Interim and Provisional Measures in
Investment Treaty Arbitration

Prof. Mark Feldman
Peking University School of Transnational Law
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Interim and Provisional Measures

Provisional measures in the investor-State context: two key issues

1. Overlapping sources of authority (including treaty text and arbitral rules)

2. Sovereignty concerns
   -- The power to “recommend” provisional measures
   -- The power to interfere with sovereign activity
Interim and Provisional Measures

The right to non-aggravation of a dispute relates to both (i) overlapping sources of authority and (ii) sovereignty

1. Overlapping sources of authority

--Is the right to non-aggravation of a dispute a “self-standing right under international law”? (*Quiborax v. Bolivia*)

2. Sovereignty concerns

--Does the right to non-aggravation of a dispute empower a tribunal to enjoin a Party from applying a measure that is the subject of a dispute? (U.S.-Rwanda BIT Transmittal Letter)
Interim and Provisional Measures

ICSID Convention Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.
Interim and Provisional Measures

ICSID Arbitration Rule 39 (before 2006 amendment)

Provisional Measures

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

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

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

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

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

ICSID Arbitration Rule 39 (as amended in 2006)

Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
Interim and Provisional Measures

ICSID Arbitration Rule 39 (as amended in 2006)

Provisional Measures

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

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

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

UNCITRAL Arbitration Rules (1976)

Article 26  Interim Measures of Protection

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.
Interim and Provisional Measures

UNCITRAL Arbitration Rules (2010)

Article 26 Interim Measures

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
   (a) Maintain or restore the status quo pending determination of the dispute;
   (b) 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) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
   (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
Interim and Provisional Measures

UNCITRAL Arbitration Rules (2010)

Article 26 Interim Measures

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy 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; and
   (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal’s own initiative.
Interim and Provisional Measures

UNCITRAL Arbitration Rules (2010)

Article 26 Interim Measures

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.
Interim and Provisional Measures

North American Free Trade Agreement

Article 1134  Interim Measures of Protection

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, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.
Interim and Provisional Measures

United States-Singapore Free Trade Agreement

Article 15.19  Conduct of the Arbitration

8. 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, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 15.15. For purposes of this paragraph, an order includes a recommendation.
Interim and Provisional Measures

Canada-China BIT

Article 31 Interim Measures of Protection and Final Award

1. A Tribunal may recommend 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, including a recommendation to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal shall not recommend attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 20.
Interim and Provisional Measures

Mexico-China BIT

Article 21 Interim Measures of Protection

An Arbitral Tribunal may recommend an interim measure of protection to preserve the rights of a disputing party, or to ensure that the arbitral tribunal's jurisdiction is made fully effective, including a recommendation to preserve evidence in the possession or control of a disputing party or to protect the arbitral tribunal’s jurisdiction. An arbitral tribunal may not recommend attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 13.
Interim and Provisional Measures

United States-Singapore Free Trade Agreement

Article 15.15 Submission of a Claim to Arbitration

7. The arbitration rules applicable under paragraph 5, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.
Interim and Provisional Measures

Government of Canada, Information Session on Foreign Investment Promotion and Protections Agreements (FIPA)

“[I]t should be noted that investor-state tribunals cannot force a Party to the FIPA to change any law, regulation, policy or practice.”
“Article 28 [of the U.S.-Rwanda BIT] authorizes tribunals to order interim measures of protection to preserve the rights of a disputing party or to ensure that the tribunal’s jurisdiction is made fully effective . . . A tribunal cannot, however, order attachment of assets or enjoin a Party from applying any measure that is the subject of a dispute.”
Interim and Provisional Measures

The power to “recommend” provisional measures

“[T]he issue of State sovereignty was at the forefront of the drafters’ minds when Rule 39 was initially crafted. Their concern in respect of State sovereignty provides the explanation for the careful wording of Rule 39, premised as it is on a tribunal’s power to ‘recommend’ provisional measures, as opposed to the power to ‘order’, or language to that effect. As noted by Redfern and Hunter, ‘[t]he use of the word “recommend” in this context stems from the concern of the drafters of the ICSID Convention to be seen as respectful of national sovereignty by not granting powers to private tribunals to order a state to do or not do something on a purely provisional basis.’ Schreuer informs us that ‘a conscious decision was made not to grant the tribunal the power to order binding provisional measures.’”

“In the fullness of time, however, this concern of the drafters of the Convention was set aside by less respectful ICSID tribunals.”

Interim and Provisional Measures

The power to “recommend” provisional measures

“[A]ccording to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures “recommended” by an ICSID tribunal are legally compulsory; they are in effect “ordered” by the tribunal, and the parties are under a legal obligation to comply with them.”

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 (July 1, 2003), ¶4.
Interim and Provisional Measures

The power to “recommend” provisional measures

“In becoming a Party to a treaty such as the ICSID Convention . . . a State confers upon an arbitral tribunal jurisdiction over certain claims and assumes an obligation to take whatever steps might be necessary to comply with decisions rendered by the tribunal pursuant to the treaty. So long as and to the extent that the arbitration is in progress, both parties are under an international obligation to comply with whatever the tribunal issues as provisional measures for the purpose of protecting its jurisdiction and its ability, should it so decide, to grant the relief requested. State Parties to the ICSID Convention thus inherently are under an international obligation to comply with provisional measures issued by an ICSID tribunal.”

Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), ¶ 67.
Interim and Provisional Measures

The power to “recommend” provisional measures

“[I]n any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish. Interim measures may thus restrain a State from enforcing a law pending final resolution of the dispute on the merits . . . While the enactment of a law by a sovereign State, upheld as constitutional in that State, is a matter of importance, it cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures.”

Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), ¶ 50
Interim and Provisional Measures

Right to non-aggravation of a dispute

Criminal investigations “are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory.”

“On the other hand, the language authorizing ICSID Tribunals in Article 47 of the Convention and Rule 39 is very broad and does not give any indication that any specific state action must be excluded from the scope of possible provisional measures . . . this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings.”

“But . . . this Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.”

Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Decision on Provisional Measures (July 31, 2009) ¶¶ 136-137
Interim and Provisional Measures

Right to non-aggravation of a dispute

“[A]pplying Rule 39(1), the Tribunal does not find that the right to be preserved is threatened. Claimant has not shown that its procedural right to continue with this ICSID arbitration is precluded by the criminal investigation . . . Regarding Claimant’s substantive rights involved, it may well be that further damage is caused by the criminal proceedings, if Claimant can show that they were an abuse of the sovereign right of the State in breach of the BIT. However, such damage may be claimed, examined and decided later in this case in the procedure on the merits.”

Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Decision on Provisional Measures (July 31, 2009) ¶ 139
Interim and Provisional Measures

Right to non-aggravation of a dispute

“The Tribunal concludes that no provisional measures are appropriate regarding the criminal proceedings . . . However, to avoid any misunderstanding, the Tribunal points out that this is without prejudice to the question whether, in the proceedings on the merits, Claimant can claim that Respondent’s criminal investigation and the measures enforced in that context were an abuse of that sovereign right of the State in breach of the BIT and may lead to damages to which Claimant is entitled.”

Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Decision on Provisional Measures (July 31, 2009) ¶¶ 140-141
Interim and Provisional Measures

Right to non-aggravation of a dispute

“Claimants submit that the right to preservation of the status quo and the non-aggravation of the dispute is a self-standing right under international law. Claimants rely on Burlington v. Ecuador, Electricity Company of Sofia v. Bulgaria, and Amco Asia v. Indonesia, among others.”

“Claimants allege that the criminal proceedings have aggravated, and continue to aggravate, the dispute between the Parties. Claimants assert that Bolivia is doing everything in its power to obstruct the ICSID proceedings, and is using the criminal proceedings and other forms of harassment to ultimately force the Claimants to give up their claims.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 51-52
Interim and Provisional Measures

Right to non-aggravation of a dispute

“In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.”

Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 29, 2009), ¶ 60
Interim and Provisional Measures

Right to non-aggravation of a dispute

“The existence of the right to the preservation of the status quo and the non-aggravation of the dispute is well-established since the case of the Electricity Company of Sofia and Bulgaria. In the same vein, the travaux préparatoires of the ICSID Convention referred to the need ‘to preserve the status quo between the parties pending [the] final decision on the merits’ and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention ‘is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.’”

Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 29, 2009), ¶ 62
Interim and Provisional Measures

Right to non-aggravation of a dispute

“The existence of the right to the preservation of the status quo and the non-aggravation of the dispute is well-established at least since the case of the Electricity Company of Sofia and Bulgaria.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶134
Interim and Provisional Measures

Right to non-aggravation of a dispute

“Respondent submits that there is no self-standing right to the preservation of the status quo or the non-aggravation of the dispute. Such right exists only when there is an imminent threat that a right in dispute will suffer irreparable harm.”

“Respondent argues that by requesting provisional measures Claimants seek to prevent Bolivia from exercising its sovereign right to prosecute crimes within its own territory.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 81, 95
Interim and Provisional Measures

Right to non-aggravation of a dispute

“[T]he criminal proceedings are related to this arbitration because both the conduct alleged and the harm allegedly caused relate closely to Claimants’ standing as investors in the ICSID proceeding.”

“In addition, although the Tribunal has every respect for Bolivia’s sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants because they had initiated this arbitration.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 120-121
Interim and Provisional Measures

Right to non-aggravation of a dispute

“Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect. But such powers must be exercised in good faith and respecting Claimants’ rights, including their prima facie right to pursue this arbitration.”

“What is clear to the Tribunal is that there is a direct relationship between the criminal proceedings and this ICSID arbitration that may merit the preservation of Claimants’ rights in the ICSID proceeding.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 123-124
Interim and Provisional Measures

Right to non-aggravation of a dispute

“The Tribunal agrees with Claimants that the criminal proceedings exacerbate the climate of hostility in which the dispute is unfolding. However, it also notes that Claimants have no more activities or presence in Bolivia. Their mining concessions have been revoked, so there is no ongoing investment to protect . . . Thus, the Tribunal cannot agree with Claimants that the criminal proceedings place “intolerable pressure” on Claimants to drop their claims.”

Right to procedural integrity of the arbitration proceedings

“Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. Given that the existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 138, 146
Interim and Provisional Measures

“[T]he Arbitral Tribunal makes the following decision:

1. Respondent shall take all appropriate measures to suspend the criminal proceedings identified as Case No 9394/08, initiated against Allan Fosk, David Moscoso, Fernando Rojas, María del Carmen Ballivián, Daniel Gottschalk, Dolly Teresa Paredes de Linares, Gilka Salas Orozco, María Mónica Lorena Fernández Salinas, Yury Alegorio Espinoza Zalles, Tatiana Giovanna Terán de Velasco and Ernesto Ossio Aramayo, and any other criminal proceedings directly related to the present arbitration, until this arbitration is completed or until reconsideration of this decision, whether at the request of a Party or of the Tribunal’s own motion.”

Quiborax S.A. v. Bolivia, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), ¶¶ 138, 146
“We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes.”

SGS v. Pakistan, ICSID Case No. ARB/01/13, Procedural Order No. 2 (October 16, 2002)
Interim and Provisional Measures

Right to non-aggravation of a dispute

“There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute . . . If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.”

Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 29, 2009), ¶ 65
Interim and Provisional Measures

Right to non-aggravation of a dispute

“In making this finding, the Tribunal understands Ecuador’s arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.”

Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 29, 2009), ¶ 66
Interim and Provisional Measures

Right to non-aggravation of a dispute

“[T]he Arbitral Tribunal makes the following order:

7. The Respondents shall discontinue the proceedings pending against the Claimant under the coactiva process and shall not initiate new coactiva actions”

Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 (June 29, 2009), ¶ 66
Interim and Provisional Measures

An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement

“[A] recent order by a tribunal in the case brought by Chevron against Ecuador under a U.S.-Ecuador BIT ordered the executive branch of that country to violate its constitutional separation of powers and somehow halt the enforcement of an appellate court ruling.”
Chevron v. Ecuador – February 2011 Order for Interim Measures

Ecuador ordered:

-- “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case,” and

-- to inform the Tribunal “of all measures which [Ecuador] has taken for the implementation of this Order for interim measures.”
“[C]onfirms and re-issues” the February 2011 Order for Interim Measures, ordering Ecuador to:

-- “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio Case,” and

-- “continue to inform this Tribunal . . . of all measures which the Respondent has taken for the implementation of this Interim Award.”
Interim and Provisional Measures

Chevron January 2012 Letter to Tribunal

“The appellate court in Lago Agrio has now affirmed the February 14, 2011 Lago Agrio Judgment, ignoring the overwhelming evidence of fraud in the case, including compelling proof that the Judgment was ghostwritten by the Plaintiffs’ representatives and issued by Judge Zambrano in name only.”

“Time is now of the essence to ensure that the Republic takes measures to prevent enforcement of the fraudulent judgment.”
Interim and Provisional Measures

Ecuador January 2012 Letter to Tribunal

Each interim measure requested by Chevron “would require circumventing established judicial procedure in direct violation of Article 168 of the [Ecuador] Constitution.”

Article 168 of the Ecuador Constitution

The administration of justice in the performance of its duties and in the exercise of its powers, shall apply the following principles: 1. The organs of the Judiciary shall enjoy internal and external independence. Any violation of this principle will lead to administrative, civil, and criminal liability in accordance with the law.
Interim and Provisional Measures

Chevron v. Ecuador – February 2012 Second Interim Award on Interim Measures

Orders Ecuador, “whether by its judicial, legislative, or executive branches,” to:

“take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador” of the February 2011 and January 2012 Ecuadorian judgments against Chevron in the Lago Agrio case.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions

(a) An “arbitral award” is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, whether or not that decision resolves the entire controversy before the tribunal. Such a decision may consist of a grant of interim relief.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions

(p) An “interim measure” is a measure by an arbitral tribunal that grants temporary relief during the arbitral process to preserve the status quo, help ensure the satisfaction of a subsequent award, or otherwise protect the rights of one or more parties and promote the efficacy of an arbitration. For purposes of this Restatement, an interim measure issued by an arbitral tribunal constitutes an award.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions, Comment a

[A] grant of interim measures by an arbitral tribunal constitutes an award inasmuch as such measures set forth a “final and binding determination” as to whether on the facts presented to the tribunal the requesting party is entitled to temporary relief. Accordingly, orders of interim measures must be recognized or enforced as an arbitral award.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions, Reporters’ Notes a

Whether a tribunal grant of “interim measures,” as defined in paragraph (p), should be
classified as an award raises challenging questions. Although including such measures
within the definition of “award” can be justified on several grounds that the Restatement
ultimately adopts, there are cogent arguments for not doing so. The main analytical
objection to treating interim measures as awards is that such relief is generally intended
to remain in effect only during the pendency of the arbitration and is capable of being
reversed or modified by the arbitral tribunal even during that period. Thus, interim
measures are in that sense never final and binding.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions, Reporters’ Notes a

Nevertheless, the Restatement view, that interim measures are awards, is supported by several considerations.

First, interim measures represent final and binding determinations in the sense that they purposefully dispose of requests for relief in response to circumstances presented at the time the request is made; and they do so through the application of legal principles about which there is substantial consensus.

Second, the Restatement position is supported in U.S. case law. Courts commonly accept the notion that such measures, despite their limitations, exhibit the requisite element of finality as well as being binding.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
Tentative Draft No. 1 (2010)
Section 1-1 Definitions, Reporters’ Notes a

Third, the incidence of actions to vacate an interim measure is not high, due to reluctance on the part of dissatisfied parties to bring judicial challenges to rulings of the arbitral tribunal during the pendency of the arbitration. Thus, courts do not in practice have frequent opportunity to second-guess arbitral grants of interim relief.
Interim and Provisional Measures

Enforcement of interim measures in the United States

Restatement (Third) of the U.S. Law of International Commercial Arbitration
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Section 1-1 Definitions, Reporters’ Notes a

Fourth, and most importantly, not treating interim measures as awards risks undermining their effectiveness. U.S. law offers no reliable framework for ensuring the judicial enforceability of interim measures issued by foreign courts. In particular, the FAA contains no counterpart to the Revised UNCITRAL Model Law’s Article 17(h), which provides in relevant part that:

An interim measure issued by a tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon the application to the competent court, irrespective of the country in which it was issued, subject to the provisions [of this Law concerning grounds for refusing recognition and enforcement].