this case. The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so" (at [81]). The United Kingdom's position was that the Rule 39 indication should not be interpreted as requiring the Contracting State to exercise powers it did not have, including the power to continue to detain the applicants or to violate the law and sovereignty of a non-Contracting State.

83. The Court emphasized that in practice, the Court would make such an indication only if there was an imminent risk of irreparable damage. Interim measures played a vital role in avoiding irreversible situations which would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. A failure by a respondent State to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention. The United Kingdom Government had not satisfied the Court that it took all reasonable steps, or indeed any steps, to seek to comply with the Rule 39 indication.

*Inter-American Court of Human Rights*

84. Article 63(2) of the American Convention of Human Rights provides that "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission. In the *Constitutional Court* case (August 14, 2000, [14]), the Court held that such provision "makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal, since there stands 'a basic principle of the law of international state responsibility, supported by international jurisprudence, according to which states must fulfil their conventional international obligations in good faith (pacta sunt servanda).'"
85. In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, the European Court of Human Rights summarised the case law of the Inter-American Court of Human Rights in this way:

“53. *The Inter-American Court has stated on several occasions that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits (see, among other authorities, the following orders: 1 August 1991, Chuminã v. Peru; 2 July and 13 September 1996, 11 November 1997 and 3 February 2001, Loayza Tamayo v. Peru; 25 May and 25 September 1999, 16 August and 24 November 2000, and 3 September 2002, James et al. v. Trinidad and Tobago; 7 and 18 August 2000, and 26 May 2001, Haitians and Dominican Nationals of Haitian Origin in the Dominican Republic v. Dominican Republic; 10 August and 12 November 2000, and 30 May 2001, Alvarez et al v. Colombia; judgment of 21 June 2002, Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago).*

*In two orders requiring provisional measures, the Inter-American Court of Human Rights ruled that the States Parties to the American Convention on Human Rights “must fully comply in good faith (pacta sunt servanda) with all of the provisions of the Convention, including those relative to the operation of the two supervisory organs of the American Convention [the Court and the Commission]; and, that in view of the Convention’s fundamental objective of guaranteeing the effective protection of human rights (Articles 1(1), 2, 51 and 63(2)), States Parties must refrain from taking actions that may frustrate the restitutio in integrum of the rights of the alleged victims” (see the Orders of 25 May and 25 September 1999 in the case of James et al. v. Trinidad and Tobago).*

...”

86. In the *Mendoza Prisons* case, Order of March 30, 2006, Judge Cançado Trindade said in his separate opinion (at [7])

*“At present, in Latin-America and the Caribbean, there are almost twelve thousand persons (including members of entire communities) who are under the protection of provisional measures ordered by this Court. Provisional measures have expanded and gained considerable importance over the last decade, and have become a true jurisdictional guarantee of a preventive nature. And the Inter-American Court, more than any other contemporary international tribunal, has significantly contributed to their development as part of both the International Law of Human Rights and contemporary Public International Law.”*

87. See also, among many others, *In the Matter of Pérez Torres et al. (“Campo Algodonero”)*, Order of June 30, 2011: “[t]he provisions of Article 63(2) of the Convention confer a compulsory nature on the State’s adoption of the provisional measures ordered by the Court, given that a basic principle of international law on State responsibility, supported by



international case law, indicates that the States must comply with their treaty-based obligations in good faith (*pacta sunt servanda*)"; Cançado Trindade, *Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme*, in *Mesures conservatoires et droits fondamentaux* (eds. Cohen-Jonathan and Flauss), 2005, 145-163; Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (2010).

**VII. Effect of orders of international tribunals in national courts: the death penalty cases**

*The International Court and the United States*

88. In the United States two men were executed in 1998 and 1999 after the Supreme Court by a majority refused a stay, despite the fact that the International Court of Justice had earlier on the day scheduled for execution issued an order (*Vienna Convention on Consular Relations (Paraguay v United States)*, 1998 ICJ Rep 248; *LaGrand (Germany v United States)*, 1999 ICJ Rep 9) indicating that the United States should take all measures at its disposal to ensure that the condemned men were not executed: *Breard v Greene*, 523 US 371 (1998); *Federal Republic of Germany v United States*, 526 US 111 (1999). Subsequently in the latter case the International Court decided that its orders on provisional measures had binding effect, and that the United States had been in breach of the order by failing to take all measures at its disposal to ensure that the condemned man was not executed pending the final decision of the International Court in the case (on the effect of failure by the United States to accord consular facilities to the accused): *LaGrand (Germany v United States)*, 2001 ICJ Rep 466. See also Higgins, in *Liber Amicorum Georges Abi-Saab* (2001), 547.
89. The *Avena* decisions (*Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* and *Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals (Mexico v United States of America)*) were proceedings brought in the International Court by Mexico against the United States in complaints that Mexican nationals on death row had not been afforded their rights of consular access. The application for interim measures was in relation to 54 Mexican citizens who had been arrested, detained, tried and sentenced to death by United States authorities following proceedings in which those authorities had allegedly failed to comply with their obligations under Article 36 of the Vienna Convention on Consular Relations. The Court found that it was apparent that three of the Mexican nationals were at risk of execution in the

coming months or possibly even weeks, and that their execution would cause irreparable prejudice to any rights which might subsequently be adjudicated by the court to belong to Mexico. The other individuals although currently on death row were not in the same position as the three persons identified, and the court therefore ordered that the United States should take all measures necessary to ensure that those three individuals were not executed pending final judgment in the proceedings: 2003 ICJ Rep 77. None of these individuals were executed prior to the decision of the International Court on the merits in March 2004, when the Court decided that the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals” to determine whether the violations “caused actual prejudice,” without allowing procedural default rules to bar such review: 2004 ICJ Rep 12.

90. In *Medellin v Texas*, 552 US 491 (2008) the Supreme Court decided by a 6-3 majority that the decision of the International Court was not directly enforceable domestic federal law that pre-empted state limitations on filing of successive habeas petitions, and that the President's Memorandum to United States Attorney General, that United States would discharge its international obligations under *Avena* by having state courts give effect to decision, did not independently require states to provide reconsideration and review of named Mexican nationals' claims without regard to state procedural default rules. The obligation on the part of signatory nations to comply with International Court judgments derived not from the Optional Protocol, but from Article 94 of the Charter. If International Court judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Noncompliance with an International Court judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the U.N. Charter, Optional Protocol, and International Court Statute—would no longer be a viable alternative. There would be nothing to veto. In the light of the U.N. Charter's remedial scheme, there was no reason to believe that the President and Senate signed up for such a result. See also *Torres v Mullin*, 540 US 1035 (2003); *Medellin v Dretke*, 544 US 660 (2005); *Sanchez-Llamas v Oregon*, 548 US 331 (2006); *Garcia v Texas*, 564 US 940 (2011).

91. Medellín was executed. Subsequently Mexico brought proceedings in 2008 in the International Court for interpretation of the 2004 judgment, asking the Court to declare that the United States was obliged to take any and all necessary steps to ensure that no Mexican national entitled to review and reconsideration under the *Avena* judgment was executed. The Court again indicated provisional measures in July 2008: *Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals (Mexico v United States)*, 2008 ICJ Rep 311.
92. Subsequently, the International Court found that the matters claimed by Mexico to be in issue requiring an interpretation (which dealt with the direct effect of the judgment within the United States) were not matters which had been decided by the Court in its judgment of 31 March 2004 and therefore could not give rise to the interpretation requested by Mexico. The Court noted that Mr Medellín had been executed without having been given a review and reconsideration required under the 2004 judgment, and found that the United States had breached the obligation upon it under the order indicating provisional measures in the case of Mr Medellín, and reaffirmed the continued binding character of the obligations of the United States: 2009 ICJ Rep 3.
93. In the most recent of these cases, in January 2012 a petition alleging the violation of the American Declaration and a request for precautionary measures were filed on behalf of Edgar Tamayo Arias. The Inter-American Commission granted precautionary measures asking the United States to refrain from carrying out the death penalty until the Commission had the opportunity to issue a decision on the petitioner's claims. On January 15, 2014 the Commission adopted a report in which it concluded, among other findings, that the State's failure to respect its obligation under the Vienna Convention on Consular Relations to inform Mr. Tamayo of his right to consular notification and assistance deprived him of a criminal process that satisfied the minimum standards of due process and a fair trial required under the American Declaration. The Commission expressed the view that given the comprehensive assistance provided by the Mexican Government to its citizens in death penalty cases in the United States, it believed that there was a reasonable probability that, had Mr. Tamayo received consular assistance at the time of his arrest, this would have had a positive impact in the development of his criminal case. The Commission recommended that the United States review Mr. Tamayo's trial and sentence in accordance with the guarantees recognized in the American Declaration.
94. Mr Tamayo's recourse to the federal courts in Texas was unsuccessful (*Tamayo v Stephens*, 740 F 3d 991 (5<sup>th</sup> Cir 2014), cert den 134 S Ct 1022

(2014); *In Re Tamayo*, 552 Fed Appx 371 (5<sup>th</sup> Cir 2014)), and he was executed. The Inter-American Commission issued a statement deploring the failure on the part of the United States and the state of Texas to comply with the recommendations issued by the IACHR. It said that the failure of the United States to preserve Mr. Tamayo's life pending a recommendation by the IACHR to review his trial and sentence contravened its international legal obligations derived from the Charter of the Organization of American States and the American Declaration which are in force since the United States joined the OAS in 1951.

95. The Inter-American Commission articulates a principle common to the functioning of international adjudicative systems that requires the systems' member states to implement interim or precautionary measures when doing so is necessary to preserve the very purposes for which the systems were created and to prevent irreparable harm to the parties whose interests are determined through those systems: IACHR, *Death Penalty in the Inter-American System: From Restrictions to Abolition* (2011), at [61], citing *Medina v United States* (Merits), IACHR 91/05 (2005), para 90.

*The Inter-American system and the Privy Council*

96. The Privy Council in 1999 decided by a majority that Trinidad could execute condemned men despite an order from the Inter-American Court of Human Rights requiring Trinidad to take all measures necessary to preserve their lives pending consideration of the case by the Inter-American Court: *Briggs v Baptiste* [2000] 2 AC 40.
97. None of the states concerned in the Privy Council cases, Bahamas, Jamaica, and Trinidad, had enacted legislation to give effect to their international obligations under those international instruments that applied to them, nor had they enacted legislation giving their nationals rights under those instruments.
98. In two of the cases, by a majority of 3 to 2, the Privy Council held that the treaties could give the condemned men no rights under the law of the Bahamas: *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434; *Higgs v Minister of National Security* [2000] 2 AC 228. In two other cases, by majorities of 3 to 2 and 4 to 1, the Privy Council held that the effect of the constitutions of Trinidad and Jamaica was to give condemned men a right not to be executed until the human rights bodies had reported and the authorities in the West Indies had had a chance to consider their reports: *Thomas v Baptiste* [2000] 2 AC 1; *Lewis v Attorney General of Jamaica* [2001] 2 AC 50. In a fifth case, by a majority of 4 to 1, the Privy Council decided that an interim order of the Inter-American Court of Human Rights requiring Trinidad to ensure the

men were not executed had no effect in Trinidad law: *Briggs v Baptiste* [2000] 2 AC 40.

99. The Law Lords and former Law Lords who took the view that no account should be taken of the petitions to the human rights bodies emphasised that the international instruments were not part of the law of the country concerned. No change to the constitution of the Bahamas could have been introduced by the state having joined the Organisation of American States because it would mean that the Government had introduced new rights into domestic law by entering into a treaty obligation: *Fisher v Minister of Public Safety and Immigration (No. 2)* [2000] 1 AC 434, at 445 (Lord Lloyd of Berwick). The right to enter into treaties was one of the surviving prerogative powers of the Crown, and the rule that the treaties cannot alter the law of the land is one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative: *Higgs v Minister of National Security* [2000] 2 AC 228, at 241 et seq.
100. Those who took the view that the condemned men had a right that the reports of the human rights bodies be considered before a final decision on execution were taken did not dissent from the view that unincorporated treaties are not part of the law of the land. But in their view the condemned men had a right under the constitution not to have the outcome of any international process pre-empted by executive action. The applicants were not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution; and by ratifying a treaty which provided for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution. Lord Nicholls, dissenting in *Briggs v Baptiste* [2002] 2 AC 40, 55, said that “*by acceding to the [American Convention on Human Rights] Trinidad intended to confer benefits on its citizens. The benefits were intended to be real, not illusory. The Inter-American system of human rights was not intended to be a hollow sham, or, for those under sentence of death, a cruel charade.*”
101. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, the majority decided that the condemned men had a right not to be executed until the human rights bodies had reported and the government authorities in Jamaica had had a chance to consider them. In *Lewis* the court referred to the general rule that a ratified but unincorporated treaty does not in the ordinary way create rights for individuals enforceable in domestic courts, and, speaking through Lord Slynn, it went on, [2001] 2 AC 50, at 84:

“But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter ... [W]hen Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision [in the Constitution] to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered.”

102. In 1998 Trinidad and Tobago withdrew from the American Convention on Human Rights, citing the inability of the Inter-American Commission on Human Rights to deal expeditiously with death penalty cases.
103. In *Attorney General v Joseph and Boyce* (2006) 69 WIR 104 (a decision of the Caribbean Court of Justice – the final court of appeal for Barbados, Belize, Guyana and Dominica) the Inter-American Court issued provisional measures requiring Barbados to preserve the lives of the two men until the outcome of the petitions before the Inter-American system. The Court decided that the Barbados Privy Council ought not to have decided to advise the Governor-General to proceed with the executions before allowing the condemned men a reasonable time to complete the processing of their petitions. In giving this advice without waiting a reasonable time for the Commission's report, the Barbados Privy Council defeated their legitimate expectation and deprived itself of any opportunity of considering the Commission's report or if the matter was referred to the Inter-American Court, that Court's judgment.<sup>8</sup>

***VIII. The relationship between interim measures and jurisdiction over the merits***

104. It has been seen in section IV above that in national legal systems provisional measures may be granted by a court which does not have jurisdiction over the merits, e.g. because there are assets within its jurisdiction which may be attached in aid of the proceedings in the court which does have jurisdiction over the merits. Or a court may be asked to order provisional measures before its jurisdiction is finally established.

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<sup>8</sup> The UN Human Rights Committee has granted interim relief by way of a request for a stay of execution in death penalty cases, but they have been ignored in many cases, especially in Caribbean States: e.g. *Ashby v Trinidad and Tobago* (1994); *Bullock v Trinidad v Tobago*; *Ross v Guyana* (1996).

105. In the *Interhandel Case (Switzerland v United States) (Interim Measures of Protection)*, 1957 ICJ Rep 105, Judge Sir Hersch Lauterpacht said (separate opinion, at 17) that “the correct principle ... which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which prima facie confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.”
106. In the *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, 1951 ICJ Rep 89 at 93, the International Court, in granting provisional measures, said that it could not be accepted that the claim fell completely outside the scope of international jurisdiction. Since the *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, 1972 ICJ Rep 1, at 16 the Court has consistently required that the instrument invoked by the parties conferring jurisdiction on the Court “appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.”<sup>9</sup>
107. Accordingly, the Court must be satisfied that it has prima facie jurisdiction over the merits before it can grant interim measures: see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, 1984 ICJ Rep 169 at 179; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, 2002 ICJ Rep 219 at [30]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2006 ICJ Rep 113 at [57]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2009 ICJ Rep 139, at [40]; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147 at [18].
108. In the *Legality of Use of Force cases*, 1999 ICJ Rep 124 and the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, 2002 ICJ Rep 219, the Court refused to make orders for provisional measures because it did not have prima facie jurisdiction.
109. The problem with the prima facie approach is that if the Court has indicated interim measures in exercising its incidental jurisdiction in a case where it has no jurisdiction over the merits, it will have acted

<sup>9</sup> On this principle see Yee, *Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice*, in *The Reality of International Law: Essays in Honour of Ian Brownlie* (ed Goodwin-Gill & Talmon, 1999), 565.

without the Respondent State's consent. See Collins, (1992-III) 234 *Recueil des cours*, at 222.

110. That was why in the *Anglo-Iranian Oil Co. Case*, 1951 ICJ Rep 89, Judges Winiarski and Badawi Pasha said in their joint dissenting opinion (at 89): “[i]n international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. ...If there is no jurisdiction on the merits, there can be no jurisdiction to indicate interim measures of protection.”
111. In the *Anglo-Iranian Oil Co. case*, the International Court ultimately found that it did not have jurisdiction to hear the merits of the case after having indicated provisional measures of protection in favour of the United Kingdom: Preliminary Objections, 1952 ICJ Rep 93. In the *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, 2008 ICJ Rep 353, Georgia sought to establish prima facie jurisdiction on the merits on the basis on Article 22 of the CERD. The Order was adopted by a bare majority of 8 votes to 7, with strong dissenting opinions on the likelihood of finding jurisdiction on the merits. The Court ultimately found that it did not have jurisdiction: 2011 ICJ Rep 70. See Thirlway (2010) 81 BYIL 13, at 67-69 on this case and the *Avena* decision, above.
112. The jurisprudence of the International Court has been influential in other tribunals. See *The ARA Libertad Case (Argentina v Ghana)* Order of 15 December 2012, at [11] (ITLOS) Joint Separate Opinion of Judges Wolfrum and Cot: “[t]o come to a conclusion [on prima facie jurisdiction], three steps have to be taken, namely to establish which threshold has to be applied in deciding whether the arbitral tribunal prima facie has jurisdiction, whether a legal dispute exists between the parties and, finally, whether the Applicant in its discourse with the Respondent has presented facts and law which allow the Tribunal to conclude that the arbitral tribunal prima facie has jurisdiction.” In relation to the first step, while the UNCLOS provided little guidance, International Court jurisprudence (from which the Judges saw “no reason to deviate” (at [12])) does assist. The *prima facie* test was “[w]hether the facts and the law presented and argued are sufficient...” and that this was to be “decided on a case-by-case basis, the dominant factor being urgency” (at [13]). See also “*M/V SAIGA*” (No 2) (*St Vincent and the Grenadines v Guinea*) Order of March 11, 1998: “[b]efore prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear prima facie to



afford a basis on which the jurisdiction of the Tribunal might be founded” (at [29]); *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan)*, Order of August 27, 1999, at [62]; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Order of October 8, 2003, at [30]; *M/V “Louisa” (St Vincent and the Grenadines v Spain)*, Order of December 23, 2010, at [69]; *The “Ara Libertad” Case (Argentina v Ghana)*, above, at [60]; *Arctic Sunrise Case (Netherlands v Russian Federation)*, Order of November 22, 2013 at [71]; *The “Enrica Lexie” Incident (Italy v India)*, Order of August 24, 2015, [52]-[54].

113. The *prima facie* test was also adopted by the Iran-US Claims Tribunal: *Ford Aerospace and Communications Corp v Air Force of the Islamic Republic of Iran* (1984) 6 Iran-US CTR 104; *Bendone-DeRossi International v Islamic Republic of Iran* (1984) 6 Iran-US CTR 130; *Tadger-Cohen Associates v Islamic Republic of Iran* (1985) 8 Iran-US CTR 302; and reflects the practice in the investment treaty arbitration field: e.g. *City Oriente Ltd v Republic of Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/06/21 at [50]; *Perenco Ecuador v Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/08/6 at [39].
114. The same issue can arise generally in arbitration. Under Article 26(1) of the P.R.I.M.E. Rules, the tribunal may grant interim measures “if it finds that it has *prima facie* jurisdiction to decide the claim.” This threshold requirement is not present in Article 26(1) of the 2010 UNCITRAL Rules, although it is no doubt implicit in Article 26(1) of those Rules: See *Paushok v Government of Mongolia*, Order on Interim Measures, September 2, 2008 at [55]; Caron & Caplan, *The UNCITRAL Arbitration Rules, Commentary* (2nd ed 2013), 522-523.

### **IX. The Exercise of Discretion**

#### *Urgency and necessity as general principles*

115. These are general principles both in national law and international law.
116. The International Court has emphasised two elements: real risk of harm arising and imminency: see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, 2011 ICJ Rep 6, at [24].: “[t]he power of the Court to indicate provisional measure will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court has given its final decision.” “Real risk” meant whether “such a right exists at this stage of the proceedings” (at [24]-[25]).

117. The International Court has, on several occasions, found that a measure is “imminent” where “action prejudicial to the rights of either party is likely to be taken before such final decision is taken” (*Aegean Sea Continental Shelf*, 1976 ICJ Rep 3 at [33]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2007 ICJ Rep 16 at [32]; *Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)*, 2008 ICJ Rep 353, at [129]; *Passage through the Great Belt (Finland v Denmark)*, 1991 ICJ Rep 12 at [23].
118. For the application of the standard of “irreparable harm” see *Fisheries Jurisdiction (United Kingdom v Iceland)*, 1972 ICJ Rep 11 (the power to grant provisional measures “presupposes that irreparable prejudice should not be caused to rights which are the subject of a dispute in judicial proceedings”) (at [34]), applied in, e.g. *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2006 ICJ Rep 113, at [61-2] and 2007 ICJ Rep 3, at [32]; *Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)*, above, at [128]; *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)*, 2013 ICJ Rep 398, at [24]–[25]; and *Questions Relating to the Seizure and Detention of Certain Documents (Timor-Leste v Australia)*, 2014 ICJ Rep 147, at [32].
119. Irreparable can mean non-compensable: *Nuclear Tests (Australia v France)*, 1973 ICJ Rep 99, [27], [30]; *United States Diplomatic and Consular Staff in Teheran (US v Iran)*, 1979 ICJ Rep 20, [42]: “[with the] continuation of the situation, the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus a serious possibility of irreparable harm”; *Frontier Dispute (Burkina-Faso v Republic of Mali)*, 1986 ICJ Rep 10, at [21]; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures*, 1996 ICJ Rep 13 at [38]; *LaGrand (Germany v United States)*, 1999 ICJ Rep 9, at [24]; *Avena and others (Mexico v United States of America)*, 2003 ICJ Rep 77, at [55].
120. Article 290(5) of the UNCLOS empowers ITLOS to order provisional measures “if the urgency of the situation so requires”. There must be “a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute”: *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Order of December 23, 2010, [72]; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote d’Ivoire in the Atlantic Ocean (Ghana v Côte d’Ivoire)*, Order of April 25, 2015, [41] (risk of irreparable prejudice where, in particular, activities result in “significant and permanent modification of

the physical character of the area in dispute” and where such modification “cannot be fully compensated by financial reparations” at [89]).

121. In *Iran v United States* (1984) 5 CTR 112, 113 the Iran-US Claims Tribunal, operating under a modified version of the UNCITRAL Rules, expressly adopted the standard of “irreparable prejudice” set by the International Court. In *Atlantic Richfield v Islamic Republic of Iran* (1985) 8 Iran-US CTR 179) at 182, the lack of urgency was evident, and the Tribunal concluded that it did “not consider that there exists any threat of grave or irreparable damage.”
122. In *Behring International Inc v Air Force of the Islamic Republic of Iran* (1985) 8 Iran-US CTR 238, 273, 275-276 the Tribunal found that the disputed electronic property was so unique in nature, or so difficult to replace, as to render the potential harm “irreparable” regardless of the availability of “effective” monetary compensation. The Tribunal noted that “irreparable prejudice has long been recognized as a basis for ordering provisional relief in international law” (note 42).
123. Article 26(3) of the UNCITRAL Rules (and Article 17A of the Model Law) sets a standard of “harm not adequately reparable by an award of damages”: for the history, in which the notion of “irreparable harm” was abandoned, see Caron & Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2013), 520-522, and generally 513-522; see also Baker & Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992), 139-40: “[i]f this [Anglo-American standard of irreparable harm] were strictly applied, most commercial disputes arbitrated under the UNCITRAL Rules would not qualify for interim protection under Article 26, since an award of money damages can, at least in theory, rectify nearly all commercial losses”.
124. Article 63 (2) American Convention on Human Rights explicitly requires “extreme gravity and urgency” and the need to “avoid causing irreparable damage to persons”, and this is mirrored in Article 27(1) of the Rules of Procedure of the Inter-American Court of Human Rights, See, e.g. *Case of Ibsen Cárdenas and Ibsen Peña v Bolivia*. Order of October 14, 2014; *Case of Castro Rodríguez v Mexico*. Order of June 23, 2015; *Case of Gonzales Lluy et al. v Ecuador*, Order of September 2, 2015.
125. The inherent power of the Inter-American Commission on Human Rights to order provisional measures has been considered above.<sup>10</sup> When it examines a request seeking precautionary measures, the Commission

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<sup>10</sup> The rapporteur is also indebted to Colleague Arrighi for the information in this section.

#### PROVISIONAL MEASURES - PREPARATORY WORK

looks for three essential preconditions: (1) gravity; (2) urgency, and (3) the risk of irreparable harm to persons. The Commission's examination of requests seeking precautionary measures looks at the specifics of each situation. Its analysis is not governed by strict criteria, but looks at the nature of the risk and the harm that the precautionary measure seeks to avert. The following are some non-exhaustive examples of the factors that the Commission has weighed when considering requests seeking precautionary measures. As for the "urgent" nature of the situation for which measures are sought, the risk or threat involved must be imminent, which means that the remedial response must be immediate; and it is necessary to consider the timing and duration of the precautionary or protective intervention requested. The following are among the factors that the IACHR considers when assessing this aspect: (1) the existence of cyclical threats and assaults, which strongly suggests the need to take immediate action; (2) the continuing nature of the threats and how close one follows upon the others. For purposes of assessing the gravity and urgency requirements, the Commission also considers information describing the events which triggered the request (telephone threats, written threats, assaults, acts of violence, accusations); the identity of the source of the threats (private parties, private parties with ties to the State, State agents, others); the complaints made to the authorities; the protective measures that the potential beneficiary has already received and information concerning their effectiveness; a description of the context, which is needed to assess the gravity of the threats; the chronology and proximity in time of the threats made; the identity of the persons affected and, where relevant, the group to which they belong and the degree of risk. The Commission also considers factors related to the setting in the country concerned, such as: (1) the existence of an armed conflict; (2) the existence of a state of emergency; (3) the efficacy of the judicial system and the severity of the problem of impunity; (4) indicia of discrimination against vulnerable groups; and (5) the control that the executive branch exercises over the other branches of government, and other factors. On the matter of irreparable harm, the events that warrant the request must suggest that there is a reasonable probability that the harm will materialize; the request must not rely on legal rights or interests that can be remedied. When a matter has been brought to the attention of the local authorities, the Commission can consider the efficacy or inefficacy of the State's response. If the party requesting precautionary measures has not filed a complaint with the local authorities, it is important for the Commission to know the reasons for refraining from doing so. The failure of the State or of the party requesting precautionary measures to reply to the Commission's request for

information is a factor that it will consider when deciding whether or not to grant the requested measure.

126. As indicated above, UNCITRAL Rules and Model Law provide for a test of non-compensable harm (see Rule 26(3)(a) and Model Law Article 17A(1)(a)). Originally, the 2006 Model Law draft versions used the more common term “irreparable harm” instead of “harm not adequately reparable by an award of damages”. In the end the latter wording was agreed on as it addressed the concerns “that irreparable harm might present too high a threshold and [the final wording] would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure” (see Analytical Commentary to the UNCITRAL Arbitration Rules [26-034] citing A/CN.9/547 at [86].)
127. In investor-State arbitrations (both under ICSID and UNCITRAL Rules) there is some difference of emphasis and approach. Some decisions apply the test of irreparable harm to mean harm which cannot be compensated by an award of damages *Burlington Resources Inc v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1, June 29, 2009 at [51] the tribunal considered the required intensity of the harm that would justify an award of provisional measures: “‘irreparable’, i.e. not compensable by money, for the Respondents, as opposed to ‘significant’ for the Claimant”. It considered case law from both ICSID and UNCITRAL tribunals, arriving at the conclusion that the (essentially International Court derived) standard of “irreparable harm” ought to be defined as “‘harm not adequately reparable by an award of damages, to use the words of the UNCITRAL Model Law” ([82]). The tribunal also said at [74], citing *City Oriente Ltd v Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters, May 13, 2008 at [69]: “where measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition.”
128. In *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, May 8, 2009 at [43] the tribunal said that it “will not judge that circumstances require the grant of provisional measures unless it judges such measures to be necessary and urgent. They must be necessary, because that is what “require” means...”. The tribunal found that the language of Article 47 of the ICSID “largely reproduces that of Article 41 of the ICJ Statute and has been interpreted in a similar sense.” at [42]. At [43] the Tribunal recognized that provisional measures “will not be necessary when a party can be adequately compensated by an

award of damages if it successfully vindicates its rights when the case is finally decided.” In such cases the test for provisional measures in Article 47 was likely to be met. But Article 47 did not lay down a test of irreparable loss.

129. In *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments BV v Venezuela*, ICSID Case No. ARB/08/15, Decision on the claimants' request for provisional measures, March 3, 2010 at [39] the tribunal said: “Article 47 of the [ICSID] Convention ‘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 judgments given in the past by that Court.’...” (citing *Victor Pey Casado* at [2] and Schreuer, *The ICSID Convention: A Commentary*, 759). Citing recent case law of the International Court, the tribunal went on to find that the power to award provisional measures “can be exercised only if there is an urgent necessity to prevent irreparable prejudice to such rights, before the court has given its final decision” and that “irreparable prejudice is always required by the International Court of Justice for provisional measures” (at [43]). The tribunal did not consider that the standards enunciated in the *Burlington* and *Perenco* cases above differed in substance from the standard of “irreparable damage” generally used: at [45]-[46]. The International Court often granted provisional measures to avoid irreparable harm, although damages could be awarded. The International Court “when applying the test of ‘irreparable prejudice’ makes in fact a distinction between (a) actions which should be restrained, because their effects, though capable of financial compensation, are such that compensation cannot fully remedy the damage suffered; (b) and actions which may well prove to have infringed a right and cause harm, but in respect to which it would be sufficient to award damages without taking provisional measures.” (at [49]). See also *Occidental Petroleum Corp v Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007.
130. Sarooshi, *Provisional Measures and Investment Treaty Arbitration* (2013) 29 *Arbitration International* 361, 367-379, takes the view that many investment treaty tribunals have erred in accepting the “irreparable harm” test derived from the International Court of Justice cases *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005, at [8]; *Occidental Petroleum Corp v Ecuador*, ICSID Case No. ARB/06/11, *Decision on Provisional Measures*, August 17, 2007, at [59], and should adopt a lower threshold of “significant harm or threat” as in *City Oriente Ltd v Ecuador*, ICSID Case No. ARB/06/21),

Decision on Revocation Provisional Measures, May 13, 2008, at [72]. See also Mouawad and Silbert, *A Guide to Interim Measures in Investor-State Arbitration* (2013) Arbitration International 381, at 393-397, who cite examples of cases where the concept of irreparable harm or prejudice did not necessarily imply that the harm could not be compensated by an award of damages. See generally Kaufmann-Kohler and Antonietti, *Interim Relief in International Investment Agreements*, in Yanaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2010), chap 10.

*The Balance of Convenience*

131. This is a question which arises in all legal systems. The rights of the applicant, who may, if interim relief is not granted, lose the effective exercise of its rights, must be balanced against those of the defendant, whose position may eventually be vindicated.
132. In *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2006 ICJ Rep 113, Judge Abraham, in his separate opinion, noted that when acting on a request for the indication of provisional measures, the Court was necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties, and it could not avoid weighing those rights against each other. By virtue of the indication of provisional measures of protection, the Court would invariably impose an obligation on one party requesting that it either take certain steps, or that it refrain from taking certain steps, to that party's detriment. In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise. He went on:
- “... there is nothing out of the ordinary about a judicial body imposing on a party a specific obligation as to conduct, but the obligation thus imposed must rest on sufficiently solid legal ground, especially when the party in question is a sovereign State. In other words, I find it unthinkable that the Court should require particular action by a State unless there is reason to believe that the prescribed conduct corresponds to a legal obligation (and one pre-dating the Court's decision) of that State, or that it should order a State to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.”
133. In *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147 Judge Greenwood said (dissenting opinion at [7]): “In seeking to protect the plausible rights asserted by one party from irreparable harm, [the Court] should always be mindful of the effect which compliance with its Orders may have on the

ability of the other party to exercise plausible rights of its own. ... [The Court has a] duty to ensure that any provisional measures which it might indicate do not achieve protection for the rights of one party at the expense of undue harm to the rights of the other. In this respect also a degree of caution is required.”

134. Article 17A(1)(a) of the UNCITRAL Model Law expressly provides that interim measures will only be ordered where “(1) The party requesting an interim measure ... satisf[ies] the arbitral tribunal that: (a) Harm 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”. See *Paushok v Government of Mongolia*, Order on Interim Measures, September 2, 2008 at [45]: The tribunal found it to be “internationally recognized” that one of the standards that must be met before a tribunal will issue an order in support of interim measures includes “proportionality”. Under proportionality “the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties” ([79]) and found that “[o]n balance... there is considerable advantage for both parties in the issuance of interim measures of protection” ([85]).
135. In *City Oriente Ltd v Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters, May 13, 2008, at [70]-[72] the tribunal said: “First, 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... 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.” See also *Occidental Petroleum Corp v Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007 at [93]: the tribunal highlighted that provisional measures go to the protection of the rights of “either party” and maintained therefore that while provisional measures can be granted to protect the rights of one party from irreparable harm, these measures “may not be awarded ... where such provisional measures would cause



irreparable harm to the rights of the other party, in this case, the rights of a sovereign State”.

136. In *Burlington Resources Inc v Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1, June 29, 2009 at [81] the tribunal referred to *Occidental and City Oriente* as supporting the need to “weigh the interests of both sides in assessing necessity”. The *Occidental* tribunal refused provisional measures inter alia on the basis of the harm being compensable by an award of damages. The *Burlington Resources* tribunal distinguished the final decision in *Occidental* on the basis that, unlike in *Occidental*, when the interests of both the claimant and the respondent were taken into account, the loss of revenue and deterioration of the investment caused in the absence of provisional measures would be a detriment to both the investor and the State (*Burlington Resources* at [83]–[84]). For other ICSID cases see e.g. *Burimi SRL and Eagle Games v Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012; *PNG Sustainable Development Program Ltd v Papua New Guinea*, ICSID Case No. ARB/13/33, January 21, 2015.
137. In the Court of Justice of the European Union the President of the General Court recently re-stated the principle that the weighing up of interests requires the judge to determine whether or not the applicant's interest in obtaining the measures sought outweighs the interest in the immediate application of the contested measure, by examining, more specifically, whether the possible annulment of that measure by the Court when ruling on the main application would allow the situation that would have been brought about by its immediate operation to be reversed and, conversely, whether suspension of operation of the measure would prevent it from being fully effective in the event of the main application being dismissed: Case T-235/15R *Pari Pharma GmbH v European Medicines Agency (EMA)*, September 1, 2015.

#### *Security*

138. This is an issue which arises in national law. In the United States, the successful applicant for a preliminary injunction may be required to put up a bond. In England, every successful applicant for an interim injunction must give an undertaking that it will compensate the defendant for any damage which may flow from the injunction having been wrongly granted, and may have to fortify that undertaking by a payment into court, or a bank guarantee.
139. The UNCITRAL 2010 Rules provide (in Rule 26(6)) that “The arbitral tribunal may require the party requesting an interim measure to provide

appropriate security in connection with the measure.” See also UNCITRAL Model Law, 2006 revision, Article 17E.

140. A claimant whose claim may be doubtful, and whose willingness or ability to cover the resulting costs is not clear, may be required to provide a financial guarantee as a condition for the tribunal proceeding with the principal claim: Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009), 782.
141. In *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No ARB/98/2, Decision, September 25, 2001, at [78] – [89] Chile asked the tribunal to order the production of guarantees sufficient to cover the costs which would be incurred by the losing party in the arbitration. The claimants opposed the request arguing that it was unfounded as it concerned non-existing or potential rights and prejudged the decision of the tribunal. The tribunal noted that neither Article 47 nor Rule 39 foresee the granting of a conservatory measure aiming at the payment of a *cautio judicatum solvi*, or a “pre-judgment security” (at [82]). Nevertheless, the Tribunal observed that in some particular cases a tribunal could recommend the deposit of a guarantee protecting a respondent against the non-payment by a claimant of costs in case of insolvency. The recommendation of such a measure fell within an ICSID tribunal’s mandate under Art. 47 of the Convention (at [88]).
142. In *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, May 8, 2009 the tribunal said (at [80]): “[s]ince the tribunal may, in a later decision, hold that it has no jurisdiction to entertain this dispute, or that the Respondents are entitled to claim and enforce the enhanced payments required by Law 42, the Tribunal considers that the Respondents should enjoy a measure of security in relation to sums accruing due to them from Perenco ... It considers that such security is best provided by payment of the sums so accruing into an escrow account, from which sums will be disbursed on the direction of the tribunal or by agreement of the parties.”

#### *Undertakings*

143. In national systems of law an undertaking from a party may make it unnecessary to make a formal order, e.g. because the undertaking covers the same ground as the injunction which is sought, or removes the urgency or some other element necessary for the grant of the injunction. Such an undertaking to the court may be included in the order of the court, or (as in England) be treated as if it were a court order with the result that a breach of the undertaking will be punishable as it had been a

breach: “Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in the like terms and that the contrary has never been suggested” (*Hussain v Hussain* [1986] Fam. 134, 139 (Lord Donaldson MR)); “An undertaking is a very serious matter with potentially very serious consequences. It is a solemn promise to the court, breach of which can lead to imprisonment or a heavy fine” (*Zipher Ltd v Markem Systems Ltd* [2009] EWCA Civ 44, [2009] FSR 14, [19] (Lord Neuberger MR)).

144. Thus in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160 the Court of Appeal in England said that the default position was that an applicant for a freezing order would be required to give an unlimited cross-undertaking in damages, and the burden lay on the applicant to show that any cross-undertaking should be limited. The mere fact that the litigation in support of which the freezing order had been granted had been brought by the liquidator of an insolvent company did not compel the conclusion that the cross-undertaking had to be limited. A defendant did not have to show that the freezing order was likely to cause him a loss before a cross-undertaking of unlimited amount was required.
145. The position in international law is not so clear.
146. In the *Case Concerning Passage through the Great Belt (Finland v Denmark)* 1991 ICJ Rep 12, the International Court, placing on record assurances given by Denmark that no physical obstruction of the East Channel would occur before the end of 1994, and considering that the proceedings on the merits would be completed by that time in the normal course, found that it had not been shown that the right claimed would be infringed by construction work during the pendency of the proceedings: at [27].
147. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2009 ICJ Rep 155, the International Court, taking note of the assurances given by the Senegalese Head of State that it would not allow Mr Habré to leave its territory before the Court had given its final decision, found that there was no risk of irreparable prejudice (at [71]-[72]).
148. In *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste versus Australia)*, 2014 ICJ Rep 147, a written undertaking was given by the Australian Attorney-General on behalf of the Government not to make the contested material available to any part of the Australian Government for the purpose of negotiations in connection with exploitation of the Timor Sea. The Attorney-General also gave an undertaking that the Government would “not under any

circumstances [allow the data and documents] to be communicated to those conducting the [arbitration] proceedings on behalf of Australia” (at [36]). The Australian Attorney General “undertook that he would not make himself aware or otherwise seek to inform himself of the content of the material or any information derived from the material and that, should he become aware of any circumstances in which he would need to inform himself, he would first bring that fact to the attention of the Tribunal and offer further undertakings” (at [36]). The Court recognized that the Attorney General was capable of making binding unilateral statements and that there was no reason to believe that the undertaking would not be implemented (at [43]-[44]). But the Court found that in the context of circumstances involving national security, there was a risk of disclosure that would be highly prejudicial. Thus “the written undertaking... makes a significant contribution towards mitigating the imminent risk of irreparable prejudice created by the seizure of the above mentioned material to Timor-Leste’s rights, particularly its right to the confidentiality of that material being duly safeguarded, but does not remove this risk entirely” (at [47]). The Court therefore concluded that it was appropriate to indicate provisional measures, in particular that the material not be used in *any* way or at *any* time by *any* person and that they should be kept under seal until further decision of the Court (at [55]).

149. Judge Greenwood observed (dissenting opinion, at [7]) that the use of financial guarantees in public international law cases was rare: “The International Court of Justice has never sought to impose such a condition and the nature of most of the cases which come before it (including the present case) is such that a financial indemnity of this kind would usually be neither sufficient nor appropriate.” He also observed (at [20]). that: “[t]he Court has in the past taken into account a formal undertaking regarding future conduct of the kind given by Australia and concluded that, in the light of that undertaking, no risk of irreparable harm existed (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2009 ICJ Rep 155, paras 71-72). It has also taken note of a formal undertaking in proceedings before the Court as to an existing state of affairs (see *Maritime Dispute (Peru v Chile)*, Judgment of 27 January 2014, para. 178).”

150. In his separate opinion Judge Cançado Trindade said:

“14. Promises or assurances or 'undertakings' have been relied upon in a distinct context, that of diplomatic relations. When they are unduly brought into the domain of international legal procedure, they cannot serve as basis for a decision of the international tribunal at issue, even less so when they ensue from an original act of

*arbitrariness. The posture of an international tribunal cannot be equated to that of an organ of conciliation. Judicial settlement was conceived as the most perfected means of dispute settlement; if it starts relying upon unilateral acts of States, as basis for the reasoning of the decisions to be rendered, it will undermine its own foundations, and there will be no reason for hope in the improvement of judicial settlement to secure the prevalence of the rule of law.*

*15. Reliance upon unilateral acts of promise or assurances has been the source of uncertainties and apprehension in the course of international legal proceedings...*

...

*57. Can a unilateral assurance or promise provide a basis for the Court's reasoning in Orders of binding provisional measures of protection? Not at all...*

*58. ...In the exercise of its judicial function, [the Court] is not to ground its reasoning on unilateral 'undertakings' or assurances or promises formulated in the course of international legal proceedings. Precepts of law provide a much safer ground for its reasoning in the exercise of its judicial function..."*

151. See also his separate opinion in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012 ICJ Rep 422, at [73]-[78].
152. In the case of *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)*, Provisional Measures, Order of November 22, 2013, the tribunal was of the view that "under Article 290 of the [UNCLOS], it may prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained" and that "in accordance with article 89(5) of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested" (at [93]-[94].). The tribunal therefore ordered that a "bond or other financial security should be in the amount of 3,600,000 Euros to be posted by the Netherlands with the competent authority of the Russian Federation and that the bond or other financial security should be in the form of a bank guarantee, issued by a bank in the Russian Federation or a bank having corresponding arrangements with a Russian bank" (at [96].). Cf *MOX Plant Case (Ireland v United Kingdom)* Request for Provisional Measures, for the effect of undertakings and especially the Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus.
153. In the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Order 8 October 2003, Judge Lucky, in his separate declaration (at [20]) said that while he "could find

no precedent in international law ... the time has come to consider whether applicants for provisional measures should, as in some municipal systems, give an undertaking that they will pay damages and the costs incurred if the provisional measures sought are granted but subsequently discontinued when the substantive matter is determined”.

*The role of the underlying merits of the claim*

154. How far does the applicant for interim protection have to go to show that it has a good case on the merits? This is a pervasive problem in national and international law.
155. Article 26(3)(b) of the UNCITRAL Rules requires that the party requesting an interim measure shall satisfy the arbitral tribunal that “[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.” See Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules*, 2013, at [26-037] citing A/CN.9/545 at [31] and Article 17A(1)(b) of the Model Law. During the drafting of the Model Law provision, criticisms were voiced over the use of the wording “will succeed” and the alternative wording “is likely to succeed” was suggested in order to make this requirement appear less strict. However, after discussion, the words “will succeed” were retained in view of the fact that the introductory wording includes that there is a “reasonable possibility” and that this provides sufficient flexibility.
156. In an UNCITRAL Rules case, *Paushok v Government of Mongolia*, Order on Interim Measures, September 2, 2008, at [55] the tribunal said that it “need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunals. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.”
157. In *Occidental Petroleum Corp v Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, at [61] the tribunal said that “the right to be preserved only has to be asserted as a theoretically existing right, as opposed to proven to exist in fact” and the claimant at this stage “need only show that they allege the kind of claims that – if ultimately proven – would entitle Claimants to substantial relief” (at [64].) Because restitution was not the remedy for termination of a concession the claimants had not established a strongly arguable case that

- there existed a right to be protected by provisional measures. See also *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, January 21, 2015, at [124].
158. In the International Court the rights asserted to be protected by the request must be “at least plausible”: e.g. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, 2011 ICJ Rep 6; *Request for the Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, 2011 ICJ Rep 537 at [33]; *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)*, 2013 ICJ Rep 398, at [15]. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 2009 ICJ Rep 151 at [57]; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147, at [22].
159. In the latter case Judge Greenwood said in his dissenting opinion (at [4]-[6]) that : “the rights asserted [must be] at least plausible, that is to say that there is a realistic prospect that when the Court rules upon the merits of the case they will be adjudged to exist and to be applicable ... In addressing a request for provisional measures, however, the Court has to be careful not to stray into matters which can properly be decided on at the merits phase. Thus, while the Court insists that measures will be ordered to protect claimed rights only if those rights are plausible, it should not go beyond that preliminary appraisal and do or say anything which prejudices the questions which can only be decided on the merits after the Court has determined that it has jurisdiction and after it has had the benefit of full argument on the law and hear the evidence which the parties wish to put before it. Nor should the Court allow itself to be influenced, at the provisional measures stage, by consideration of the likely outcome on the merits.”
160. In *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2006 ICJ Rep 113, Judge Abraham said in his separate opinion (at [8]) “... the doctrine as to a clear separation of the issues on the merits from those concerning provisional protection, which I have always found to be misguided, might conceivably have been seen as in keeping with the widespread belief, before the *LaGrand* Judgment, that the Court’s orders were not binding. With the Judgment of 27 June 2001 [*LaGrand*], that ceased to be the case. It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way only because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out

some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated – and irreparably so – in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.” Without coming to a firm conclusion on the content of the plausibility criterion, Judge Abraham concluded that, in his view, “the most important point is that the Court must be satisfied that the arguments are sufficiently serious on the merits – failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law” (Separate Opinion at [9]).

161. The plausibility test is also applied by ITLOS: *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v Côte d’Ivoire)*, Order of April 25, 2015, at [58]; see also *The “Enrica Lexie” Incident (Italy v India)*, Order of August 24, 2015, [84]. Cf *Matter of Children and Adolescents Deprived of Liberty in the “Complexo do Tatuapé” of FEBEM*, Order of July 6, 2006 (“even though it is true that the events which motivated the request for provisional measures ... do not have to be fully proven, a minimum degree of detail and information is necessary so as to allow the Court to assess *prima facie* a situation of extreme gravity and urgency”: at [23]) (which presumably includes the underlying merits of the complaint).
162. In *Tanzania Electric Supply Co Ltd v Independent Power Tanzania Ltd* ICSID Case No ARB/98/8, Decision on the Respondent’s Request for Provisional Measures, Appendix A to Final Award Dated June 22, 2001, the respondent company (IPTL) sought from the claimant company (TANESCO) the continuation of the operation of its facilities in Tanzania, as well as damages for outstanding payments owed to IPTL. A key issue before the tribunal was whether “the request [was] one for conservatory measures or, in effect, for specific performance of the Agreement” (at [5]). The tribunal found that, in reality the Respondent sought specific performance of the Agreement and/or an interim mandatory injunction requiring such performance: “far from seeking to maintain the ‘status quo’, the recommendations sought by [the Respondent] were plainly directed to affect a fundamental change to it” (at [15]). “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” (at [16]).



**X. Relationship between interim measures and the rights in issue**

163. Revisions of the UNCITRAL Model Law and Rules removed the requirement that provisional measures are “in respect of the subject-matter of the dispute.” This was because of a concern that the phrase could lend itself to a restrictive interpretation of the provision. See Analytical Commentary to the UNCITRAL Arbitration Rules at [26-006] citing A/CN.9/508 at [53]: The UNCITRAL Working Group considered that if the provision “were understood to mean that an arbitral tribunal could only order interim measures of protection that were directly related to assets under dispute” this would lead to an “undue restriction on the power of the arbitral tribunal to issue interim measures”. For example, it was argued that if interim measures could only be issued in respect of the subject matter of the dispute, this might not cover interim measures for the freezing of assets which were strictly speaking not the subject matter of the dispute.
164. The history of the ICSID Convention shows that any express reference to the functions of provisional measures orders or the types of rights that might be protected by them was deliberately left out of the final draft. See Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009), 778-779: “[i]n the course of the drafting of the Convention, the question was raised whether it would be advisable to clarify what kind of provisional measures lay within the powers of the tribunal... The Chairman pointed out that ‘in international practice authority to prescribe provisional measures was left to the appreciation of the tribunal, presumably because it was difficult to foresee the types of situations that might arise’. In a show of hands on the kind of provisional measures which could be recommended, the Legal Committee eventually accepted the broad and open-ended formulation of Art. 47 which closely follows that of Art. 41 of the Statute of the International Court of Justice.”
165. In *Plama Consortium Ltd v Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005, the Respondent state argued that the claimant’s request for provisional measures ought to be dismissed on the basis that *inter alia*, “an ICSID tribunal’s authority to recommend provisional measures is limited to that which is necessary to preserve the right of a party [and that] the Tribunal can order a provisional measure to safeguard only those rights over which it is seised.” In that case the claimant company sought from the ICSID tribunal an interim order requiring that domestic insolvency proceedings against the claimant in Bulgaria be suspended pending the decision of the ICSID tribunal on a claim relating to a number of breaches of the provisions of the Energy Charter Treaty (at [8]). The tribunal found that there was no express

provision in the Convention limiting the scope of provisional measures awards, but that the rights referred to in Article 47 of the ICSID Convention “must be limited in some way” (at [40]). While the standard of “rights in dispute” might be too narrow, a broader standard of “rights relating to the dispute” was a reasonable limitation: “The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date” (at [40]).

166. In *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No 3, January 18, 2005 the Respondent argued against a request for interim relief on the basis that the relief sought was *inter alia* to suspend and discontinue criminal proceedings and that these proceedings did not fall within the terms of Article 25 of the ICSID Convention (which conferred jurisdiction on the tribunal). The tribunal found that: “[i]t is not necessary for a tribunal to establish that the actions complained of in a request for provisional measures meet the jurisdictional requirements of Article 25. A tribunal may order a provisional measure if the actions of the opposing party relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters” (at [11]).
167. In *Churchill Mining PLC v Indonesia* (ICSID Case No ARB/12/14) Procedural Order No 3, Provisional Measures, March 4, 2013 the tribunal considered a request for provisional measures preventing the claimant from “making false, unfounded and misleading statements [about the respondent State] in the press about the case at hand”. The Tribunal found that: “the rights invoked by the Respondent, i.e. the right to attract foreign investment, the right to regulate and promote foreign investment in its natural resources, the right to enforce the regulations on investments in its natural resources, the right to the protection of its honor and reputation, and the right to justice based on factual truth, are not rights in dispute that could warrant the recommendation of provisional measures” (at [50]).
168. So also in *Caratube International Oil Co LLP v Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants’ Request for Provisional Measures, December 4, 2014, the claimants requested provisional

measures, inter alia, “to pursue their claims and the integrity of the process in this arbitration in an orderly fashion without the ongoing risk that they, or any potential witnesses on which they wish to rely to produce evidence or to provide information or documents, be exposed to further sanctions or harassment” (at [119]). The tribunal considered the appropriateness of the measures requested in relation to the Parties’ rights, and held (at [121]) that “[t]he 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.”

169. Consequently the obligation of the parties to a dispute to refrain from acts that may have a prejudicial effect on the implementation of the award has been well established in investor-State orders: see *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures, September 25, 2001, at [67]; *Burlington Resources Inc v Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Request for Provisional Measures, June 29, 2009, at [61].
170. In the *Case concerning the Polish Agrarian Reform and the German minority (Application for the indication of interim measures of protection)*, Ser A/B, (No 58), the Permanent Court restated the “essential condition” that had to be fulfilled prior to granting interim measures, namely that “such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court.”
171. The International Court has confirmed that provisional measures may only be made so as to protect from irreparable harm those rights that are “the subject of the dispute before the Court”: *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2006 ICJ Rep 113, at [62]; *Certain Criminal Proceedings in France (Republic of the Congo v France)*, 2003 ICJ Rep 107 at [22]; *Passage Through the Great Belt (Finland v Denmark)*, 1991 ICJ Rep 12, at [16]-[17]; *Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)*, 2008 ICJ Rep 353 at [34]. See Thirlway (1990) 82 BYIL 1, at 55. For the same approach in the

Iran-US Claims Tribunal see *Islamic Republic of Iran v United States* (1984) 5 Iran-US CTR 112.

172. In *Arbitral Award of 31 July 1989*, 1990 ICJ Rep 64, Guinea-Bissau instituted proceedings against Senegal in respect of a dispute concerning the existence and validity of an arbitral award delimiting their maritime boundary. Guinea-Bissau sought a decision from the Court that the arbitral award was null and void and that Senegal could not enforce it (at [14]). In the application for interim measures, Guinea-Bissau claimed that the Senegalese Navy had boarded fishing vessels and had attempted to enforce its own fishing regulations. Guinea-Bissau sought an order from the Court to the effect that the Senegalese navy would be prevented from operating in the disputed area (at [3]). Senegal accepted that it had acted in the way described by Guinea-Bissau, but had done so on the presumed validity of the arbitral award (at [16]). In considering the request for interim measures, the Court stated that "...the Application instituting proceedings asks the Court to declare the 1989 award to be 'inexistent' or, subsidiarily, 'null and void', and to declare "that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989";... the Application thus asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question... accordingly the alleged rights sought to be made the subject of provisional measures are not the subject to the proceedings before the Court on the merits of the case... any such measures could not be subsumed by the Court's judgment on the merits." (at [26]).
173. By contrast in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2007 ICJ Rep 16, at [20] Uruguay sought measures restraining actions by Argentina's citizens blocking roads and bridges between the two countries by way of their protest against the building of the pulp mills that were allegedly causing pollution of the River Uruguay, in violation of the 1975 bilateral Statute. The Court found that "any right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures" (at [29]).
174. In *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)*, above, the International Court found that the request for an immediate and unconditional Environmental Impact Assessment was exactly the same as the claimant's claims on the merits,

which included the reassessment of an infrastructure project on the basis of its potential downstream environmental effects. A decision to order an Environmental Impact Assessment would therefore amount to prejudicing the Court's decision on the merits of the case (at [21]). But the separate requests to immediately take emergency steps to reduce or eliminate erosion, and to halt construction of the road, were linked to the right that sought to be protected (the right to be free from transboundary harm) and did not amount to "enforcement" of the rights in dispute: [22]-[23]. See also *Request for the Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, 2011 ICJ Rep 537; *Questions Relating to the Seizure and Retention of Certain Documents and Data (Timor-Leste v Australia)*, 2014 ICJ Rep 147. A similar approach has been adopted by ITLOS: See *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire)*, Order of April 25, 2015 at [42], [63].

175. In a number of opinions Judge Cançado Trindade has emphasised that the rights which may be protected are not limited to the rights of States but extend to natural persons for whose benefit those rights exist: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2009 ICJ Rep 155, dissenting opinion at [21]-[23]; *Temple of Préah Vihear (Cambodia v Thailand)*, 2011 ICJ Rep 537, separate opinion at [74].
176. A unique feature of the Law of the Sea Convention system is that by virtue of Article 287 of the Convention jurisdiction may be conferred on (among other bodies) the International Court, and by Article 290: "If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction ...the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision." That means that the measures of protection may go beyond the rights of the parties to the dispute and include serious harm to the environment.

*The non-aggravation of the dispute*

177. The question whether the measures must relate to the rights in issue also arises in the context of whether there is a free-standing power to order measures which are designed to prevent aggravation of the dispute.
178. In *Legal Status of South Eastern Greenland*, Ser A/B, (No 48) 1932, at 284, the Permanent Court of Justice found that while it had to power to order interim measures "in so far, that is, as the damage threatening [the

Applicant's] rights would be irreparable in fact or in law", it accepted that "under Article 41 of the Statute, the Court is also competent to indicate interim measures of protection for the sole purpose of preventing regrettable events and unfortunate incidents".

179. In *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, 2007 ICJ Rep 16, the Court recalled that it had "on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement" but that "in those cases, provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated" (at [49]). The International Court noted that: "it has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay in dispute" (at [50]). In the absence of provisional measures indicated on that basis, the Court decided it had no power to indicate provisional measures relating to the "aggravation or extension of the dispute" (at [51]).
180. Judge Buergenthal disagreed with the conclusion that there was no free-standing power to order provisional measures to prevent aggravation of the dispute and referred (at [6]) to "pronouncements by this Court that are predicated on the assumption that it has the power under Article 41 to order provisional measures to prevent a party to a dispute before it from interfering with or obstructing the judicial proceedings by coercive extrajudicial means, unrelated to the specific rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case." So also Judge *ad hoc* Torres Bernárdez, dissenting in part, emphasised (at [46]) that the Court should have relied on the "principle universally accepted by international tribunals and likewise laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute," citing *Electricity Company of Sofia and Bulgaria*, Order of December 5, 1939, PCIJ, Series A/B, No. 79, 199, as quoted in *LaGrand (Germany v. United States)*, 2001 ICJ Rep at [103].
181. In the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, 2011 ICJ Rep 537, the Court (at [59]) re-stated that when it was "indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties' requests, also possesses the power to indicate provisional measures with a view to

preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require.” In her dissenting opinion in that case, Judge Donoghue noted that the independent purpose of “non-aggravation” had not been widely accepted by the Court: “It has been suggested that there is a role for non-aggravation measures that is independent of the preservation of rights *pendente lite*, in light of the language of Article 41 permitting the Court to indicate provisional measures when “circumstances” so require ... Because the Court has not embraced that view, it seems unlikely that it provides the rationale for the non-aggravation measure imposed today.” (at [24]), but “There are sound reasons for including non-aggravation measures in a provisional measures order imposed in the context of an Article 26 dispute. Indeed, the objective of preventing the aggravation of the dispute has resonance beyond the standard non-aggravation subparagraph that appears the Court’s order. The concept of non-aggravation may also provide a rationale for other measures in an order, even when such measures have a more attenuated link to a dispute before the Court. Thus, for example, in an Article 26 case regarding a region of disputed sovereignty, particularly where there is a risk to life, the concept of non-aggravation lends credence to the extension of provisional measures beyond the perimeter of the territory in dispute, despite the more attenuated link to the dispute over territory” (at [25]). See also separate opinion of Judge Cançado Trindade, [76]-[77].

182. In his dissenting opinion in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Judge Greenwood said at [6]: “It might seem that the measure, frequently included in an Order for provisional measures, by which the Court enjoins both parties to refrain from any action which might aggravate or extend the dispute... is an exception to this principle. In fact, the exception is more apparent than real. A measure of this kind is not normally free-standing but is indicated where the Court also indicates measures for the protection of rights. Moreover, the link to the merits is still present, since the dispute which the parties are required not to aggravate or extend is the dispute on which the Court is being asked to rule at the merits phase”.
183. ITLOS has also made orders of this kind. See *M/V “SAIGA” (No 2) (St Vincent and the Grenadines v Guinea)*, Order of March 11, 1998, at [43]; Cf. *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan)*, Order of August 27, 1999: parties should, “[a]ct with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of the southern bluefin tuna” (at [77])

and the operative part was that the parties “shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal.” See also *The “Enrica Lexie” Incident (Italy v India)*, Order of August 24, 2015: Italy and India offered to suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the tribunal or might jeopardize or prejudice the carrying out of any decision which the Tribunal may render.

184. In *Burlington Resources Inc v Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1, June 29, 2009 the tribunal said (at [60]) that “the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or ‘substantive rights’ ... but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.” The independent right to non-aggravation was, according to the tribunal, well established by the Permanent Court in *Electricity Company of Sofia and Bulgaria*; by the travaux préparatoires of the ICSID Convention which referred to the need “to preserve the status quo between the parties pending [the] final decision on the merits”; by the ICSID tribunals in *Holiday Inns SA v Morocco* (ICSID Case No. ARB/72/1), Order of July 2, 1972 (Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v Morocco) – Some Legal Problems* (1980) 51 BYIL 123 and *Amco v Indonesia*, Decision on Request for Provisional Measures of December 9, 1983, .412), and more recent ICSID jurisprudence.
185. The tribunal also said at [74], citing *City Oriente Ltd v Ecuador and Empresa Estatal Petroleos Del Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and other Procedural Matters, May 13, 2008 at [69]: “where measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition.”
186. See also *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures, September 25, 2001, at [67]; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No 1 on Claimant’s Request for Provisional Measures, July 1, 2003, at [2]; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia*, ICSID Case No. ARB/06/2, February 26, 2010, at [134].
187. In *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants’ Request for Provisional Measures, March 3, 2010, at [65] the tribunal



followed the International Court's decision in *Pulp Mills*. After discussing the relevant part of the International Court's decision, the tribunal concluded that absent a finding of "necessity" and "urgency", a court or tribunal would not have jurisdiction to award provisional measures in order to avoid the aggravation of extension of the dispute. In other words: 'non-aggravation' measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind."

*XI. Some examples*

188. The UNCITRAL Model Law (at Article 17(2)(a)-(d): and see also Article 26(2)(a)-(d) of the 2010 Rules) provides expressly for the following purposes of interim measures:

(a) [to] maintain or restore the status quo pending determination of the dispute;

(b) [to] take action that would prevent, or refrain from taking action that is likely to cause

(i) current or imminent harm; or

(ii) prejudice to the arbitral process itself

(c) [to] provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) [to] preserve evidence that may be relevant and material to the resolution of the dispute.

189. The UNCITRAL Working Group in its 2002 Report to the UNCITRAL Secretariat on the *Preparation of Uniform Provisions on Interim Measures of Protection* (2002) made a distinction between (1) measures to avoid or minimize prejudice, loss or damage ("for example, preserving a certain state of affairs until a dispute is resolved by the rendering of a final award and avoiding prejudice") and (2) enforcement facilitation measures ("includ[ing]: orders which are intended to freeze assets... orders concerning property belonging to a party to the arbitration which is under the control of a third party... security for the amount in dispute... security for costs of arbitration..."). The Working Group also found that "[t]here is no evidence to suggest that the objectives differ in the international commercial arbitration context from those sought in the context of domestic litigation." (see A/CN.9/WG.II/WP.119: UNCITRAL Working Group II (Arbitration and Conciliation), 36<sup>th</sup> Sess., 4-8 March 2002, Secretariat Note: Preparation of uniform provision on interim measures of protection, [14]).

190. Thus Article 17 of the UNCITRAL Model Law and Article 26 of the Arbitration Rules provide that: “(2) An interim measure is any temporary measure ... by which ... the arbitral tribunal orders a party to [...] (c) Provide a means of preserving assets out of which a subsequent award may be satisfied.” That the assets relevant to the effectiveness of a final award must be protected from dissipation pending an outcome of a hearing, is undisputable.
191. For example, interim measures have been sought before the Iran-US Claims Tribunal for the stay of sale or transfer of goods in possession of the claimant (*see e.g. Avco Corp v Iran Aircraft Industries* (Case No 261)); the stay of a planned auction of property (*see e.g. Iran v United States* (1984) 5 Iran-US CTR 112; an order directing conservation of goods (*e.g. Behring International, Inc v Air Force of the Islamic Republic of Iran* (1985) 8 Iran-US CTR 238); and in investment treaty arbitrations an order to refrain from seizing or obtaining a lien on assets relevant to the final award (*see e.g. Paushok v Government of Mongolia*, Order on Interim Measures, 2 September 2008).

*Protection of procedural integrity*

192. In national law anti-suit injunctions to restrain actions in breach of forum selection or arbitration agreements fall within this category.
193. At the time of the revisions to the UNCITRAL Model Law in 2006, the Working Group considered whether Article 17(2)(b) of the Model Law (which provides for provisional measures that ensure the procedural integrity of UNCITRAL arbitrations) included a power to order anti-suit injunctions. It was argued that such injunctions were uncommon in international legal practice and in many legal systems they were completely unknown. However, it was also pointed out that in certain jurisdictions such injunctions were regarded as contradicting the fundamental constitutional right of a party to apply for court action. This led to the concern that the inclusion of anti-suit injunctions in the Rules and Model Law “might jeopardize the chances of the [revised versions of the Rules and Model Law] being implemented, or indeed [might] jeopardize the overall acceptability of the Model Law, particularly in those countries that did not recognise anti-suit injunctions” (at [76]). Those in favour of including a provision for anti-suit injunctions stated that its unfamiliarity to some legal systems only supported the inclusion of the provision “with a view to promoting the modernisation and harmonisation of legal practices” (at [77]). Further arguments included the view that anti-suit injunctions were designed to protect the arbitral process and that it was legitimate for arbitral tribunals to protect their own process. It was in light of these considerations that the Working

Group agreed to retain in the 2006 revisions the wording “or to prejudice the arbitral process itself” so as to refer, inter alia, to the concept of anti-suit injunctions (Analytical Commentary to the UNCITRAL Arbitration Rules at [26-021], citing A/CN.9/589 at [21]; A/61/17 at [94]).

194. The NAFTA provides in Article 1134 that “[a] Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal’s jurisdiction is made fully effective”. The NAFTA then references two sub-categories of procedural effectiveness: “...an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction”.
195. In *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006 at [135] the tribunal emphasized that provisional measures were necessary in order 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; 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’.” See also *Quiborax SA, et al v Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 1, 2010, at [153] (provisional measures “are intended to protect the procedural integrity of the arbitration”); *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, May 8, 2009 at [43].
196. A request was refused in *Holiday Inns SA v Morocco* ICSID No ARB/72/1, Decision on Provisional Measures (July 2, 1972). Shortly before ICSID arbitration had been initiated, the Government turned to its own courts and obtained orders authorizing them to take all necessary measures to have construction of the hotel resumed and completed at the claimant’s cost. A request by the claimant to the tribunal for provisional measures sought to have the actions in the Moroccan courts terminated. The tribunal declined to recommend measures on the basis that the “requests bear on injunctions which are beyond the framework of provisional measures which the tribunal could consider.” But requests were granted in *CSOB v Slovakia*, Procedural Order No. 4, 11 January 1999 (suspension of domestic bankruptcy proceedings recommended to the extent that these proceedings might involve the determinations of issues before the tribunal) and in *SGS v Pakistan*, Procedural Order No. 2, October 16, 2002, 8 ICSID Reports 388. The tribunal said: “The right to

seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law” (at 393). With respect to Pakistan’s application in the Pakistani court to have SGS held in contempt of court, the tribunal requested Pakistan to refrain from acting on its earlier complaint or file a new complaint. The tribunal further asked Pakistan to ensure that no action be taken in respect of contempt proceedings (at 394). With regard to SGS’s request that Pakistan refrain from participating in proceedings “in any way” relating to the arbitration in the future, the tribunal found the request to be too broad. It held that it could not “enjoin a State from conducting the normal process of criminal, administrative and civil justice within its own territory” (at 396). With respect to SGS’s request for a stay of the national arbitration, the tribunal noted that it raised a number of substantial issues regarding the tribunal’s competence and jurisdiction. Nevertheless, having weighed up the different elements of the case, the tribunal decided that “it would be wasteful of resources for two proceedings relating to the same or substantially the same matter to unfold separately while the jurisdiction of one tribunal awaits determination” (at 396). Therefore it concluded that it would be appropriate to recommend a stay of the Pakistani arbitration until the tribunal had reached its decision on jurisdiction (at 397). See also *Zhinvali v Georgia*, Award, January 24, 2003; *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005; contrast *Plama Consortium Ltd v Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005. See Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009), at 784

*Preservation of the effectiveness of the award*

197. In *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Provisional Measures, May 8, 2009 at [43] the tribunal observed that Article 47 and Rule 39 of the ICSID Convention and Rules “recognize 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 proceedings and avoid severe aggravation of the dispute.”

*Preservation of evidence*

198. Normally there are separate procedural provisions for the production of documentary evidence and the giving of oral testimony, but sometimes provisional measures are used to preserve documentary material and to ensure that oral evidence is given. The distinction is illustrated by *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007. The claimant requested the opening of secret services archives, stressing that this would help it prepare its case, but failed to request specific documents. The tribunal was unclear what right the “vague and general request” was deemed to protect. It emphasized that the request was “an application for disclosure of unspecified evidence rather than a proper request for provisional measures. This seems to be analogous to what is sometimes called a ‘fishing expedition’.” In considering the request for provisional measures for the purpose of preservation of evidence, the tribunal considered that the IBA Rules were “used widely by international arbitral tribunals as a guide even when not binding on them. Precedents and informal documents, such as the IBA Rules, reflect the experience of recognized professionals in the field and draw their strength from their intrinsic merit and persuasiveness rather than from their binding character.”
199. So also in *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia*, ICSID Case No. ARB/06/2, February 26, 2010, (at [153]) the tribunal accepted the claimants’ position 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. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.” The tribunal said (at [157]) that “[...] any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party’s access to evidence or the integrity of the evidence produced could not be remedied by an award of damages.”
200. In *AGIP v Congo*, Award, November 30, 1979, 1 ICSID Rep 306 the claimant’s subsidiary in the Congo had been nationalized. In the course of the nationalization, the Government had occupied the local offices and seized the company’s records. AGIP lodged a request for “measures of preservation” in accordance with Article 47 to the effect that the Government should be directed to collect all the documents that had been kept at the local office, furnish the tribunal with a complete list of these documents and keep these documents available for presentation to the tribunal at AGIP’s request. The tribunal made the order as requested.

201. In *Sempra v Argentina*, Decision on Provisional Measures, January 16, 2006, reproduced in *Sempra v Argentina*, Award, September 28, 2007, at [37], the claimant filed a request for provisional measures to secure the oral testimony of two of its witnesses. The tribunal's order was that Argentina should adopt the necessary measures to comply with these provisions and in particular shall refrain from any conduct that may impair the witness's ability to provide oral testimony.
202. For other cases on preservation of evidence see *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, September 29, 2006 at [84] and [92]; *Railroad Development Corp v Guatemala*, Decision on Provisional Measures, October 15, 2008, at [32], [36].
203. In *Land and Maritime Boundary between Cameroon and Nigeria*, 1996 ICJ Rep 13 at [42] the order of the International Court recognized that "actions within the territory in dispute could jeopardize the existence of evidence relevant to the present case".

#### ***XII. International Commercial Arbitration***

204. This section is primarily concerned with international commercial arbitration, and not with investment arbitration where special considerations arise, and have been considered above. A very extensive literature has developed on interim and provisional measures in international commercial arbitration in recent years, much of which is listed in Born, *International Commercial Arbitration* (2nd ed 2014), 2424-2425.

#### *The powers of arbitrators: obtaining interim relief from the arbitral tribunal*

205. Generally arbitration tribunals, once they have been fully constituted, may grant provisional remedies: e.g. UNCITRAL 2010 Rules, Article 26; ICC 2012 Rules, Article 28; LCIA 2014 Rules, Article 25.
206. This power is frequently underlined by national legislation. In England the Arbitration Act 1996 provides that, absent contrary agreement, an arbitral tribunal may issue orders concerning the preservation, detention, inspection, or sampling of "property which is the subject matter of the dispute" (s.38(4)) and concerning the preservation of evidence (s.38(6)). For other types of provisional measures, the Act provides that "the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award" (s.38(1); s.39(1)). See also UNCITRAL Model Law, Article 17;

Germany, ZPO, section 104; Switzerland, Private International Law Act, Article 183; France, CPC, Article 1468.

207. But some systems of law prevent them from doing so. Modern examples of national legislation which prevent arbitral tribunals from ordering provisional relief include Italy and Argentina and the view has been expressed that this is contrary to the New York Convention: Born, 2430.

*Choice of law*

208. At least two choice of law questions arise in relation to the grant of interim measures. First, what law applies to determine the authority of the tribunal to grant interim measures? Second, once the tribunal has the necessary power, what law determines the standards which the tribunal applies in granting the measures?
209. There are at least three possible choices for the law governing the granting of provisional measures: (i) the law of the arbitral seat; (ii) the law governing the parties' contract; or (iii) international standards.
210. It is unlikely that the law of the seat will provide much guidance for the tribunal as to the standards applicable to the grant of interim relief. National arbitration statutes are unlikely to provide meaningful standards, beyond stating that the tribunal has the power to grant such relief as it considers "necessary" or "appropriate". The law governing the contract is also unlikely to be an appropriate source for such standards, as the substantive law of contract is unlikely to address this issue. Further, if the tribunal were to look to the applicable law to guide its discretion in this area, it might run into other difficulties. For example, different causes of action in the arbitration may be governed by different substantive laws; or there may be disputes under different contracts, being heard in the same arbitration, but each governed by a different law.
211. The better view is that the power to grant interim relief depends on the law of the seat, but that the tribunal may apply international standards, rather than purely national standards of the law of the seat, in exercising the power. See also Born, *International Commercial Arbitration* (2nd ed 2014), 2457-2460.
212. The international standards can be found in, for example, the UNCITRAL 2010 Rules, which flesh out specific guidelines applicable to a tribunal when considering the grant of interim measures. First, the applicant must be likely to suffer a harm not "adequately reparable" by an award of damages. Second, the applicant must demonstrate that 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." Thirdly, the applicant must persuade the tribunal that it has a "reasonable

possibility” of success on the merits of the claim. The issue of urgency, often considered to be an important factor, is not specifically included within the UNCITRAL 2010 Rules test.

*Jurisdiction of national courts to grant interim relief in support of arbitral tribunal proceedings*

213. Although an arbitral tribunal will normally possess the power to grant interim relief, there are a number of inherent and significant limitations on the tribunal’s power. These limitations mainly derive from the contractual nature of the tribunal’s jurisdiction; and from the fact that the tribunal must first be constituted before it can grant relief. A tribunal’s order of provisional measures will only bind the parties to the arbitration agreement. The tribunal does not have the power to order relief against (or binding upon) a third party. This means that a tribunal may not be able to effectively freeze funds held by a party in a bank account (the bank, not being a party to the arbitration agreement, is not bound by the tribunal’s order).
214. Many national arbitration statutes contain provisions that allow a party to apply to the relevant national court to support or enforce the tribunal’s orders. Some national arbitration regimes provide the ability for the tribunal to seek assistance from the local court. For example, a tribunal seated in England is entitled, upon notice to the parties, to apply to the English court to require a party to comply with its peremptory order: Arbitration Act 1996, section 42(2)(a). Similarly, the Swiss Private International Law Act also allows the tribunal to seek such support from the local court: Article 183(2) (“[i]f the party so ordered does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court”). See also UNCITRAL Model Law, Article 17H.
215. In some jurisdictions, national law expressly limits the circumstances in which court-ordered provisional measures may be ordered. By section 44(4) of the Arbitration Act 1996, the English court can only order certain provisional measures in support of the arbitral proceedings with the permission of the tribunal or the agreement in writing of the parties. Section 44(3) of the 1996 Act provides that a party can apply to the English court for an order preserving evidence or assets without obtaining such permission if the case is one of “urgency”. But section 44(5) provides that the court shall only act where the tribunal has no power or “is unable for the time being to act effectively”, which includes cases where no tribunal has yet been constituted.



216. For provision for court-ordered provisional measures under institutional arbitration rules see the UNCITRAL 2010 Rules, Article 26(3); ICC 2012 Rules, Article 23(2); LCIA 2014 Rules, Article 25(3).
217. In the United States the courts may grant injunctive or other preliminary relief in aid of arbitrations in the United States: see *e.g. Benihana, Inc v Benihana of Tokyo, LLC*, 784 F 3d 887 (2d Cir 2015). But there is a division of authority on whether the court has such a power in cases where the New York Convention applies.
218. In *McCreary Tire and Rubber Co v CEAT SpA*, 501 F 2d 1032 (3d Cir 1974) it was held that the court would not grant an attachment in support of an arbitration in Belgium between a US company and an Italian company. The decision assumed, without any supporting reasoning, that resort to attachment was in itself a breach of the arbitration agreement, and that to allow attachment would be inconsistent with the New York Convention. In fact this was not a case where the plaintiff genuinely desired arbitration, and was bona fide seeking protective remedies from a judicial tribunal. McCreary had brought an action in Massachusetts which was stayed after CEAT had relied on the arbitration clause, and then sought an attachment in Pennsylvania. Consequently the merits were all in the direction of CEAT, and there seems to have been no evidence that McCreary would have been prejudiced by the lifting of the attachment.
219. But *McCreary* has been heavily criticised, and has not been applied in many cases, especially where the remedy sought from the court is injunctive in nature, or where the remedy is seizure of a vessel under maritime law: *e.g., Borden, Inc v Meiji Milk Products Co., Ltd*, 919 F 2d, 822 (2d Cir 1990) (application for preliminary injunction in aid of arbitration is consistent with the court's powers under the New York Convention); *EAST, Inc of Stamford v M/V Alaia*, 876 F 2d 1168 (5th Cir 1989) (the arrest of a vessel prior to arbitration); *China Nat'l Metal Prods. Import/Export Co v Apex Digital, Inc*, 155 F Supp 2d 1174, 1180 (CD Cal 2001) (pre-arbitral award writ of attachment pending reference to arbitration and pending the conclusion of the arbitration proceedings).
220. In *Aggarao v MOL Ship Management Co, Ltd*, 675 F 3d 355 (4th Cir 2012) it was decided that where a dispute is subject to mandatory arbitration, the court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a "hollow formality". The arbitration process would be a hollow formality where the arbitral award when rendered could not return the parties substantially to the status quo ante. This principle applies to cases covered by the New York Convention:

*Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 365 (5th Cir 2003) (“nothing in the Convention or [the Convention Act] limits the inherent authority of a federal court to grant injunctive relief with respect to a party over whom it has jurisdiction”); *Bahrain Telecommunications Co v DiscoveryTel, Inc*, 476 F Supp 2d 176, 180 (D Conn 2007); see also *Borden, Inc. v Meiji Milk Products Co, Ltd*, 919 F 2d 822, 826 (2d Cir 1990).

221. The New York Court of Appeals, by a bare majority of 4 to 3, followed *McCreary* in *Cooper v Ateliers de la Motobecane*, 442 NE 2d 1239 (1982). The provisional remedy of attachment was, in part, a device to secure the payment of a money judgment. The court said that the purpose and policy of the New York Convention would “be best carried out by restricting pre-arbitration judicial action to determine whether arbitration should be compelled” (at 732). Section 7502(c), of the New York Civil Procedure Law and Rules now provides (since 2005): “The supreme court ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” In *Sojitz Corp v Prithvi Information Solutions Ltd*, 921 NYS 2d 14, 17 (App Div 2011) it was held that it was constitutionally permissible for a New York court to order attachment under the new CPLR 7502(c) as security in aid of arbitration in Singapore. To demonstrate entitlement to a provisional remedy in aid of arbitration, the applicant must show that any award issued by the arbitrator would otherwise be rendered ineffectual if the relief was not granted.
222. Finally, in the House of Lords, Lord Mustill said (citing *McCreary*): “I am unable to agree with those decisions in the United States ... which form one side of a division of authority as yet unresolved by the Supreme Court. These decisions are to the effect that interim measures must necessarily be in conflict with the obligations created assumed by the subscribing nations to the New York Convention, because they ‘bypass the agreed upon method of settling disputes’ ... I prefer the view that when properly used such measures serve to reinforce the agreed method, not to bypass it”: *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 365.

*Enforcement of interim measures orders granted by arbitral tribunals*

223. For enforceability in national courts of interim measures ordered by arbitral tribunals see Article 17H(1) of the Model Law: “an interim measure by an arbitral tribunal shall be recognized as binding and, unless

otherwise provided by the arbitral tribunal, enforced upon application to the competent court” (with exceptions in Article 17I); see Arbitration Act 1996, s.42(1).

224. The prevailing view is that the recognition provisions of the New York Convention (and national arbitration legislation) apply only to awards that finally determine matters submitted to arbitration, and therefore not to either orders (or “awards”) of provisional relief: e.g. *Re Resort Condominiums Inc* [1995] 1 Qd 406; Dicey, Morris and Collins, *Conflict of Laws* (15<sup>th</sup> ed 2102), para 16-130; Pyles, *Interlocutory Orders and Convention Awards; the Case of Resort Condominiums v Bolwell* (1994) 10 *Arbitration International* 385; cf *Hart Surgical Inc v Ultracision Inc*, 244 F 3d 231 (7th Cir 2000). But some authorities hold that the grant of provisional measure finally disposes of the request for such measures and that judicial enforcement of such measures is important to the arbitral process. The United States Court of Appeals for the Sixth Circuit has held that an arbitration award that disposes of one self-contained issue, namely whether a party is required to perform the contract during the pendency of the arbitration proceedings can be confirmed as a separate, discrete, independent, severable issue: *Island Creek Coal Sales Co. v City of Gainesville*, 729 F 2d 1046, 1049 (6th Cir 1984). According to the United States Court of Appeals for the Fourth Circuit “arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction, and district courts must have the power to confirm and enforce that equitable relief as ‘final’ in order for the equitable relief to have teeth.” *Arrowhead Global Solutions, Inc v Datapath, Inc*, 166 Fed Appx 39, 44 (4th Cir 2006).

*Provisional measures in national courts in support of ICSID arbitration*

225. In *ETI Euro Telecom International NV v Bolivia* [2008] EWCA Civ 880, [2009] 1 WLR 665: it was decided that the English court did not have jurisdiction under the Civil Jurisdiction and Judgments Act 1982 section 25 and the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 to make a freezing injunction in aid of attachment proceedings in New York themselves said to be in aid of an ICSID arbitration. Nor were the arbitration proceedings themselves “proceedings” for the purposes of section 25 and the 1997 Order. See also *AIG Capital Partners Inc v Kazakhstan* [2005] EWHC 2239 (Comm), [2006] 1 WLR 1420.

***XIII. Extraterritorial provisional measures***

226. In common law countries the courts have used their powers over persons subject to their jurisdiction to make orders in relation to acts and property abroad.
227. The freezing injunction (originally called the *Mareva* injunction) was developed in England in order to prevent the removal of assets from the jurisdiction to avoid judgment. In a series of decisions of the Court of Appeal in 1988 it was held, reversing previous practice, that freezing injunctions and ancillary disclosure orders could be granted in relation to assets abroad. First, in *Babanaft International Co SA v Bassatne* [1990] Ch 13 an injunction was granted, after judgment in a fraud action, restraining the judgment debtors from disposing of any of their assets worldwide. Secondly, in *Republic of Haiti v Duvalier* [1990] 1 QB 202 (CA) an injunction was granted (in aid of proceedings pending in France) restraining the defendants from dealing with their assets wherever situated and requiring the defendants to disclose information relating to their assets worldwide. Thirdly, in two decisions in *Derby & Co Ltd v Weldon* [1990] Ch. 48 (CA); it was held that a pre-judgment freezing injunction and ancillary disclosure could be granted in relation to assets worldwide in the course of litigation pending in England, irrespective of whether the defendant had assets in England. It was subsequently held in *Derby Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139, 1149 (CA) that the jurisdiction could be exercised to order the transfer of assets from one foreign jurisdiction to another, or to restrain the transfer of assets from one foreign jurisdiction to another, or to order the return to England of assets from a foreign jurisdiction. But it was emphasised that these were highly exceptional orders, and in that decision the order was limited to restraining the return to Switzerland (where, according to the evidence, the English order might not be recognised) of deposits made outside Switzerland by Swiss banks acting on the instructions of the defendants.
228. The basis for the development of the worldwide freezing injunction was the recognition that the freezing injunction operates *in personam*, and that where the defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad. Although exceptional or special circumstances must be present to justify a worldwide injunction, that does not mean more than that the court should go no further than necessity dictates, and that in the first instance it should look to assets within the jurisdiction.
229. An important limitation on the scope of the worldwide injunction is that what has become known as “the *Babanaft* proviso” has been inserted in

such orders in order to make it clear that the English court is not purporting to make third parties abroad subject to the contempt powers of the English court. The reason was: “It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extra-territorial jurisdiction”: *Babanaft International Co SA v Bassatne* [1990] Ch 13, 44.

230. A third party who, knowing of a freezing injunction, assists in the breach of the order (*e.g.* a bank allowing payments to be made by the defendant) is guilty of that type of contempt of court which consists in the interference with the administration of justice. In principle, if the defendant has an account with a foreign branch of an English bank, the bank (being a bank resident in England) will, after service of the order, be required not to allow withdrawals from the foreign branch. If the defendant has an account with the head office of, or a branch of, a foreign bank which also has a branch in London, the position is more controversial, and it was accepted that there was a risk that (in the absence of a variation to the order) the bank might be in contempt if the head office or foreign branch allowed withdrawals. But the Commercial Court Guide makes it clear that, as regards freezing injunctions in respect of assets outside the jurisdiction, the order should normally incorporate wording to enable overseas branches of banks which have offices within the jurisdiction to comply with what they reasonably believe to be their obligations under the laws of the country where the assets are located or under the applicable law of the contract relating to such assets.
231. But the mere fact that an order is *in personam* and is directed towards someone who is subject to the personal jurisdiction of the English court does not exclude the possibility that the making of the order would be contrary to international law or comity, and outside the subject matter jurisdiction of the English court: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 303, [2009] QB 450. That was why the English Court of Appeal confirmed that the *Mareva* injunction should not conflict with “the ordinary principles of international law” and that “considerations of comity require the courts of this country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries”: *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, 82. It was for this reason also that it has been suggested that the extension of the *Mareva* jurisdiction to assets abroad was justifiable in

terms of international law and comity provided that the case had some appropriate connection with England, that the court did not purport to affect title to property abroad, and that the court did not seek to control the activities abroad of foreigners who were not subject to the personal jurisdiction of the English court: Collins, *The Territorial Reach of Mareva Injunctions* (1989) 105 Law Quarterly Rev 262, 299.

232. The proposition that an *in personam* order may be made against a person subject to the jurisdiction of the court to do, or refrain from doing, acts abroad was accepted by the French Cour de cassation in *Banque Worms v Brachot* 2003 Rev crit 816 (note Muir-Watt), Muir-Watt [2003] Cambridge LJ 573, in which it was held in principle (though not on the facts) that a French bank could be restrained from obtaining security abroad. The Cour de cassation stated that an injunction addressed to the defendant personally to act or refrain from acting, wherever the assets in question are situated, does not fall foul of such jurisdictional limits, as long as it is awarded by the court with legitimate jurisdiction over the merits.
233. In Case C-391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-7091, [1991] QB 1225, [40], the European Court said  
*"It follows that the granting of provisional or protective measures on the basis of article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought."*
234. The consequence is that a distinction has to be drawn between those cases where the court ordering provisional measures is the court with jurisdiction over the merits and cases where it is granting the provisional measures where the merits are being litigated in another Member State. In the former case the measures are not limited to assets in the territory of the State in which the court is sitting. In *Re Grant of an Extraterritorial Injunction*, Oberster Gerichtshof, March 16, 2007 [2009] ILPr 2 an Austrian court confirmed that under the Brussels/Lugano regime the court with jurisdiction to hear the merits may issue provisional prohibitory injunctions with extraterritorial effects and such provisional injunctions, issued following an *inter partes* procedure, were to be recognised as judgments and were to be enforced in accordance with the provisions of the Brussels Convention or the Brussels I Regulation.
235. Where the merits are proceeding abroad, the view expressed in England is that the court may properly grant interim relief in particular where either: (a) there are assets of the defendant within the jurisdiction of the court making the order which may be the subject of an injunction, in which event the court's jurisdiction to grant interim relief is (save in

exceptional cases) limited to the assets or property in that country; or, (b) the defendant is present in that country and thus properly amenable to the enforcement jurisdiction of the court in respect of asset freezing injunctions or other *in personam* orders addressed to him: Dicey, Morris and Collins, *Conflict of Laws*, 15<sup>th</sup> ed 2012, paras 8-037 et seq.

*Enforcement of court-ordered interim measures abroad*

236. At common law a court-ordered provisional measure would not normally be enforceable abroad because it would lack the necessary element of finality, since it can always be varied or rescinded if circumstances change: see e.g. Dicey, Morris and Collins, *Conflict of Laws*, 15th ed 2012, para 14-023.
237. But the position under the Brussels/Lugano regime is different. Recital (33) and Article 2 of the recast Brussels I Regulation confirm that a provisional measure ordered by the court with jurisdiction over the substance enjoys free circulation under the Regulation (provided the defendant has been summoned to appear or the judgment has been served on him prior to enforcement: Case 125/79 *Denilauler v Couchet Frères* [1980] ECR 1553). This can apply also to extraterritorial freezing orders: decision of Swiss Federal Tribunal, ATF 7a 366/2011, October 31, 2011; *Re Grant of an Extraterritorial Injunction*, Oberster Gerichtshof, March 16, 2007 [2009] ILPr 2. For other cases in which English freezing injunctions were recognised abroad, in Germany and Switzerland see Schroeder, *Provisional Measures in Private International Litigation* (thesis, King's College London, 2006), s. 7.30-7.32), who also deals with those cases where judgment on the merits was entered in England following a refusal to comply with interim orders: foreign courts decided that enforcement of the judgment would not be contrary to *ordre public*: see *ibid* ss. 7-20-7.25 (and *Stolzenberg v Daimler Chrysler Canada Inc* 2005 Clunet 112 (note Cuniberti), [2005] ILPr 266). Cf *CIBC Mellon Trust Co. v Mora Hotel Corporation NV*, 100 NY 2d 215, 222 (“Indeed, defendants were given ample notice and numerous opportunities to present their defense in England; they simply elected to forego these opportunities (apparently against the advice of their English attorneys) for strategic reasons”).

*European Account Preservation Order*

238. Regulation (EU) 655/2014 of the European Parliament and the Council establishing a European Account Preservation Order Procedure (“EAPO”), which will take effect from January 1, 2017 (except for the United Kingdom and Denmark) creates a uniform European procedure for the preserving of bank accounts, which will allow creditors to

preserve the amount owed in a debtor's bank account located in the EU. The Regulation provides common rules relating to jurisdiction, conditions and procedure for issuing an order, how it should be enforced by national courts and authorities, the remedies for the debtor and other elements of defendant protection. A single order can be made in the courts of one Member State which would be capable of freezing any bank account of a debtor in any Member State. The EAPO will be issued in an *ex parte* procedure. It is a protective measure in that it can be issued not only after judgment on the merits but also before. The Regulation contains a special procedure for obtaining information about the bank account of the debtor.

*Hague Conference on Private International law*

239. The Hague Choice of Court Convention deals with the enforcement of jurisdiction clauses and judgments in proceedings in the chosen court and so far is of very limited application.<sup>11</sup> Article 4 provides that for the purpose of the Convention: “An interim measure of protection is not a judgment.” The Hague Convention is expressed in Article 7 not to apply to provisional measures: “Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.”<sup>12</sup> Potentially this is significantly less effective than the Brussels/Lugano regime.

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<sup>11</sup> It has been ratified only by Mexico, the European Union, and Singapore.

<sup>12</sup> See Colleague Van Loon’s paper in the *travaux* on the relationship between the Hague Choice of Court Convention and the Brussels/Lugano regime and Hartley, *Choice-of-Court Agreements under the European and International Instruments* (2013), Ch.6. In its proposal for a Council Decision on the approval of the Convention on behalf of the European Union (COM(2014) 46 final), the Commission said (at para.1.3) that “the Convention affects the application of the Brussels I Regulation if at least one of the parties is resident in a Contracting State to the Convention. The Convention will prevail over the jurisdiction rules of the Regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention.” For family law see Colleague Van Loon’s paper and Brussels IIa Regulation, Article 20: Regulation 2201/2003; and contrast Hague Convention of October 19, 1996 on Jurisdiction, etc in respect of Parental Responsibility and Measures for the Protection of Children, Article 11.



240. Similarly the latest published working draft of the proposed multilateral judgments convention at the Hague Conference provides in Article 3 that: “An interim measure of protection is not a judgment.”<sup>13</sup>

*United States*

241. In *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund, Inc*, 527 US 308 (1999) Alliance, the creditor, sought a preliminary injunction restraining Grupo Mexicano, from altering Alliance’s rights in the course of restructuring debts owed by Grupo Mexicano to a number of different creditors.
242. Delivering the opinion of a divided court, Justice Scalia phrased the issue as follows: “This case presents the question whether in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed” (at 310). The district court lacked authority to issue an injunction because such power was not part of equity jurisdiction when the Judiciary Act was enacted in 1789 and, under traditional principles of equity jurisdiction, courts were precluded from interfering with a debtor’s control over his own property where the creditor did not have a direct interest in the property and had yet to obtain a favourable judgment. Justice Ginsberg, dissenting, said: “[c]ompared to many contemporary adaptations of equitable remedies, the preliminary injunction Alliance sought in this case was a modest measure. In operating, moreover, the preliminary injunction to freeze assets *pendente lite* may be a less heavy-handed remedy than prejudgment attachment, which deprives the defendant of possession and use of the seized property... Taking account of the office of equity, the facts of this case, and the moderate, status quo preserving provisional remedy, I am persuaded that the District Court acted appropriately in general” (at 337-338). For criticism of the majority see *Equity Jurisdiction Preliminary Injunctions on Debtors’ Assets*, 113 Harvard L. Rev 316, 326 (1999): “The Court’s formalistic interpretation of equity jurisdiction nonetheless flouts equity’s tradition of flexibility and was inappropriate even from an originalist perspective”; Mayler, *Towards a Common Law Originalism*, 59 Stanford L Rev 551, 556-557 (2006); Capper, *The Need for Mareva Injunctions Reconsidered*, 73 Fordham L Rev 2161, 2181 (2005). For support of the decision see, e.g. Burbank,

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<sup>13</sup> Report of the Fifth Meeting of the Working Group on the Judgments Project, October 31, 2015.

*The Bitter with the Sweet: Tradition, History and Limitations on Federal judicial Power – A Case Study*, 75 Notre Dame L Rev 1291 (2000).

243. But the *Desarrollo* decision does not prevent the exercise of the equitable jurisdiction in relation to equitable claims to property: *US, ex rel Rahman v Oncology Associates*, 198 F 3d 489, 496 (4th Cir 1999):

“... when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets.”

244. A worldwide injunction was granted against former President Marcos and his wife Imelda Marcos in *Republic of the Philippines v Marcos*, 862 F 2d 1355 (9th Cir 1988). That decision is not affected by the *Desarrollo* ruling since the *Marcos* injunction was granted in respect of a cause of action for equitable relief in relation to property which allegedly represented the proceeds of stolen property: “The injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach ... Although the gravamen of the complaint is that the Marcoses converted public property to their own use, the seventh claim for relief, which alleges a constructive trust, states an equitable cause of action and seeks equitable relief” (at 1363-1364).
245. Similarly, the *Desarrollo* decision does not restrict the SEC's right to obtain an asset freeze injunction in suits arising under US securities law. An asset freeze in these cases is permissible under *Desarrollo* because it restrains funds for the equitable remedy of disgorgement: e.g., *SEC v Yun*, 327 F 3d 1263, 1269 (11th Cir 2003); *SEC v Blatt*, 583 F 2d 1325, 1335 (5th Cir 1978).
246. Nor are remedies under state law affected. For example, the general principle under New York law is that unsecured creditors have no right to interfere with defendants' property through use of a preliminary injunction when they are seeking money damages: *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 708 NYS 2d 26 (NY Ct App 2000). But the process of attachment is an analogous relief under the New York Civil Procedure Rules, and can be used to achieve the same result. Attachment seizes the defendant's property and prevents the defendant

from using it unless the defendant discharges the attachment with a bond. The property does not have to be located in New York for a court to have jurisdiction over it. A court with personal jurisdiction over a non-domiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York: *Hotel 71 Mezz Lender, LLC v Falor*, 900 NYS 2d 698 (NY Ct App 2010). See Gee, *Commercial Injunctions* (6<sup>th</sup> ed 2016), Appendix 1 on US law (by Greenblatt, Ryan and Amato).

**XIV. Compatibility of interim measures with human rights obligations**

247. In *Chappell v UK* (1989) 12 EHRR 1 the European Court of Human Rights decided that because what is now known as a search and seizure order (most often used in intellectual property piracy cases) is granted without the defendant being notified or heard, it was essential that this measure should be accompanied by adequate and effective safeguards against arbitrary interference and abuse. But in fact the safeguards were adequate and (in particular) it was sufficient that the execution of the order was conducted by the plaintiffs' solicitor (who is also an officer of the court in the sense of being answerable to the court for any default). The shortcomings in the execution of the order were not so serious that its execution must be regarded as disproportionate to the legitimate aim. This decision was followed in *Buck v Germany* (2006) 42 EHRR 21. See also *C Plc v P* [2007] EWCA Civ 493, [2008] Ch 1; *Motorola Credit Corp v Uzan And Others (No 2)* [2003] EWCA Civ 752, [2004] 1 WLR 113 at [152]-[154] (whether freezing order discharged on appeal can constitute a breach of the Convention). See Clarke, *Injunctions and the Human Rights Act 1998: Jurisdiction and Discretion* (2002) 21 Civil Justice Quarterly 29; Collins, *Anton Piller Orders and Fundamental Rights* (1990) 106 Law Quarterly Rev 173.

**XV. Draft Resolution**

248. There was some discussion in the Third Commission of the question whether this topic, especially in the light of the many subjects dealt with in this report, was suitable for the traditional Institut resolution.

249. There follows in this Report is a draft resolution setting out some principles, which owes much to the suggestions of Colleague van Loon, and also takes its inspiration from the work of the ILA Committee on International and Civil Litigation Committee principles (1996) and the ALI/UNIDROIT principles.

PROVISIONAL MEASURES - PREPARATORY WORK

*The Institute of International Law*

Considering that the availability of provisional and protective measures is a general principle of law in international law and in national law

Considering that it would contribute to the development of international law and national law if principles relating to the grant of provisional and protective measures were adopted by the Institute

*Adopts the following guiding principles*

1. It is a general principle of law that international and national tribunals may provide discretionary remedies to maintain the status quo pending determination of disputes or to preserve the ability to grant effective relief.
2. These remedies are available if the applicant can show that (a) it has a prima facie case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the potential injury to the applicant outweighs the potential injury to the respondent; and (d) the measures are proportionate.
3. In cases of urgency an order may be made without hearing the respondent (ex parte), but the respondent has a right to be notified promptly and to object to the order.
4. In national legal systems an applicant for provisional relief is in principle liable for compensation of a party against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.
5. The order is binding. It must be subject to variation or discharge.
6. An international or a national tribunal may make such orders if it has prima facie jurisdiction over the merits (unless in the case of arbitral tribunals, the parties have excluded the right to apply for such measures).
7. A national court may make orders for provisional or protective measures in relation to assets, or to acts, within its territory even if a court in another country has jurisdiction over the merits. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts.
8. Where the provisional measure is ordered by a court with jurisdiction over the merits and the party to whom the provisional measure is addressed has been given notice of the order prior to enforcement,

MESURES PROVISOIRES - TRAVAUX PREPARATOIRES

courts of other States should where possible lend their cooperation and recognise and enforce such measures.

9. In commercial arbitration proceedings, an application may be made to courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of such proceedings.
10. International courts and tribunals may make orders for measures aimed at the non-aggravation of the dispute.
11. Provisional measures in international tribunals are binding on the parties and States are under an obligation to give effect to provisional measures addressed to them by international courts and tribunals.

London, December 23, 2016  
Lawrence Collins

**TRAVAUX**

***I Note from Rapporteur of July 9, 2011***

I am writing to raise the question of how we should proceed with the work of the 3<sup>rd</sup> Commission on provisional measures, and I would welcome your views. ...

In case it would be helpful, I am enclosing a copy of my 1991 Hague lectures on this subject.

A great deal of new material has emerged since then (of which the following is just a selection):

There has been an increased literature on the subject, including the report of the International Law Association, Committee on International Civil and Commercial Litigation, on *Provisional and Protective Measures in International Litigation*, 1996.

In *Grupo Mexicano de Desarrollo SA v Alliance Bond Fund Inc*, 527 US 308 (1999) the United States Supreme Court decided that US federal courts have no power to grant an injunction to restrain a defendant from disposing of its assets pending the determination of an action.

There have been several important decisions of the European Court of Justice on provisional and protective measures under what is now the Brussels I Regulation, including: e.g. Case C-398/92 *Mund & Fester v Hatrex International Transport* [1994] ECR I-467 (rule in the German Code of Civil Procedure that an attachment could be granted

automatically in cases where a judgment was to be enforced abroad held to be discriminatory and unlawful); Case C-391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-7091 and Case C-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277 (whether order for payment on account is a provisional measure).

There have been many English decisions on extra-territorial measures and on measures in aid of proceedings in other countries, of which the most important are *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818 (CA) and *Motorola Credit Corp v Uzan (No 2)* [2004] 1 WLR 113.

There is much new learning on provisional measures in arbitration: e.g. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases* 11(1) ICC Ct. Bull. 23 (2000); ICC, *Conservatory and Provisional Measures in International Arbitration* (1993).

There have been developments in relation to interim measures in connection with ICSID arbitrations: e.g. *ETI Euro Telecom International NV v Republic of Bolivia* [2008] 1 WLR 665.

In *Al-Saadoon v UK* (2010) the European Court of Human Rights decided that failure to comply with an indication of interim measures might place the State in breach of the obligation to guarantee the right of individual application under Art 34 of the Human Rights Convention.

The European Court of Justice has confirmed that a national court seised of a dispute governed by EU law must be in a position to grant interim relief against a national law or administrative order that is claimed to be incompatible with EU law: Case C-432/05 *Unibet* [2007] ECR I-2271.

The International Court of Justice has rendered some important decisions on interim measures, especially in the death penalty cases, *Lagrand* and *Avena*.

There have been important death penalty cases in the Privy Council on appeal from Jamaica and other Caribbean countries involving interim measures indicated by the Inter-American Court of Human Rights: *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.

## ***II Letter from Colleague Georg Ress, July 28, 2011***

... I think we could, on a comparative level, taking into account the practice of International Courts and their specific tasks and try to see whether there are some common general considerations and principles and then compare this to the practice of regional Courts as the European Court of Justice and furthermore the highest National Courts

(Constitutional or Supreme Courts) as to see whether there are convincing common denominators.

In your Hague lecture on provisional and protective measures in International Litigation, you have already collected all the material in relation to the question whether there is a principle of International Law underlying this protection. You have raised all the necessary questions in the last chapter of your lectures in the Hague Academy and in particular your conclusions which would be useful further to concentrate on. This question concerns the conditions of provisional or protective remedies in particular the relevance of the underlying merits.

Furthermore the question of recourse if the measures were not justified by the merits of the case. There are other questions relating to the jurisdiction of the courts on the merits, the rights to a fair hearing and at what time and on what issues and the pre-judging effect of provisional and protective measures on the merits.

I think a list of these issues and questions might be useful together with the question if and how far they are already part of the general principle of law.

...

### ***III Email from Colleague Antonio Cançado Trindade, July 21, 2015***

I have just received your initial comments on Provisional Measures. As member of the Third Commission, may I observe that along the years I have been dwelling extensively upon the matter, both as a scholar and as a judge. As we know each other since 1972, I am surprised that no reference at all is found in your initial comments to my own insights on the matter. In a constructive spirit, I am thus promptly forwarding to you, in the attached archive, the source references to my writings on the subject-matter. I trust you may find them useful for the forthcoming work of the Third Commission on the subject.

#### ***ANNEX: Provisional Measures of Protection: Contribution of Judge A.A. Cançado Trindade***

##### **I. International Case-Law (Inter-American Court of Human Rights and International Court of Justice):**

1. *Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013) - (Series "The Judges"), vol. I (Inter-American Court of Human Rights),*

Leiden, Brill/Nijhoff, 2014, pp. 9-852 (containing several Individual Opinions on Provisional Measures);

2. Judge A.A. Cançado Trindade - *The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013)* - (Series "The Judges"), vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876 (containing some Individual Opinions on Provisional Measures until the end of 2013);

3. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 1-1055 (containing 23 Individual Opinions on Provisional Measures);

4. A.A. Cançado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", *Compendio de Medidas Provisionales* (Julio 2000-Junio 2001), vol. 3, Series E, San José of Costa Rica, I.A. Court H.R., 2001, pp. V-XX;

5. A.A. Cançado Trindade, "Preface by the President of the Inter-American Court of Human Rights", *Compendium of Provisional Measures* (July 2000-June 2001), vol. 3, Series E, San José of Costa Rica, I.A. Court H.R., 2002, pp. V-XX;

6. A.A. Cançado Trindade, "Preface by the President of the Inter-American Court of Human Rights", *Compendium of Provisional Measures* (June 2001-July 2003), vol. 4, Series E, San José of Costa Rica, I.A. Court H.R., 2003, pp. V-XXI;

## II. Bibliographical Sources (Examination of International Case-Law):

7. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 3rd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, chapters V and XXI (Provisional Measures), pp. 47-52 and 177-186;

8. A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; and in *Revista do Instituto Brasileiro de Direitos Humanos* - vol. 4, 2003, n. 4, pp. 13-25;

9. A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human



Rights (1987-2002)", in *Human Rights Law Journal*, Strasbourg/Kehl, vol. 24, n. 5-8, 2003, pp. 162-168;

10. A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117;

11. A.A. Cançado Trindade, "Reflexiones sobre el Instituto de las Medidas Cautelares o Provisionales de Protección: Desarrollos Recientes en el Plano Internacional", in *La Ciencia del Derecho Procesal Constitucional - Estudios en Homenaje a H. Fix-Zamudio* (eds. E. Ferrer Mac-Gregor and A.Z. Lelo de Larrea), vol. IX, Mexico, UNAM, 2008, pp. 343-359;

12. A.A. Cançado Trindade, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", in *El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Ed. Trotta, 2002, pp. 61-74;

13. A.A. Cançado Trindade, "Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte", 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) pp. 629-699, esp. pp. 671-673 (Provisional Measures);

14. A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", in 16 *Revue universelle des droits de l'homme* (2004) n. 5-8, pp. 177-180;

15. A.A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", in 25 *Human Rights Law Journal* (2004) n. 5-8, pp. 157-160.

#### *IV Note of meeting of August 25, 2015, Tallinn, Estonia*

**Present: Colleagues Collins (rapporteur), Arrighi, Bogdan, Damrosch, Dogauchi, Keith, van Houtte, van Loon**

The Rapporteur's Note was tabled, together with the contributions of colleagues van Loon and Cançado Trindade, and there was a discussion of the way forward.

There was general agreement that it would not be necessary for a questionnaire to be circulated, and that the Commission should work

towards presenting a preliminary report at the next session of the Institut, which, if possible, should annex draft principles (rather than a formal resolution).

The preliminary report should take account of these additional matters: (a) measures ordered by institutions other than judicial authorities (such as the Inter-American Commission on Human Rights and the UN Human Rights Committee); (b) the consequences of breach of provisional measures; (c) grant of provisional measures in arbitration other than by the arbitral tribunal; (d) the Hague Choice of Court Convention.

Although the maximum number of members of the Commission had been reached, additional colleagues were keen to participate in the work of the Commission. The rapporteur would seek the advice of the Secretariat on how those members who were no longer taking an active part in the work of the Commission should be invited to make way for new colleagues.

*V. Paper by Colleague Hans van Loon, August 21, 2015*

1. The Note brings together a wealth of materials from various, national, regional and global, sources, and deals, very helpfully, with a number of issues of eminent practical importance. There is no doubt that the subject deserves further in-depth study. The following short comment seeks to contribute to the discussion in Tallinn by raising three points: the purpose of the exercise: resolution and/or report; provisional measures, the Hague Choice of Court Convention and the ongoing Hague Judgments project; and provisional measures in the context of transnational family law, regarding the protection of children.

**I. Purpose: resolution and/or report**

2. Among the many issues discussed in the Note there are quite a number that are controversial in practice or doctrine, and on which the Note takes, suggests or invites a view. For example: whether international courts need specific authority in order to exercise jurisdiction to grant provisional measures; whether exclusive choice of court clauses prevent action before other courts for provisional measures; whether provisional measures ordered by international courts are binding; what the effect of such provisional measures orders is in domestic law; what law applies to the authority of arbitral tribunals to grant provisional measures (and to the measures themselves); in what circumstances provisional measures may be enforced abroad, etc.

3. Future drafts and work of the Commission may well lead to further clarification of (some of) these and other issues. That there is a need for such clarification is obvious, even, for example, in the context of the Brussels I /Lugano instruments on jurisdiction and enforcement of judgments, where successive revisions have not led to a full re-examination of the original Article 24 of the Brussels Convention despite the desirability of such reconsideration<sup>14</sup>. It is true that one should not overestimate the role of Resolutions of the *Institut* in general, but much depends on their content. If clear rules could be formulated, with clear explanations, they could well be useful and have impact. The Note itself refers to the work of the ILA Committee on Commercial Arbitration and the IBA Rules (on the taking of evidence in commercial arbitration) cited in an ICSID case, and there is, a priori, no reason why a well-drafted IDI Resolution could not be similarly meaningful.

## II. Provisional measures, the Hague Choice of Court Convention and the Hague Judgments Project

4. The Note ... deals with provisional measures in the context of (exclusive) choice of court agreements. It appears that there is good support in national case law for the view that such agreements do not prevent action in other countries for provisional measures. The Brussels I/Lugano instruments are based on the same view (Regulation (EU) No 1215/2012 (Brussels I Recast), Article 25 *juncto* 35); but Brussels I Recast expressly limits the recognition and enforcement of provisional orders in other Member States to those “ordered by a court... which *by virtue of this Regulation* has jurisdiction *as to the substance of the matter*”, (Article 2 (a)). As pointed out in the Note (point 9), under the Brussels I/Lugano system jurisdiction to order provisional measures is implied in jurisdiction as to the substance of the matter, including the court designated by way of prorogation (Article 25) – interestingly (and significantly!) this is not stated expressly in the instruments, but follows from the CJEU’s case law (CJEU C 391-95 *Van Uden* point 19).

5. This approach may be contrasted with that of the Hague *Convention on Choice of Court Agreements* of 30 June 2005 (‘the Choice of Court Convention’), to which Mexico acceded on 26 September 2007, which was signed by Singapore on 25 March 2015 and approved by the European Union on 11 June 2015, and which will enter into force for Mexico and the European Union (all EU Members with the exception of

<sup>14</sup> Cf Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (2015), no 312.

Denmark) on 1 October 2015. The range of States Parties to this Convention, which purports to level the playing field between international commercial arbitration, where the 1958 New York Convention applies, and civil court proceedings based on choice of court agreements, is expected to gradually expand.

6. The Convention expressly provides in its Article 7 that it does not cover provisional measures, which remain undefined – the Explanatory Report provides some examples<sup>15</sup> – and that it neither requires nor precludes the grant, refusal or termination of such measures<sup>16</sup>. The Explanatory Report comments: “*It goes without saying that the court designated in the choice of court agreement can grant any interim measure it thinks appropriate. If an interim measure – for example, an injunction – granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States. If it is merely temporary, it will not constitute a “judgment” as defined by Article 4 (1)...*”<sup>17</sup>. Article 4 (1) categorically provides: “*...An interim measure of protection is not a judgment*”.

7. How does the Convention interact with the Brussels/Lugano instruments? We will limit ourselves here to Brussels I Recast. According to Article 26 (6) of the Convention, its provisions do not affect those of the Regulation (a) where none of the parties is resident in a Contracting State that is not an EU Member State nor (b) as concerns the recognition and enforcement of judgments as between EU Members.

8. (a) means that the choice of court agreement derives its effect from the Convention and not from the Regulation (as it otherwise would, Article 25) only where one of the parties is “resident” in any EU Member State (except Denmark) and the other in another Contracting State, at this point: Mexico. If in this situation the parties have chosen, for example, the court of London as their exclusive forum under the Convention, and if one of them needs interim relief from the London court, then this court cannot base its jurisdiction to order such relief on the Convention (Article 7), nor on the Regulation because it lacks jurisdiction “*by virtue of this Regulation*” as to the substance of the matter (Article 2 (a) Recast); it can

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<sup>15</sup> Explanatory Report by Trevor Hartley and Masato Dogauchi (<http://www.hcch.net/upload/expl37final.pdf>), nr 160

<sup>16</sup> Article 7: “*Interim measures of protection are not covered by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.*”

<sup>17</sup> Explanatory Report, nr 162.

only derive its jurisdiction from national law. The same applies where in the same situation relief is sought from the Rotterdam district court. Arguably, the Rotterdam court derives its power to order interim relief according to Dutch law from Article 35 of the Regulation, which reserves the power of the courts of Member States to order provisional measures under their national law, “*even if the courts of another Member State have jurisdiction as to the substance of the matter*” (the Recast has deleted the words “under this Regulation” so as not to exclude the Lugano Convention, but this could also be seen as bringing in the Hague Convention)<sup>18</sup>.

9. (b) means that a judgment rendered under the Hague Convention by a court in the EU (except Denmark) will benefit from the speedy recognition and enforcement procedures under the Regulation. But, contrary to what Article 2 (a) of the Regulation provides for the provisional measures mentioned there, under the Convention provisional measures, without exception, are not “judgments” (Article 4 (1)), and are therefore not covered by this provision.

10. If in the same situation (one party resident in the EU except Denmark and the other in Mexico) the parties had designated a court in Mexico, and one of them needs provisional measures from the London or Rotterdam courts, the matter will be entirely governed by national law.

11. Commission III may wish to discuss in more depth the difference in approach between the Brussels I Regulation and the Hague Choice of Court Convention regarding provisional measures. Should Article 7 of the Convention not have reserved the application of the Convention to provisional measures ordered by the chosen court (with consequential amendment of Article 4 (1))? Is there a compelling reason for more reserve at the global than at the regional level? How firm is the maxim *qui potest maius potest et minus*? Cf Note II, points 9-16.

12. This discussion is also relevant in the context of the ongoing work of the Hague Conference on Private International Law on a global convention on the recognition and enforcement of judgments in civil and commercial matters. The 1999 Preliminary Draft Convention (Article 13, Provisional and protective measures) provided:

*“1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.*

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<sup>18</sup> In this regard there would be parallelism with international commercial arbitration (CJEU C 391-95 *Van Uden*, point 25 and ff.)

2. *The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.*

3. *A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that –*

*a) their enforcement is limited to the territory of that State, and*

*b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party”.*

And Article 23 Definition of “judgment” added:

*“For the purposes of this Chapter, “judgment” means –*

*...*

*b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1”*<sup>19</sup>.

The diplomatic negotiations on the subsequent “Interim Text” of 2001, however, did not lead to a consensus – neither on the inclusion of provisional measures in the jurisdictional part nor in the chapter on recognition and enforcement<sup>20</sup>. The Interim Text shows the wide variety of opinions on the matter, a number of which will come up again even if the project now in all likelihood will exclude direct jurisdiction and limit itself to recognition and enforcement of judgments. Commission III may wish to consider these various views in depth.

### **III. Provisional measures in transnational family law, regarding the protection of children**

13. While the distinction definitive/provisional decision is workable in the commercial field and in some areas of family law, its practicability is less obvious in the field of protection of children, since *“it is of the nature and essence of family law that, as children grow up and circumstances change, substantive decisions on parental responsibility may need to be varied (or indeed reversed). Consequently, no such decision is definitive or final in the sense that a decree of divorce is definitive or final....”*<sup>21</sup>

14. Consequently, Articles 8-15, Chapter II, of Regulation (EC) No 2201/2003 (Brussels II a) on jurisdiction in relation to matters of parental responsibility do not distinguish between definitive and provisional

<sup>19</sup> See <http://www.hcch.net/upload/wop/jdgm11.pdf>

<sup>20</sup> See [http://www.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf), Articles 13 and 23A.

<sup>21</sup> Advocate General E. Sharpston, in her opinion in Case C-256/09 (*Perrucker I*), par 119.

measures, and cover both “urgent” decisions, often taken in *summary* proceedings (e.g. deciding on the return of an abducted child) and “firm” decisions on the *merits* (e.g., on custody of the child) which, however, remain subject to variation or reversion at any time. Similarly, the provisions on recognition and enforcement (Chapter III) apply to *all* judgments, firm or urgent, based on Articles 8-15 (no control of the jurisdictional basis of such judgments being allowed).

15. The matter is more complex, however, in respect of urgent measures that cannot be based on Articles 8-15, e.g. measures taken by the court of the EU Member State to which the child was taken (court of refuge) to protect the child against abuse by the left-behind parent in connection with a return order. Here Article 20 comes into play, the origin of which lies in the Brussels I/Lugano system<sup>22</sup>. Article 20, “Provisional, including protective, measures” provides: “1. *In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member States from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under the Regulation, the court of another Member State has jurisdiction as to the substance of the matter....*”<sup>23</sup>.

16. Article 20 does not confer – uniform Regulation based – jurisdiction upon the courts. This means (a) that any power to order provisional measures to protect the child can only be based on *national* law; and (b) that any such measures cannot be recognised or enforced under Chapter III (Recognition and Enforcement) of the Regulation, see CJEU 15 July 2010 C256/09 *Purrucker I*). Both these limitations constitute a serious obstacle in respect of protective measures in return cases, in particular in light of the changed paradigm of international child abduction, where, in contrast to the past, the majority of taking parents are now having the primary care of the child, which may make such measures more needed.

17. Moreover, in its judgment of 2 April 2009 C-523/07, the Court decided that the protective measures referred to in Article 20 may only be taken in respect of persons in the Member State concerned. Therefore, the court of refuge may not order a measure prohibiting, for example, the left-behind parent residing in the home state of the child from molesting

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<sup>22</sup> Including its terminology “Provisional, including protective, measures” – better (cf nr 14): “*Urgent, including protective, measures.*”

<sup>23</sup> It continues: “2. *The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate*”

the child or the taking parent. This further weakens the powers of the court of the State of refuge to protect the child, and may well lead to refusals to return instead of return-cum-protection orders.

18. In contrast to Article 20 Brussels II a, the 1996 Hague Convention on Protection of Children<sup>24</sup> (a) does provide a jurisdictional basis for urgent measures taken by a court other than that of the home state of the child in Article 11, (b) only requires that the child or the child's property be present in its jurisdiction, and (c) does ensure the recognition and enforcement abroad of such measures under its Chapter IV (allowing the control of the jurisdictional basis of the decision).

19. That such measures may be indispensable is illustrated by a recent judgment of the UK High Court<sup>25</sup>, where the court, in the context of the Brussels IIa Regulation, ordered the return of the child to Lithuania, coupled with measures of protection under Article 11 of the 1996 Hague Convention. This combination of Brussels IIa with the 1996 Convention is not in accordance with Article 61 of the Regulation. But the case brings to the forefront the shortcomings of Article 20 of the Regulation, and the need for its reform in the context of the revision process which is currently under way.

20. Article 42 of the Regulation, as interpreted by the CJEU, raises another issue. In CJEU C-211/10 PPU *Povse*) the Court decided that a certified judgment of the court with jurisdiction in respect of the merits (custody) ordering the return of the child rendered under Article 42 (*juncto* Article 10 (8)) falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child, in other words, is unquestionably a *provisional* decision. Such a provisional decision is enforceable in all Member States without any possibility of opposing it. The result could well be that a child is being moved back and forth between the two countries if the ultimate custody decision differs from the provisional one. That goes far, and in certain circumstances *too* far, considering the rights and best interests of the child (Cf European Court of Human Rights, 12 October 2011 (14737/09) *Šneersonė and Kampanella v. Italy*, where Italy was

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<sup>24</sup> *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*. All EU Member States with the exception of Italy are bound by this instrument, which, except for its provisions on applicable law, however is in the relations between EU Members superseded by the Brussels IIa Regulation (Article 61).

<sup>25</sup> B v B [2014] EWHC 1804 (Fam)



condemned because such a return order given under Article 42 Brussels II a was considered a violation of Article 8 ECHR)<sup>26</sup>.

Admittedly, the field of protection of vulnerable persons<sup>27</sup> is not the first one may think of when studying provisional measures. Yet, they are important in practice and raise issues – such as the desirability of limiting their effect to the forum’s territory – which Commission III may wish to pay attention to.

#### **VI. Note by Colleague Sienho Yee, September 17, 2015**

Dear Lord Collins and colleagues:

My engagements with an international organization partly made it impossible for me to come to Tallinn during the meeting.

... I have these comments for consideration:

1. Regarding Section IV (Exclusive jurisdiction clauses: do they prevent action in other countries for security?) of Lord Collins’s note, I wonder whether we may like to change “countries” to “other countries and/or dispute settlement systems” and consider the possible conflicts between such systems. As we know, different treaties may provide for different systems of dispute settlement and the jurisdiction provisions for such systems may conflict and may give rise to very interesting questions relating to provisional measures. For example, possible conflicts may exist between the EU treaties and the UNCLOS (*Mox Plant Arbitration*); between the UNCLOS and related treaties (*Southern Bluefin Tuna Case*); and between the UNCLOS and the Convention on Biological Diversity. In case of conflict, how to resolve this issue can benefit from the work of the IDI.

2. Regarding Section II (The relationship between interim measures and jurisdiction over the merits), I would like to highlight for possible consideration an additional aspect: the relationship between provisional measures and *forum prorogatum*. In some 2013 ICJ cases (in addition to possibly earlier ones), this issue appeared to be present, as the Court

<sup>26</sup> See on these issues relating to Brussels IIa the author’s report to the European Parliament “The Brussels IIa Regulation: towards a review?” in *Cross-border Activities in the EU – making life easier for citizens* (2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL\\_STU\(2015\)510003\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf), p.177-207.

<sup>27</sup> Cf Article 10 of the *Hague Convention of 13 January 2000 on the International Protection of Adults* which parallels Article 11 of the 1996 Hague Child Protection Convention.

mentioned more than once that the respondent did not dispute jurisdiction. See my attached paper on the 2013 judicial activity at the ICJ, pp.354-360. Many years ago I published a paper on this issue: Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice, in: Goodwin-Gill & Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press, 1999), 565-84, also attached for convenience.

3. I would like to propose that we add modification of provisional measures to our issues to consider. Also in the 2013 ICJ cases, this issue was prominent. See my attached paper on the 2013 judicial activity at the ICJ, pp.354-360.

4. I wonder whether we should also consider, as a separate matter, the possible abuse of the provisional measures facility. This also appears to be an issue in the 2013 ICJ cases. See my attached paper on the 2013 judicial activity at the ICJ, pp.354-360.

***VII. Notes by Colleague Jean Michel Arrighi on the Precautionary Measures adopted by the Inter-American Commission on Human Rights, December 29, 2015***

These notes are an attempt to very briefly outline the Inter-American Commission on Human Rights' practice of issuing "precautionary measures" and the legal foundation for them. They are, in a sense, *sui generis*: they were created by the Commission itself in its Rules of Procedure; they are, generally speaking, observed by the states asked to comply with them; and they are not found in any of the provisions adopted by those states that created the Commission and regulate the way it functions (the Charter of the Organization of American States (OAS), the American Convention on Human Rights, and the Statute of the Inter-American Commission on Human Rights).

a. History, developments over time.

In May 1948, the Ninth International Conference of American States adopted several instruments of key importance for the inter-American system, including the Charter of the Organization of American States and the American Declaration of the Rights and Duties of Man. Both documents reaffirm the commitment of the countries of the Americas to respect human rights.

In 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs established the Inter-American Commission on Human Rights, to be comprised of seven members elected by the OAS Council; entrusted it

with promoting the observance of human rights; and endowed it with such powers as said Council chose to confer upon it. In 1960, the Council gave it its first Statute, authorizing it to make recommendations to the governments of the states in order to further effective observance of human rights. A later amendment to the Statute, in 1966, broadened its powers and requested that it submit an annual report on the human rights situation in the countries of the region.

The 1967 amendment to the OAS Charter included the Commission among its principal organs and the still current version of Article 106 provided that:

"There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters."

The American Convention on Human Rights mentioned in that article was subsequently adopted in 1969 and entered into force in 1978. The Convention established the spheres of competence of the Commission and of the Inter-American Court of Human Rights established in the Convention.

The 1967 amendment of the OAS Charter also established the General Assembly as the supreme organ of the Organization. From then on, it is the General Assembly that elected the members and is empowered to adopt the Commission's Statute, while the Commission itself adopts its own "Regulations" (Rules of Procedure), which, naturally, have to conform to both the Statute and the American Convention. Subsequently, various amendments to the Commission's Statute were adopted by the General Assembly.

However, neither the Commission's Statute nor the American Convention mention the possibility of the Commission issuing precautionary measures. On the contrary, the Convention refers only to the adoption of "provisional measures" issued by the Court at the request of the Commission; not to measures adopted directly by the Commission itself (Article 63.2 of the Convention states: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.")

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Nevertheless, in a decision it took itself, the Commission included in its Rules of Procedure, as of 1980, the possibility of it itself issuing "precautionary measures", on its own initiative, even though that was not envisioned in either the Convention or the Commission's Statute.

Article 25 of the Rules of Procedure of 2009 reads as follows:

*Article 25. Precautionary Measures*

*1. In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case.*

*2. In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons under the jurisdiction of the State concerned, independently of any pending petition or case.*

*3. The measures referred to in paragraphs 1 and 2 above may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members.*

*4. The Commission shall consider the gravity and urgency of the situation, its context and the imminence of the harm in question when deciding whether to request that a State adopt precautionary measures. The Commission shall also take into account:*

*a. whether the situation of risk has been brought to the attention of the pertinent authorities or the reasons why it might not have been possible to do so;*

*b. the individual identification of the potential beneficiaries of the precautionary measures or the identification of the group to which they belong; and*

*c. the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified.*

*5. Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.*

*6. The Commission shall evaluate periodically whether it is pertinent to maintain any precautionary measures granted.*

7. *At any time, the State may file a duly grounded petition that the Commission withdraws its request for the adoption of precautionary measures. Prior to the adoption of a decision on the State's petition, the Commission shall request observations from the beneficiaries or their representatives. The submission of such a petition shall not suspend the enforcement of the precautionary measures granted.*

8. *The Commission may request relevant information from the interested parties on any matter related to the granting, observance, and maintenance of precautionary measures. Material non-compliance by the beneficiaries or their representatives with such a request may be considered a ground for the Commission to withdraw a request that the State adopt precautionary measures. With regard to precautionary measures of a collective nature, the Commission may establish other appropriate mechanisms of periodic follow-up and review.*

9. *The granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of the rights protected by the American Convention on Human Rights or other applicable instruments.*

b. Provisions currently governing precautionary measures

An amendment to the Rules of Procedure of the IACHR entered into force on August 1, 2013, altering the scope and content of precautionary measures and generally clarifying the concept as well as the requirements that have to be met in the case of precautionary measures. That amendment was a direct consequence of the efforts of OAS political and technical bodies between 2011 and 2014 to strengthen the inter-American human rights system.

One of the novelties of that amendment was, precisely, its clarification of the notions of "seriousness", "urgency", and "irreparability" of situations, which hitherto had been assessed by the IACHR without any specific criteria. Thus it was established that a "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system; "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and finally "irreparable harm" refers to injury to rights which, due to their nature, are not susceptible to reparation, restoration or adequate compensation.

Article 25 of the Rules of Procedure currently in force reads as follows:

*1. In accordance with Articles 106 of the Charter of the Organization of American States, 41.b of the American Convention on Human Rights,*

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*18.b of the Statute of the Commission and XIII of the American Convention on Forced Disappearance of Persons, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures.*

*Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.*

*2. For the purpose of taking the decision referred to in paragraph 1, the Commission shall consider that:*

*a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;*

*b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and*

*c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.*

*3. Precautionary measures may protect persons or groups of persons, as long as the beneficiary or beneficiaries may be determined or determinable through their geographic location or membership in or association with a group, people, community or organization.*

*4. Requests for precautionary measures addressed to the Commission shall contain, inter alia:*

*a. identifying information for the persons proposed as beneficiaries or information that allows them to be determined;*

*b. a detailed and chronological description of the facts that motivate the request and any other available information; and*

*c. the description of the measures of protection requested.*

*5. Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, except where the immediacy of the threatened harm admits of no delay. In that circumstance, the Commission shall review that decision as soon as possible, or at the latest during its next period of sessions, taking into account the information received from the parties.*

*6. In considering the request the Commission shall take into account its context and the following elements:*

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*a. whether the situation has been brought to the attention of the pertinent authorities or the reasons why it would not have been possible to do so;*

*b. the individual identification of the potential beneficiaries of the precautionary measures or the determination of the group to which they belong or are associated with; and*

*c. the consent of the potential beneficiaries when the request is presented by a third party unless the absence of consent is justified.*

*7. The decisions granting, extending, modifying or lifting precautionary measures shall be adopted through reasoned resolutions that include, among others, the following elements:*

*a. a description of the alleged situation and of the beneficiaries;*

*b. the information presented by the State, if available;*

*c. the considerations by the Commission concerning the requirements of seriousness, urgency, and irreparability;*

*d. if applicable, the time period for which the measures will be in effect; and*

*e. the votes of the members of the Commission.*

*8. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of any right protected by the American Convention on Human Rights or other applicable instruments.*

*9. The Commission shall evaluate periodically, at its own initiative or at the request of either party, whether to maintain, modify or lift the precautionary measures in force. At any time, the State may file a duly grounded petition that the Commission lift the precautionary measures in force. Prior to taking a decision on such a request, the Commission shall request observations from the beneficiaries. The presentation of such a request shall not suspend the precautionary measures in force.*

*10. The Commission shall take appropriate follow up measures, such as requesting relevant information from the interested parties on any matter related to the granting, observance and maintenance of precautionary measures. These measures may include, as appropriate, timetables for implementation, hearings, working meetings, and visits for follow-up and review.*

*11. In addition to the terms of subparagraph 9 above, the Commission may lift or review a precautionary measure when the beneficiaries or their representatives, without justification, fail to provide a satisfactory reply to the Commission on the requirements presented by the State for their implementation.*

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*12. The Commission may present a request for provisional measures to the Inter-American Court in accordance with the conditions established in Article 76 of these Rules. Any precautionary measures issued with respect to the matter shall remain in effect until the Court notifies the parties of its resolution of the request.*

*13. In the case of a decision of the Inter-American Court dismissing an application for provisional measures, the Commission shall not consider a new request for precautionary measures unless there are new facts that justify it. In any case, the Commission may consider the use of other mechanisms to monitor the situation.*

### c. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights

The Commission is a body arising out of two Conventions: the OAS Charter and the American Convention on Human Rights. The former states only that the Commission should promote and defend human rights, while the latter reiterates that and also establishes an Inter-American Court with competence to issue "provisional measures." However, not all the member states adhering to the OAS Charter are Parties to the American Convention. Nor have all the Parties to said Convention recognized the competence of the Court. Of the 35 member states of the OAS, 24 are Parties to the Convention and only 20 have recognized the competence of the Court.

OAS member states that are not Parties to the American Convention are governed by decisions of the Commission based on the OAS Charter, the Statute adopted by the General Assembly -- the supreme organ of the OAS -- and by such Rules of Procedure as are adopted by the Commission itself, they being the instrument that provided for the possibility of adopting "precautionary measures." OAS member states that *are* Parties to the Convention are governed not only by the aforementioned instruments shared by all the member states, but also by this Convention which does provide for measures to be adopted by the Court at the Commission's request.

However, and generally with the consent of the states, the Commission has been adopting these "precautionary measures" both in cases in which the state is a Party to the Convention and in cases in which the state is just a member of the OAS but not a Party to the Convention.

### d. Implementation

On its web site, the Commission describes implementation of these measures as follows:



In the last 30 years, precautionary measures have been invoked to protect thousands of persons or groups of persons at risk by virtue of their work or affiliation. They include human rights defenders, journalists, trade unionists, vulnerable groups such as women, children, Afro-descendant communities, indigenous peoples, displaced persons, LGTBI communities and persons deprived of their liberty. They have also been used to protect witnesses, officers of the court, persons about to be deported to a country where they might be subjected to torture or other forms of cruel and inhuman treatment, persons sentenced to the death penalty, and others. The IACHR has also ordered precautionary measures to protect the right to health and the right of the family. It has also resorted to precautionary measures in situations involving the environment, where the life or health of persons or the way of life of indigenous peoples in their ancestral territory may be imperilled, and in other situations.

Precautionary measures serve two functions related to the protection of fundamental rights recognized in the provisions of the inter-American system. They serve a “precautionary” function in the sense that they preserve a legal situation brought to the Commission’s attention by way of cases or petitions; they also serve a “protective” function in the sense of preserving the exercise of human rights. In practice, the protective function is exercised in order to avoid irreparable harm to the life and personal integrity of the beneficiary as a subject of the international law of human rights. Precautionary measures have, therefore, been ordered for a wide array of situations unrelated to any case pending with the inter-American human rights system.

In the case of the precautionary function, the measures ordered may be intended to prevent execution of judicial, administrative or other measures when it is alleged that their execution could render the IACHR’s eventual decision on an individual petition moot. The kinds of situations the IACHR has had occasion to address to preserve the subject of a petition or case have included, inter alia, requests to suspend deportation or extradition orders when there is a risk that the individual being deported or extradited might suffer torture or other cruel and inhuman treatment in the receiving country; situations in which the IACHR has urged a State to suspend application of the death penalty; situations in which the IACHR’s purpose has been to protect an indigenous people’s territory from incursions that might break the close relationship that exists between the indigenous people and its ancestral lands and natural resources, or endanger the survival of its culture. When it orders precautionary measures in such circumstances, the IACHR is

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asking the state to suspend any and all activity that could result in a violation of the party on whose behalf it is requesting those measures, until such time as the organs of the inter-American system have had an opportunity to address the merits of the matter in question.

The IACHR has ordered precautionary measures to protect a wide array of rights, such as the rights to health and to family when the conditions of gravity, urgency and a risk of irreparable harm are present. It has also had occasion to order measures to avoid harm to life or health as a result of environmental contamination.

When it examines a request seeking precautionary measures, the Commission looks for three essential preconditions: i) gravity; ii) urgency, and iii) the risk of irreparable harm to persons.

The Commission's examination of requests seeking precautionary measures looks at the specifics of each situation. Hence, the Commission's analysis cannot be governed by strict criteria that must apply to each and every case; instead, it has to look at the nature of the risk and the harm that the precautionary measure seeks to avert. With this clarification, the following are some examples of the factors that the Commission has weighed when considering requests seeking precautionary measures. These factors ought not to be construed as an exhaustive list of the preconditions that must be met for precautionary measures to be granted.

As for the "urgent" nature of the situation for which measures are sought, the risk or threat involved must be imminent, which means that the remediation response must be immediate; hence, when examining this aspect, one has to consider the timing and duration of the precautionary or protective intervention requested. The following are among the factors that the IACHR considers when assessing this aspect: a) the existence of cyclical threats and assaults, which strongly suggests the need to take immediate action; b) the continuing nature of the threats and how close one follows upon the other, and other factors.

For purposes of assessing the gravity and urgency requirements, the IACHR also considers information describing the events that are triggered the request (telephone threats, written threats, assaults, acts of violence, accusations); the identity of the source of the threats (private parties, private parties with ties to the State, State agents, others); the complaints made to the authorities; the protective measures that the potential beneficiary has already received and information concerning their effectiveness; a description of the context, which is needed to assess the gravity of the threats; the chronology and proximity in time of the

threats made; the identity of the persons affected and, where relevant, the group to which they belong and the degree of risk.

The IACHR also considers factors related to the setting in the country concerned, such as: a) the existence of an armed conflict; b) the existence of a state of emergency; c) the efficacy of the judicial system and the severity of the problem of impunity; d) indicia of discrimination against vulnerable groups, and e) the control that the executive branch exercises over the other branches of government, and other factors.

On the matter of irreparable harm, the events that warrant the request must suggest that there is a reasonable probability that the harm will materialize; the request must not rely on legal rights or interests that can be remedied.

It is important to make the point that filing a complaint with local authorities is not a necessary precondition that must be met for precautionary measures to be granted. However, as Article 25(4) of the Commission's Rules of Procedure states, it is a factor that the Commission will consider when deciding whether to request precautionary measures from a State. Correspondingly, when a matter has been brought to the attention of the local authorities, the IACHR can consider the efficacy or inefficacy of the State's response. Likewise, if the party requesting precautionary measures has not filed a complaint with the local authorities, it is important for the Commission to know the reasons for refraining from doing so.

Before arriving at a final decision as to whether to grant or reject the request seeking precautionary measures, the IACHR may request additional information from the person applying for precautionary measures or from the State concerned, or from both. Much of what the Commission does is to follow up requests for information from the State and from the petitioners. The failure of the State or of the party requesting precautionary measures to reply to the Commission's request for information is a factor that the IACHR will consider when deciding whether or not to grant the requested measure.

If the measure is not granted, this does not prevent the petitioner from filing a new request for protection if he or she believes that there are grounds to grant the request or if new circumstances develop.

In compliance with their international obligations, States must provide effective protection to prevent the risk from materializing. The parties are in the best position to know what type of tangible or other measures are called for to address the situation and prevent further danger.

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The IACHR has various tools at its disposal for follow-up and monitoring of precautionary measures: exchanges of communications; working meetings or hearings convened during the IACHR's sessions; follow-up meetings during *in loco* or working visits by the Commission or the country rapporteurs; press releases, thematic reports or country reports.

The Commission welcomes the States' positive response to the precautionary measures. In carrying out the Commission's requests for precautionary measures, the States have ordered specific protection measures for beneficiaries (for example, bodyguards, security at office buildings, direct lines of communication with the authorities, protection of ancestral territory, and others), taking into account the opinion of the beneficiary and the beneficiary's representative; their active participation by supplying information requested by the IACHR or participating in working meetings or hearings held to follow up on precautionary measures; creating inter-institutional working groups to implement the protection measures requested by the inter-American system; and introducing compliance with precautionary measures into their case law and legislation.<sup>28</sup>

#### c. A few final comments

In recent years, some countries have questioned the competence of the Commission to adopt these precautionary measures, given that neither the OAS Charter, nor the Commission's Statute, nor the American Convention on Human Rights expressly grant such competence. Nevertheless, generally speaking, the countries have abided by them. The Commission has followed up on them. And each year it reports on them to the OAS General Assembly.

In 2015, alone, the Commission issued 37 "precautionary measures" against OAS member states that are not Parties to the Convention (such as the United States of America or Cuba), against countries that have denounced that Convention (Venezuela), and against countries that *are* Parties to it (such as Mexico or Colombia).

The "Inter-American Convention on Forced Disappearance of Persons" of 1994 is a special case because Article XIII thereof establishes that:

*For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights*

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<sup>28</sup> <http://www.oas.org/en/iachr/decisions/precautionary.asp>

*and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.*

In this case, there is absolutely no doubt that as regards the forced disappearance of persons the Commission's competence is recognized by the states.

But in all other cases what we have is the development by the Commission itself of its own competence within the framework of its own Rules of Procedure, which it itself issues and which the countries have been accepting and enforcing.

***VIII. Memorandum by Colleague Santiago Torres Bernárdez,  
January 14, 2016***

1. Many thanks again for your learned Survey on Provisional Measures of 15 July 2015 and all my congratulations for this basic paper which is going to facilitate enormously the work of the Third Commission on the topic.
2. All particular issues presented under the selected headings of each of the XIII Chapters of the Survey deserve to be initially considered by the Commission in order to reach some preliminary conclusions on both the scope of the study to be undertaken by the Commission and the object and purpose of our task.
3. As to the final scope of the study, I favour an approach as wide as possible but compatible with the need of legal coherence of the final product. My preliminary view in that respect is that in the first place the Commission should remain rather within the ambit of public international law and deal, consequently, with the topic of provisional measures as presented itself mainly in statutes, conventions, rules, decisions and practices of judicial bodies and arbitral tribunals established by States as entities of public international law or whose constituent instruments are governed by that law (as, for example, the ICJ, ITLOS, etc.), including of course, as you did, international courts on human rights (ECtHR, IACtHR) as well as ICSID investments arbitral tribunals which are also international tribunals in the sense indicated. Investments arbitral tribunals established within the framework of some free trade zones treaties (i.e. NAFTA) could perhaps be added to the list.
4. It seems also clear that international criminal courts should be excluded as you did. Courts or tribunals of regional economic integration systems (i.e. MERCOSUR), of regional unions (i.e. European Court of

Justice; Central American Court of Justice) and the like should be kept in the background without prejudice of eventual references, if needed, to some outstanding punctual questions of their respective provisional measures regimes.

5. I have, however, some difficulties with the “international commercial arbitration” of Chapter XI because the lack in the Survey of a definition in the context of the term “international” and the yet unknown final purpose of the work to be undertaken by the Commission: the preparation of one or more draft resolutions on provisional measures for consideration by the Institute or something else (for instance, a mere recommendation or commentary)?

6. “Commercial arbitration” belongs - originally in any case - to private arbitration between trade actors or public persons acting in a commercial capacity (*lex mercatoria* in a wide sense), namely to a legal universe quite different from the “international arbitration” of public international law. It is not clear for me the meaning attached by Survey to the expression “*international* commercial arbitration”, nor the courts, tribunal or chambers, actors and applicable law you have in mind on that account. Do you intend, for instance, to cover arbitration panels as those of the World Trade Organization’s system?

7. The solutions found to the problems posed by provisional measures in a given legal system may be unattainable, unnecessary or unavailing within a system of a different nature or kind. On one hand, the Commission should avoid, in my opinion, mixing up solutions belonging clearly at different systems particularly if the systems concerned pertain to different legal orders. But, on the other hand, the elaboration of sets of provisions hybrid in character might make the final product useless. Better, in my opinion, to try in the first place to prepare a draft of common rules on provisional measures applicable to both judicial courts and arbitral tribunals of public international law. If retained for study by the Commission, “international commercial arbitration” could thereafter be the subject of a separate set of draft provisions.

8. For the time being, I reserve my position on the question of including in the study of the Commission “international commercial arbitration”, as well as on the need for the Commission to deal with the issues under Chapter III (attachment of assets), IV (exclusive jurisdiction clause) and XII (extraterritorial provisional measures) in so far as they seem related to the “international commercial arbitration” of Chapter XI.

9. I have no problems in admitting the international overtones evolutions experienced during the last decades by private commercial arbitration because of the impact of trade and market new needs and other external

legal factors, such as; the advances in the codification and unification of rules of private international law; the New York Convention of 1958 and other international conventions; the stage of development reached by ICSID investment international arbitration; and the adoption by international bodies like UNCITRAL and PCA respectively of further Arbitrations Rules adding new options for arbitration of disputes that parties may consider inserting in treaties, but also in contracts or other agreements of a private nature.

10. The UNCITRAL Arbitration Rules have been incorporated by reference in multilateral (i.e. Article 188(2) (c) of the LOS Convention) and more often bilateral treaties. Several BITs have incorporated, as an alternative to ICSID Arbitration, UNCITRAL Arbitration Rules, the PCA acting often in such instances as Registry of the investment arbitral tribunal concerned. In such a case, the provisional measures clause of the applicable version of the UNCITRAL Arbitration Rules will apply instead of Article 47 of the ICSID Convention and Rule 39 of ICSID Arbitration Rules. However, in all cases I am aware, the applicable UNCITRAL Arbitration Rules were Article 26 of the 1976 version, not the UNCITRAL Model Law (Article 17 (2) (a-d)) or 2010 Rules version (Article 26 (2) (a-d)) with the detailed list of the purposes of provisional measures mentioned in Chapter X of your Survey. These successive new versions suggest that the possibility in the future of inter-temporal law problems cannot be altogether excluded.

11. The PCA Arbitration Rules of 2012 are based on the 2010 UNCITRAL Arbitration Rules with changes in order, *inter alia*, to reflect the public international law elements that may arise in disputes involving at least a State, State-controlled entity, or intergovernmental organization, pinpointing to a kind of mixed public/private international arbitration which reminds the ICSID arbitration model.

12. The Iran-United States Claims Tribunal, an international arbitral tribunal established by the 1981 Algerian Declaration (settlement of the Hostages crisis), conducts also its business in accordance with the 1976 UNCITRAL Arbitration Rules except to the extent modified by the Parties or by the Tribunal itself. The Tribunal Rules of 3 May 1983 maintained unchanged the text of the interim measures of protection of Article 26 of the 1976 UNCITRAL Arbitration Rules.

13. With regard to questions of mutual assistance between national courts and international courts and arbitral tribunals mentioned in your Survey, I agree that some of those questions deserve to be studied by the Commission, such as the support that national courts may provide for the enforcement of provisional measures orders granted by international

courts and arbitral tribunals, and the order by national courts of provisional measures in support of ICSID arbitrations.

14. In sum, I consider that the study of the topic has to be somewhat circumscribed and the criterion of “treaty-based courts and tribunals” (namely, courts and tribunals of public international law) appears to me as one of the most appropriate criteria for a delimitation, at least initially, of the scope of the study to be undertaken by the Commission. But we need first to agree broadly within the Commission as to the very purpose of the undertaking. In any case, it seems unavoidable for the Commission that - whatever the scope of the topic finally retained might be – the study must certainly include the provisional measures regimes of judicial courts and arbitral tribunals of public international law as provided for their constituent instruments and rules.

15. We would have therefore “international judicial courts” and “international arbitral tribunals” and under each of these two kinds of international dispute settlement means there is a certain number of provisional measures regimes, those of judicial courts appearing more homogenous than the arbitral tribunal regimes. But, fortunately, during the last century a considerable degree of convergence has taken place between the regulation of provisional measures in international judicial settlement and in international arbitration. The power of international arbitral tribunals to indicate or grant of provisional measures is not longer questioned as a matter of principle.

16. The insertion in the 1920 Statute of the PCIJ of Article 41 on provisional measures (inspired in a provision of the Bryan Treaty between United States and Sweden) marks also the beginning of the process of general recognition of the competence not only of permanent international judicial bodies but also of international arbitral tribunals to indicate provisional measures. This was manifested before the Second World War in Article 33 of the 1929 Geneva General Act. And, after the War, Article 20 of the 1958 ILC Model Rules on Arbitral Procedure confirms that evolution.

17. The object and purpose of the power to indicate provisional measures is similar for international judicial courts and arbitral tribunals as well as, notwithstanding different formulations, the general scope of such a power. There is however an important difference because in international judicial bodies the power to indicate provisional measures is of a *statutory character* and as such cannot be derogated or modified by the mutual agreement of the parties to the dispute (the parties do not have the right to contract out of that statutory jurisdiction). This not necessarily the



case in international arbitration as illustrated by Article 47 of the ICSID Convention.

18. It may be added that there are a series of general factors that international courts and arbitral tribunals ponder, when acting as dispute settlement international organs, before concluding that *the circumstances of a given case* advise or require the indication of provisional measures to preserve rights of either party at issue in the case, such as: urgency, necessity, risks, gravity, irreparability, proportionality, values to be protected by the measures, protection of evidence, parties' conduct, nature of the dispute, object and purpose of principal dispute, timing of the request, preservation of the proceedings, consequences of no action, eventual outside related party or parties' actions, etc.

19. These elements operate however within conventional frameworks and related enacted rules which are not necessarily the same for all courts and tribunals, without prejudice of the existence also between their respective provisional measures regimes alike or similar elements, conditions or requirements with respect to some basic presuppositions such as: (i) the existence of a right or rights of either party to the dispute in need to be preserved during the judicial proceedings (*pendente litis*); (ii) the existence of a right or rights asserted by the requesting party sufficiently plausible to justify its preservation through the indication of provisional measures; (iii) the existence of risk of a prejudice irreparable to be caused to the said right or rights if provisional measures are not indicated; (iv) the existence of urgency in avoiding the risk, in the sense of a real and imminent risk, susceptible of causing a prejudice irreparable to the right or rights concerned; (v) the existence at the least of *prima facie* jurisdiction on the merits of case; and (vi) the existence of a link between the alleged right or rights requested to be preserved and the provisional measures actually requested.

20. ... I join below some comments on the ICJ provisional measures regime (Article 41 of the Statute) and practice, in case it would be of some utility for your work as Rapporteur of the Commission.

*ANNEX: Brief note on provisional measures in the ICJ (Article 41 of the Statute)*

1. The power of the International Court of Justice (ICJ) to indicate, if it considers that the circumstances so require, provisional measures is expressly recognized in Article 41 of the Statute of the Court which is an integral part of the United Nations Charter. The Members of the United Nations being *ipso facto* parties to the Court's Statute, that Court's power is today universally recognized by practically all States. Likewise, it is applied in the practice of the Court regularly at the request of States'

parties to the disputes referred to it. The text of Article 41 reproduces the formulation adopted in 1920 for the PCIJ Statute. Thus, in the case of the ICJ, its remedial jurisdiction power does not need to seek additional support in any “inherent power” theory or explanation. It is an explicit statutory power of the Court.

2. I have participated on several occasions in ICJ incidental proceedings on request for the indication of provisional measures in *contentious cases*, first as Registrar and then as judge *ad hoc*. I have therefore some direct personal experience on the handling by the Court of those party’s requests and of the progressively overcoming by Court’s jurisprudence during the last decades of the two main pending controversial issues identified in 1983 by Jerzy Sztucki (*Interim Measures in the Hague Court*, Kluwer, Chapter V), namely the indication of provisional measures in situations in which substantive jurisdiction on the main case is still uncertain and the question of the obligatory character of the provisional measures indicated by the Court.

3. Concerning competence, it is Court’s established jurisprudence that provisional measures may be indicated pursuant to Article 41 of the Statute before the substantive jurisdiction in the case concerned be finally established, providing however that the requesting party appear to afford a basis - in the light of the jurisdictional titles invoked - allowing the Court to conclude at the existence of a *prima facie* jurisdiction on the merits of the case. In was so, for example, in the *Pulp Mills on the Uruguay River Case* in which I participated as *judge hoc*, as well as in several other cases before and after the *Pulp Mills*.

4. Thus, the exercise of the power granted to the ICJ by Article 41 of the Statute is conditioned to the existence of jurisdiction of the Court, at the least *prima facie*, on the merits of the case to which the request refers. It is so because the aim of the exercise by the Court of the said power is the preservation, *while the proceedings on merits in the case are going on*, the respective substantive rights of either party in those proceedings which may subsequent be adjudged. The alleged rights sought to be made the subject of provisional measures by the requesting party must be the subject of the proceedings before the Court on the merits of the case. Consequently, a link must exist between the provisional measures being sought by the requesting party and the rights which form the subject of the proceedings before the Court on the merits of the case (see, for example, *Arbitral Award of 31 July 1989, Order on Provisional Measures, ICJ Reports 1990*, p.70, para. 26). It follows also, that the rights claimed by the requesting party on the merits of the case, and for which it is seeking protection, are “plausible rights” (see, for example,

*Questions relating to the Seizure and Detention of Certain Documents and Data, Order for the indication of Provisional Measures of 3 March 2014, paras 24-28).*

5. The relationship between the merits of the case and the request for indication of provisional measures is reflected in the procedural treatment reserved by the Rules of Court (Articles 73-78) to such requests: (i) they must be made during the course of the proceedings in the case in connection with which the request is made; (ii) they open an incidental proceedings within the framework of the proceedings on the related connected case; (iii) the subject of those incidental proceedings must be as indicated preservations of alleged rights at issue in the main proceedings on the related connected case and (iv) the final judgment on the merits of the case (or its discontinuance) makes indicated provisional measures still in force at that moment to lapse.

6. The application of the criterion of “*prima facie* jurisdiction” by the ICJ in situations in which the competence on the related case has not been yet established seems by now generally accepted. It is, for example, mentioned expressly in Article 290 of the Law of the Sea Convention. However, on other accounts the scope of the ITLOS’ power to indicate provisional measures (within its own competence field) differs from the general provisional measures regime of the ICJ Statute. According to Article 287 of the LOS Convention the ITLOS, the ICJ and arbitral tribunals (constituted in accordance with annexes VII and VIII of the Convention) allows the indication of provisional measures not only to preserve the respective rights of the parties in dispute concerned but also *to prevent serious harm to the marine environment* as well. Furthermore, Article 290, paragraph 5, enounces a kind of *residual power* of ITLOS to prescribe provisional measures *pending the constitution of an arbitral tribunal to which a dispute is being submitted* under Part XV (Section 2) of the LOS Convention.

7. The ICJ Statute did not entrust the Court with the power to indicate any kind of provisional measures in cases already referred, or to be submitted, to another international court or tribunal (see my article: “*Provisional Measures and Interventions in Maritime Delimitations*”, in Publications on Ocean Development, Maritime Delimitation, Volume 53 (of a Series Studies on International, Legal, Institutional and Police Aspects of Ocean Development), Martinus Nijhoff Publishers, Volume 53 (2006) on Maritime Delimitations, at pp.41-44).

8. In the *Pulp Mills Case*, following its institution by Argentina, both Parties filed requests for the indication of provisional measures. Argentina did it in May 2004, immediately after filing the Application (*in*

*limine* request), and Uruguay in November 2006, before the filing the Memorial of Argentina on merits (early request). Both requests were considered on the basis of the existence of *prima facie* jurisdiction and both rejected by the Court, after hearing the Parties (Orders of 2006 and 2007 respectively). The Court found with respect to each of the two requests that the circumstances were *not such as to require the exercise of its power under Article 41 of the Statute*.

9. The finding on the existence of *prima facie* jurisdiction did not pose major difficulties in the *Pulp Mills Case*. Uruguay did not file preliminary objections, and both Parties agreed that the Court had jurisdiction with regard to the rights to which Article 60 of the 1975 Statute of the Uruguay River applies. Thus, the Court concluded with respect to Argentine request that “it has *prima facie* jurisdiction under Article 60 of the 1975 Statute to deal with the merits *and thus may address the present request for provisional measures*” (*ICJ Reports 2006*, p.129, para. 59, and *2007*, p.10, para. 26).

10. The Court’s Order on Uruguay’s request underlined once more that “in dealing with a request for provisional measures the Court need not finally satisfied itself that it has jurisdiction on the merits of the case but will not indicate such measures unless, there is, *prima facie*, a basis on which the jurisdiction of the Court might be established” and “that is so whether the request for the indication of provisional measures is made by the applicant or by the respondent in the proceedings on the merits” (*Reports 2007*, p.10, para. 24).

11. There was however disagreement between the parties as to the “scope” of the declared *prima facie* jurisdiction. Argentina argued that Uruguay’s request for the indication of provisional measures related to rights which would fall outside the scope of the jurisdictional clause of the 1975 Statute and therefore outside the *prima facie* jurisdiction finding. The Court rejected that argument declaring that the rights invoked in and sought to protect Uruguay “have a sufficient connection with the merits of the case for the purpose of the current proceedings; ... Article 60 of the 1975 Statute may thus be applicable to the rights which Uruguay invokes in the present proceedings” (*Ibid.*, pp. 10/11, para. 29). It is to be noted that the criterion of “sufficient connection” with the merits of the case as a whole (which I endorse) would seem wider than others criteria applied some times in the past. The “scope” of the Court jurisdiction in the *Pulp Mills Case* was finally determined by the Court in its final Judgment on Merits (*ICJ, Reports 2010*, p. 40-47, paras 48-66).

12. In incidental proceedings on a request for the indication of provisional measures, the rejection by the Court of the request because

the jurisdictional titles invoked by the applicant *manifestly* does not constitute a basis of jurisdiction, even *prima facie*, may be an occasion for the Court to order that the case be altogether removed from the List, as happened in the *Legality of Use of Force Cases (Yugoslavia v. Spain)* and *(Yugoslavia v. United States)* (*ICJ Reports 1999*, p. 774 and p. 926). But in so doing, the Court exercises a power different from the power to indicate provisional measures, namely the power to remove a case from the List when it is manifest that it will not have jurisdiction to adjudicate on the merits or when events subsequent to the filing of an application render it without object (mootness). It is therefore quite normal that a same Court's order may deny the indication of provisional measures while rejecting a party's requests to remove the case from the List (i.e. the Order in the *Arrest Warrant of 11 April 2000*, *ICJ Reports 2000*, p. 202). "Removal of the case" and "provisional measures" are different procedural means subject as such to different rules and considerations.

13. Lastly, the question of the power and/or appropriateness to indicate provisional measures in *advisory proceedings* discussed at the doctrinal level has not yet been authoritatively settled by the Court. In its Order of 9 March 1988 concerning the request for advisory opinion of the UN General Assembly in the case of the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* the Court refers to the question, but avoided a pronouncement thereon by declaring that the relevant GA resolution: "while it contains in its preamble a reference to Articles 41 and 68 of the Statute, does not constitute a formal request for the indication of provisional measures" (*ICJ, Reports 1988*, p. 4).

14. It may be said that the wording of Article 68 of the Statute of the Court does not exclude altogether the possibility for the Court of indicating provisional measures in some *qualified* advisory proceedings such as, for example, when the advisory opinion requested appears to the Court to be one "upon a legal question actually pending between two or more States". These terms were used by the Court in its Order of 22 May 1975 when allowed Morocco to choose a person to sit as a judge *ad hoc* in the *Western Sahara* advisory proceedings (*ICJ, Reports 1975*, at p. 8). But, some questions arise. For example, could it be so when the "legal question actually pending" is between a State and an international organization? And more important, could the Court adopt *binding* decisions as are those on provisional measures in proceedings ending by the adoption of a *no binding* advisory opinion?

15. As to the obligatory character of the provisional measures indicated by the Court, the former debate on whether or not they are binding is over

(so far the ICJ is concerned) since the Judgment of 27 June 2001 in the *LaGrand Case*, even though they were already a number of positive signs before. For example, in the *Application of the Genocide Convention Case* the operative part (first paragraph) of the Order of 13 September 1993 reaffirms a provisional measure indicated by the Court a few months before “*which should be immediately and affectively implemented*” (*ICJ Reports 1993*, p. 349). In the *Military and Paramilitary Activities in and against Nicaragua Case* the Court devoted some passages of the Judgment on merits of 27 June 1986 to consider parties’ implementation of provisional measures previously indicated in its Order of 10 May 1984, making the following statement with respect to the indicated measure of not aggravating or extending the dispute: “When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court’s indications seriously into account, and not direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have be contrary to international law” (*ICJ Reports 1986*, p. 144, para. 289).

16. In its Judgment in *LaGrand Case*, the Court interpreted Article 41 of the Statute in accordance with Articles 31 to 33 of the VCLT concluding that: “It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid of prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the text and the object and purpose of that Article” (*ICJ Reports 2001*, p. 503, para. 102).

17. It should be recalled because of its interest for the work of the Commission that the ICJ, like the Permanent Court, have treated the “parties’ duty of preventing the aggravation or extension of the dispute” as a kind of customary international law principle, or general principle of law, intended to protect the respective rights of the parties in a given case and that Article 41 of the Statute empowers the Court to formulate it in a given order in terms of a “provisional measure” whenever it considers that circumstances so require and independently of having being or not requested (i.e. *Certain Criminal Proceedings in France, Provisional Measures*, *ICJ Reports 2003*, p.111, para. 39). In is respect, it should be also recalled that the Court may indicate provisional measures in whole

or in part other than those requested or that ought to be taken or complied with by the party which has itself made the request. Furthermore, the Court may indicate *proprio motu* provisional measures (Article 75 of the Rules of Court).

18. The *LaGrand* Judgment (*ICJ Reports 2001*, p. 503, para. 103) considers that a related reason with points to the binding character of orders made under Article 41 of the Statute is precisely the existence of the above commented principle, quoting the statement of the 1939 PCIJ Order in the *Electricity Company of Sofia and Bulgaria* when it spoke of: “the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute” (*PCIJ, Series A/B N° 79*, p. 199).

19. Following a detailed examination (for confirmatory purpose) of the *travaux préparatoires* of the Article 41 of the Statute starting with the initial proposal of the Brazilian jurist Raul Fernandes in the Committee of Jurists established by the Council of the League of Nations (itself based on a provision of the Bryan Treaty of 13 October 1914 between the United States and Sweden) (*ICJ, Reports 2001*, p. 504, para. 105), the *LaGrand* Judgment concludes that: “the preference given in the French text (of the Statute) to ‘indiquer’ over ‘ordonner’ was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding of such orders” (*Ibid.*, p. 505, para. 107). I fully agree with that conclusion.

20. Furthermore, the *LaGrand* Judgment specifies likewise that Article 94 of the United Nations Charter does not prevent orders made under Article 41 of its Statute of the ICJ from having a binding character (*Ibid.*, p. 506, para. 108).

21. Being binding, the ICJ orders indicating provisional measures are a source of international legal obligations for the party or parties to the dispute to which they are addressed. In fact, they are often addressed by the Court to both parties. For example, in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* all provisional measures indicated in the operative part of the Order of 15 October 2008 are addressed to both parties (*ICJ Reports 2008*, p. 398-399).

22. No compliance with these orders constitutes an international wrongful act of the addressee party or parties entailing their international responsibility and, consequently, the international obligation to make reparation as provided for in the ILC Articles on State Responsibility for International Wrongful Acts. This is now reflected, whatever relevant, in the operative parts of Court's judgments on merits of the case. For example, in paragraph 5 of the operative part of the Judgment in *LaGrand Case*, the Court finds that the United States breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999 (*Ibid.*, p. 516).

23. This declaration of wrongfulness was not accompanied however in that Case by the determination of an indemnification, because as explained in the Judgment: (i) Germany's submission did not include a claim for indemnification; (ii) the United States was under great time pressure in the case due to the circumstances in which Germany had instituted the proceedings; and (iii) "at the time when the United States authorities took their decision the question of the binding character of the orders indicating provisional measures had been extensively discussed in the literature, but had not being settled by its jurisprudence" (*Ibid.*, p. 508, para. 116). Recently, the Court has reaffirmed in unequivocal terms that its orders on provisional measures under Article 41 of the Statute have binding effects and thus create international legal obligations for any party to whom the provisional measures are addressed (*Questions relating to the Seizure and Detention of Certain Documents and Data, Order for indication of Provisional Measures of 3 March 2014*, para. 53).

24. Any indicated provisional measure is binding while *in force*. The ICJ may revoke, modify or replace any prior order indicating provisional measures at any time before the final judgment and, in any case, the indicated provisional measure in force lapses as from the moment when the merits judgment in the case is read out at a public sitting of the Court. Indicated provisional measures lapse of course also when, subsequent to their adoption, the Court by a judgment concludes that it lacks jurisdiction to entertain the case or that the application instituting the case was not admissible, as well as when the case is discontinued.

25. The Court's orders indicating provisional are therefore *binding*, but being temporal in nature they do not have by definition effects of *res judicata*. This explain why all Court's decisions on provisional measures adopt the form of *orders* (Article 48 of the Statute) and not of *judgments* because the latter in the Court's system are final and without appeal (Article 60 of the Statute).



26. It is also of interest to note that the Court is empowered by Article 78 of its Rules to request information from the parties on any matter connected with the implementation of any provisional measure it has indicated.

27. In the *Avena Case*, the operative part of the Order of 5 February of 2003 after indicating a provisional measure addressed to the United States provides for that the latter “shall inform the Court of all measures taken in implementation of this Order” (*ICJ, Reports 2003*, p. 92, para. I (b)). The same in the operative part of the Order of 16 July 2008 in the case concerning the *Request for Interpretation of the Judgment of 31 March 2004 in the Avena Case* (*ICJ Reports 2008*, p. 332, para. II (b)). More recently, in the joined cases of *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, the Court’s Order of 22 November 2013 reaffirms previous indicated provisional measures, indicates additional ones and decides that the parties “shall regularly inform the Court, at three-month intervals as to the compliance with the about provisional measures” (*ICJ, Reports 2013*, p. 370, point 3 of the operative part).

28. The very existence of a provision in the Rules of Court (Article 75 (1)) according to which the Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures has proved in practice to be a useful instrument in situation requiring a very urgent remedy as in death penalty cases (i.e., in the *Breard Case*, *ICJ Reports 1998*, p. 248). But, the Court still appears quite reserved concerning the indication of provisional measures *proprio motu* outside the context provided for by an incidental proceeding opened by a party’s request for indication of provisional measures.

29. A new development has taken place in 2008 and 2011 in the exercise by the ICJ of its power to indicate provisional measures. The Court has in effect granted provisional measures at party request in cases concerning the interpretation of its own judgments in proceedings instituted under Article 60 of the Statute (*Interpretation of the 2004 Judgment in Avena Case; Interpretation of the 1962 in the Temple of Preah Vihear Case*). This combination of Articles 41 and 60 opens new avenues to the role of the provisional measures in the judicial settlement of inter-states dispute by providing some temporal but binding relief during derivatives proceedings (as those conducted under Article 60 of the Statute) in a Court lacking itself of executive powers.

30. During the last decades ICJ perfected and developed its remedial jurisdiction pursuant to Article 41 of the Statute and Articles 73 to 78 of the Rules of Court. These norms as whole established a coherent regime of provisional measures of public international law treaty-based which

should in my opinion be taken by our Commission, at the least initially, as the set of rules *par excellence* for our study. This was the method generally adopted in the past by Commissions of the Institute in like situations, as by example the Commission which elaborated the Resolution on “Judicial and Arbitral Settlement of International Disputes Involved More Than Two States” (Berlin, 1999).

31. In 2005, I delivered some lectures on a topic entitled “*Medios procesales a la disposición de las partes en el procedimiento contencioso de la Corte Internacional de Justicia*” (published in Spain in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Vol. VIII/IX, 2004/2005). In chapter II of the publication I made a summary presentation of the provisional measures (*medidas provisionales*) in the ICJ system. I refer also to provisional measures in the commentary under Article 48 of the Statute in the publication: “The Statute of the International Court of Justice. A Commentary” edited by Zimmermann, Tomuschat, etc., Oxford University Press, Second Edition (2012), p. 1215-1233.

32. I joined to the Court’s Order on the request for provisional measures of Uruguay in the *Pulp Mills* an Opinion in which I considered some aspects of the topic *in the light of the circumstances of that case* such as, for example: the requirement of the existence of an adequate relationship between the conduct or fact of object of the request and the rights at issue in the case; the assessment of the risk of a prejudice irreparable; and the Court’s power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute (*ICJ Reports 2007*, at pp. 26-41). With respect to this last aspect I disagree with the conclusion in the Court’s Order quoted in paragraph 121 of your Survey. It was in my opinion a backward step. I subscribe the legal and logical reasons of Judge Buergenthal in the Declaration he joined to the said Order (*Ibid.*, at pp. 21-25).

33. As conceived in Article 41 of the Statute, the Court’s provisional measures must be aimed at preserving the *respective rights of the parties in the case*. This differentiates those measures from those that a political organ as the Security Council may recommended or decided pursuant to Article 40 of the United Nations Charter on two main following accounts mainly: (i) the object and purpose of the adopted measures and (ii) the circle of addressees of the measures. In 1994, I gave in Doha a lecture entitled “Some considerations on the respective roles of the Security Council and the International Court of Justice with respect to ‘the prevention of aggravations of disputes’ in the domain of the pacific settlement of international disputes and situations” which might be also of some interest for you as Rapporteur. I made at that time some

considerations on the convenience to avoid conflicts in practice between the ICJ powers to indicate provisional measures in cases before the Court and the exercise by the Security Council of its powers under Chapter VII of the UN Charter which were prompted by what happened in 1992 in *Lockerbie Cases* (printed in: Qatar International Law Conference, 94, *International Legal Issues arising under the United Nations Decade of International Law*, Edited by Dr. Najeeb Al-Nauimi and Richard Meese, Martinus Nijhoff Publishers, at pp. 663-708).

34. There are no legal limits or hierarchies concerning the material contents or nature of provisional measures that the ICJ may indicate in a given case whatever it considers *in casu* that circumstances so require. Thus, like in the case of the Security Council, the indicated measures as such may well be aimed at putting an end to military or other forms of armed activities or violence (i.e. *Nicaragua Case*; *Delimitation Case between Cameroon and Nigeria*; *Armed Activities on the Territory of the Congo Case*; *Request for the Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear*).

35. One of the first examples of this kind of provisional measures are those indicated by the Order of the Chamber of the Court of 10 January 1986 in the *Frontier Dispute (Burkina Faso/Mali) Case (ICJ, Reports 1986*, at p.11/12). This Order confirms likewise that when a case is referred to a Chamber of the Court, it belongs to the Chamber concerned (not to the Plenary) the exercise of the power to indicate provisional measures pursuant to Article 41 of the Statute.

36. Lastly, I do not know whether you are aware that the Institute in the Bruges session (2003) granted the James Brown Scott “Prix Rolin Jaequemyns” to a memorial on “provisional measures” written by an Argentine lady Ms. Silvina S. Gonzalo Napolitano (*Annuaire*, Vol.70-II, pp. 56-58). In 2008, she published it in Buenos Aires as a book entitled “Obligatoriedad y eficacia de las medidas provisionales en la jurisdicción internacional” which contains a lot of information on practice, case-law and doctrine on the subject.

#### ***IX Note from Rapporteur, April 15, 2016***

Colleagues will already have the helpful comments on the memorandum by colleague Torres Bernárdez which was attached to his email of January 14, 2016 commenting on the paper circulated last year. The rapporteur understands very well the concerns expressed in that memorandum, but remains of the view that the value and utility of the

work would be much reduced if it were limited to public international law, whilst recognising that it would be much easier to formulate a traditional Institut resolution if the scope of the next report were limited in that way.

***Questionnaire April 15, 2016***

1. What are your views of the scope of the subject matter?
2. In particular, do you agree that it should deal on a broad comparative basis with public international law; investor-state arbitration; human rights; private international law; international commercial arbitration?
3. If not, what areas of law should be covered?
4. Should the report deal with orders granted by administrative bodies such as the Inter-American Commission on Human Rights or the EU Commission? If so, which ones? [note: at present the report contains material kindly supplied by colleague J-M Arrighi on the Inter-American Commission]
5. Should additional areas be covered, such as EU law and the interim orders of the CJEU?
6. Will members of the Third Commission with background from civil law countries be able to contribute additional material, especially in the field of private international law?
7. Is the topic suitable for a resolution of the Institut?
8. If so, what principles should such a resolution cover?

***X Email from Colleague Michael Bogdan, May 11, 2016***

In response to our rapporteur's most useful preliminary report and questionnaire of 15 April, I would like to submit the following short remarks.

**1.-3.** The scope of the subject-matter of our Commission should in my view focus on public international law, but principles and experiences derived from private international law, international commercial arbitration, and even municipal laws on situations without foreign elements can be taken into account, if and to the extent they can contribute to defining those "general principles of law" that can conceivably be transposed to public international law. For example, experiences from business-to-business disputes may sometimes be instructive for disputes between States, whereas the provisional measures taken in disputes concerning custody of children can hardly provide useful lessons for disputes between States.

4.-5. Orders of administrative bodies should not, in my view, be covered, as their procedures are usually governed by rules based on other principles than judicial proceedings. On the other hand, the practice of the CJEU, including in disputes of civil-law nature such as cases involving Article 35 of the Brussels Ia Regulation and its predecessors, deserves to be taken into account.

6. A comparative study of private international law of civil-law countries would probably result in the finding that the prerequisites and effects of provisional measures (urgency, risk of prejudice, security, etc.) are governed by the *lex fori* (see e.g. the abovementioned Article 35 of the EU Brussels Ia Regulation). The situation is probably the same in the private international law of most common-law jurisdictions. A broad comparative study of the multitude of national procedural rules on provisional measures would be too time-consuming, but a less ambitious study covering a smaller selection of countries, perhaps the countries represented in the Commission, may lead to useful conclusions as to those common principles that might be classified as general principles of law in the sense of Article 38 of the Statute of the International Court of Justice.

7.-8. I think the subject is suitable for a resolution of the *Institut*, even though it will hardly comprise any revolutionary novelties. Such a resolution might become a useful summary of principles that can be relied on by international courts and jurists. As most of the principles do not seem to be controversial, the chances of having a resolution adopted are not too bad.

I take the liberty of enclosing an article I published in 2012 on the (then) proposed recast of the provision on provisional measures in what subsequently became Article 35 of the Brussels Ia Regulation. The proposal and the final Article are not quite identical, but my article may be of some marginal interest for provisional measures fans.

**XI Paper by Colleague Hans van Loon on Preliminary Report, June 23, 2016**

1-3. The Preliminary Report (the “Report”) provides many examples of interaction between different legal orders and systems, courts and tribunals, regarding provisional measures: the PCIJ and ICJ’s case law is influenced by (comparative) domestic law; that case law, in turn, is cited by ITLOS, ICSID, the Iran-US Claims Tribunal, and the ECtHR; the ECHR and the case law of the ECtHR impact on domestic law, as does EU law and the case law of the CJEU. The ECtHR takes notice of the

case law of the organs of the Inter-American Convention on Human Rights, and vice versa. The case law of ICSID and UNICTRAL tribunals has an influence on other arbitral tribunals, etc.

Furthermore, in addition to emulation and borrowing among national systems of private international law (*e.g.* the impact of *Mareva* in other common law countries), there is a clear trend, as the Report brings out, for national courts to provide provisional relief in support of foreign court and arbitral proceedings, as well as to recognise the effects of provisional measures ordered by foreign courts.

These developments are to be expected in an increasingly interconnected world where traditional boundaries – both “vertical” and “horizontal” – between various legal systems are becoming ever more porous. Rigid compartmentalization in terms of international/national law (several decisions of US courts and the Privy Council referred to in Chapter VII of the Report are clearly out of step in this regard), or public/private international law, is no longer helpful (if it ever was).

I agree therefore, that an approach on a broad comparative basis, including public and private international law, investor state and commercial arbitration, human rights, and domestic law (or: municipal law without foreign elements) recommends itself. Rather than excluding any of these fields of law, the work might focus on certain *functions* of provisional measures only, leaving aside perhaps, at this stage at least, more controversial measures such as orders granting early satisfaction to the creditor, gathering (as opposed to protecting) evidence for trial, or pretrial disclosure or hearing of witnesses (*cf.* also *infra* 6.).

It seems to me that, given the developments just mentioned, the work should concentrate on trends common to all the fields of law, articulate them, and on that basis, where possible, offer useful clarifications and orientations (*i.e.* not strictly limited to *lex lata*). Indeed, the added value of the IDI project, compared to studies limited to international law, or to commercial arbitration, or to civil court proceedings, may be precisely that it would provide a – forward looking – “restatement of general principles” (Report No 1)

4. Administrative, non-judicial proceedings, conducted by government institutions have their own, heterogeneous characteristics, and should not form part of the work. But any distinction should be based on the *proceedings*, not necessarily on the (name of the) *bodies*. Therefore, I would include the precautionary measure proceedings under the petition system of the Inter-American Commission on Human Rights, because the Commission, although not a court, exercises “functions which are [in] some ways analogous to a judicial tribunal” (Report, No 25), but, at least

in principle, not preventive measures taken by the EU Commission, which acts as a non-judicial body.

5. As the Report points out, EU law both affects domestic proceedings concerning provisional measures and may itself provide for provisional measures. Provisional measures may be found in the 2012 Brussels I (recast), Art. 35 (*cf.* also Art. 31 of the 2007 Lugano Convention), 2003 Brussels II a (Art. 20, but see my comments of 21 August 2015, under III), 2008 Maintenance (Art. 14) and 2012 Successions (Art. 19) Regulations, and now also in Regulation 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (effective 18 January 2017), a very detailed regulation entirely devoted to interim protection. Both aspects should be part of the work.

6. Of course members with background from civil law countries will be able to contribute additional material. In this respect it is worth noting that the Working Group on Provisional and Protective Measures of the ELI/UNIDROIT Project on civil procedure observes that the “diversity of structure of the laws of European states hides the fact that those laws pursue similar goals, and that provisional measures often serve similar purposes”. The ELI/UNIDROIT paper contains a useful typology of 11 (!) such functions (see:

<http://www.unidroit.org/english/documents/2014/study76a/s-76a-01-e.pdf>, p. 5). Perhaps, therefore, the work should (1) focus on functions of provisional measures rather than structures and names, and (2) on that basis select certain provisional measures for consideration (*cf. supra* 1-3).

I would also hope that the work could include, at some point, materials from legal systems of developing countries or countries in transition, such as India and China. It is well-known that the courts in India, in particular its Supreme Court, have gone quite far in providing relief, including interim relief, where the executive fails to act. It would be interesting – also given that the next IDI session will be held in India – to learn more about this practice and compare this with developments in civil procedure in, for example, (mainland) China.

7. Yes, see above.

8. In my view, the Report already contains the germs of a number of principles. The following is an attempt to formulate some of them, with some questions, just as a start (*document martyr*):

1. Granting provisional measures as general principle. General requirements. Ex parte provisional measures

## PROVISIONAL MEASURES - PREPARATORY WORK

1.1. Courts and arbitral tribunals may grant provisional or protective measures when necessary to preserve the ability to grant effective relief by final judgment or award, or to maintain or otherwise regulate the status quo.

- Inspired by ALI/UNIDROIT Principles of Transnational Civil Procedure Art. 8.1. The comments are also useful. Need to go in more detail in respect of “irreparable harm”? Need to specify that there must be at least plausibility of existence of rights?

1.2 Provisional measures may be granted when there is a real and imminent risk that irreparable injustice will be caused to the rights in dispute before the final judgment is rendered. Such measures should be proportional considering the balance of inconvenience in the imposition of the measures upon the parties.

- 1.2.: Reproduces in essence the, widely followed, jurisprudence of the ICJ, and aims to deal with the issues covered by Ch. II and X (“the rights in dispute”, which may, in the case of States include the rights of citizens for the benefit of whom these rights exist). Need to elaborate on measures to prevent aggravation or extension of the dispute?

1.3. Where irreparable injustice would result from postponing the order until the other party is heard, the order may be given *ex parte*. However, the party to whom the *ex parte* order is addressed must as soon as practical be given notice of the order and the opportunity to respond concerning the appropriateness of the relief. The order should be accompanied by adequate safeguards against arbitrary interference and abuse.

- This relates to the issue raised by the Report in Ch. XIV. *Ex parte* orders are, of course, more common in civil proceedings among private parties than in proceedings between States. The wording is based on Art. 8.2. of the ALI/UNIDROIT Principles.

1.4. Provisional measures may at all times be amended, expanded or reviewed: they are not *res judicata*.

## 2. Jurisdiction to grant provisional relief

2.1. A court or arbitral tribunal having jurisdiction as to the substance of a dispute also has inherent jurisdiction to order provisional measures, unless the law, the constituent document or the choice of court or arbitration agreement otherwise provides.

- Comments might clarify that this principle applies both in national and international law (thus rejecting, in respect of the former, national laws preventing arbitral tribunals from ordering provisional relief – Report No 191 – and, in respect of the latter, Rosenne’s view that jurisdiction to order provisional measures depends on explicit granting of powers –



Report No 19). Comments might refer to Art. 2 (a) Brussels I recast (noting perhaps, that in contrast the Hague Choice of Court Convention – now also ratified by Singapore – excludes provisional measures).

2.2. Where jurisdiction as to the substance of the case depends on the consent of the parties, the court may order such measures if it finds that it has *prima facie* jurisdiction to deal with the substance of the case.

- Cf. Report Ch. X: applies to international and national proceedings including national proceedings based on choice of court agreements, and arbitration.

2.3. Even if the court of another State has jurisdiction as to the substance of the matter, and unless the law, the constituent document or the (exclusive) choice of court agreement otherwise provides, application may be made to the courts of a State for such provisional relief as may be available under the law of this State. The latter courts should, to the extent possible, avoid any conflict with the jurisdiction and orders of the primary court.

- Comments might refer to Art. 35 of Brussels I recast and to case law that reserves the situation where the parties to a choice of court agreement have excluded provisional relief applications for ancillary relief in other jurisdictions (Report Ch. V). Reference could also be made to the considerations in *Motorola* (Report, No 49).

2.4. In commercial arbitration proceedings, an application may be made to courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of such proceedings.

- Should something be said about provisional relief in national courts in support of ICSID arbitration, cf. Report No 209?

### 3. Binding character of provisional measures

3.1. Provisional measures are binding. States are under an obligation to give effect to provisional measures addressed to them by international courts and tribunals.

- Comments might refer to the growing consensus that the binding character of provisional measures of international courts is inherent in their jurisdiction as to the substance and does not depend on the wording of the constituent document.

3.2. An order of provisional measures made by an arbitral tribunal only binds the parties to the arbitration agreement.

3.3. Provisional measures may at all times be amended, renewed or dissolved: they are not *res judicata*.

### 4. Extraterritorial reach and recognition of foreign provisional measures

4.1. A court may order provisional measures in relation to acts and property abroad provided this does not infringe upon the exclusive jurisdiction of foreign courts.

- The formulation and, indeed, possible limitations of the extraterritorial effect of provisional measures (Report Ch XIII) may need further discussion, cf. also my comments of 21 August 2015, under 16-20.

4.2. Where the provisional measure is ordered by the court with jurisdiction over the substance and the party to whom the provisional measure is addressed has been given notice of the order or has been served upon it prior to enforcement, courts of other States should where possible lend their cooperation and recognise and enforce the measure.

5. Bonds or other compensation

An applicant for provisional relief is in principle liable for compensation of a party against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant to post a bond or formally to assume a duty of compensation.

- Borrowed from ALI/UNIDROIT Principle 8.3.

## *XII Email from Colleague Sir Kenneth Keith, December 19, 2016*

...1-3 I think it is best to start on a broad basis. The function of provisional measures or interim relief or injunctions, to think of terms used in my earlier judging time, is of course to preserve the claimed rights and interests which are the subject of the proceedings. On my experience, which is more limited than yours and other colleagues', the issues which arise are common across a wide range of courts and tribunals, national and international, permanent and ad hoc (perhaps with a query in respect of the last since they vary a great deal ...). My understanding is like Hans van Loons', that is the power exists to maintain the status quo and not to improve the position of the applicant.

4 The administrative/judicial line is a shadowy one but, as you said in your Hague Lectures, the power is to be seen as inherent in the function of the decider. That is an easier argument to make in respect of a body which looks and works like a court (if it looks like a duck, waddles like a duck and quacks ...). But the title given is not decisive. Consider the carefully narrow terminology used in respect of the WTO AB and its actual functioning. The need for an explicit conferral of the power was considered at the 1899 conference or by the 1920 committee of jurists, I

wrote about that but can't remember where. When I do I will look at the source and see whether it is worth mentioning to colleagues.

**5** I wonder about including the EU but that may be largely because I know so little about that area of work.

**7** Would a (re)statement be better? Recall your earlier IDI work.

**8** I think that as now spelled out by the ICJ the main principles are reasonably clear - A prima facie jurisdiction; B a tenable argument on the merits (plausible must sound better in French I think); C a real and immediate threat to the rights claimed or involved; D binding or they lose their point.

Épreuves après corrections  
2017-04-06

