# Recent developments in investor-state arbitration: effective use of provisional measures



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## Investor–state arbitration

In recent years international arbitration has become an important mechanism for private commercial interests to resolve disputes with government entities and to recover losses caused by government action. The ever growing number of international investment agreements have become a powerful tool for private investors to protect their rights.[1] These agreements frequently take the form of treaties entered into between two sovereign states (most often bilateral investment treaties, BITs), but can also be embodied in free-trade agreements and other forms of multilateral international agreements, such as the Energy Charter Treaty. These agreements are designed to encourage investment from abroad by guaranteeing foreign investors legal protection above and beyond that provided by the host state's laws. Equally important, they usually provide for a neutral forum for resolving disputes with local government entities, which allows foreign investors to avoid the local courts when such disputes arise – a particularly valuable benefit in countries with unreliable, inefficient (or even corrupt) judicial systems.

These international investment agreements commonly have two key components. First, most modern investment agreements contain a broad and open-ended definition of investment. Virtually any kind of business activity and presence in a foreign state could at least potentially fall within the ambit of a typical investment agreement. Such agreements normally provide a non-exclusive, illustrative list of investments, which can include everything from debt and equity interests; to liens, loans and licences; to all forms of tangible or intangible property, including intellectual property; to contract rights. Second, these agreements provide certain substantive obligations – in particular, three obligations are common to nearly all investment agreements: (i) a commitment to protect foreign investors and their investments against discriminatory treatment; (ii) protection against direct or indirect nationalisation or expropriation of foreign investments without full compensation; and (iii) a commitment to protect foreign investors against fundamentally unfair or arbitrary government actions including, among other things, denials of justice in the courts.

The critical aspect of such agreements is that they usually provide that covered foreign investors can hold the host state liable for breaches committed by any branch of government (executive, legislative, or judicial) and at any level of government (federal, state, provincial, or local). Significantly, such agreements often provide expansive standing to bring claims, including on behalf of minority shareholders and indirect investors. Typically, claims under such agreements are subject to some form of arbitration (frequently through the International Centre for Settlement of Investment Disputes, an arbitral institution affiliated with the World Bank).[2] Thus, such agreements usually provide that the investor may bring a claim directly against the host state before an arbitral tribunal, typically seeking monetary damages as the remedy. The arbitration is final, binding and subject to limited, if any, review in domestic courts.[3]

In recent years, the number of investor–state arbitrations has proliferated, and a growing body of international investment law has evolved. Moreover, the explosion in arbitrations under ICSID's Rules led the institution, in April 2006, to implement a number of reforms to its rules.

## Recent amendments to ICSID Rules governing provisional measures

The recent amendments to the ICSID Rules, which apply to all ICSID arbitrations to which the parties consented on or after 10 April 2006, were the product of 18 months' consultation with ICSID contracting states, the business community, civil society, arbitration experts and other arbitral institutions. They are intended to make ICSID proceedings more streamlined and transparent, while instilling greater confidence in the arbitral process. Among other things, the amendments introduced a new mechanism for raising preliminary objections to frivolous claims; sought to increase transparency through provisions for amicus submissions by third parties, public attendance at hearings, and publication of awards; and clarified the rules governing arbitrator disclosures and fees.

The remainder of this article focuses on a critical issue frequently faced by parties and tribunals in investor state disputes: the need of one or both parties to protect important rights while the arbitral proceedings are pending. A party can suffer many kinds of harm before a final order by the tribunal is issued: important evidence could be eliminated or lost; disputed property could be transferred to third parties or destroyed; competing domestic proceedings could interfere with the tribunal's ability to issue a meaningful final order; or one party's course of conduct could inflict continuing harm on the other.

Recognising this, the ICSID Convention and the ICSID Rules have long provided a route for parties to seek provisional measures (ie, measures of interim relief to preserve the party's rights, such as preliminary injunctions, orders preserving property or evidence, or orders requiring parties to post a security). The April 2006 amendments to ICSID's Rules included significant revisions to the rules relating to such relief, and have made the possibility of obtaining interim relief in a timely and effective fashion much more likely.

As part of its recent reforms, ICSID revised Rule 39. These changes were designed to enhance a tribunal's ability to grant provisional measures on an expedited basis. Accordingly, the revised rules allow requests for provisional measures to be submitted as soon as a dispute is registered with ICSID – even before the tribunal has been constituted.[4] Under the old rule, by contrast, parties were required to wait until the tribunal had been constituted before they could submit a request for provisional measures, which, as a practical matter, could take three months (or, in many cases, longer). Moreover, the new rules require the ICSID secretary general to impose an immediate briefing schedule, so that the issue is ripe for prompt consideration by the tribunal as soon as it is formed.[5] At the same time, the revised rules still allow parties to seek provisional measures from national courts, as well as the tribunal, if authorised by the applicable investment treaty or arbitration agreement.[6]

The amendments eliminate a significant practical roadblock for any party whose rights are in immediate jeopardy. As revised, the rules allow a pair of potentially time-consuming procedures – the selection of arbitrators and the exchange of written submissions (which can take months) – to run in parallel rather than in series. And, as revised, the rules allow for a deadline for briefing provisional measures, which must be completed in time for the tribunal

to consider the request for provisional measures promptly upon its being constituted. Nonetheless, even with these revisions, the process may still involve significant delays, so parties may be well advised to consider seeking provisional measures in domestic courts as well, if they are available.

Given the significance of these revisions, we offer below some observations about the mechanics of the provisional measures process and some suggestions as to how to effectively use that process.

### Procedure governing requests for provisional measures

The basic structure of provisional measures under ICSID arbitration is straightforward. Article 47 of the ICSID Convention allows a tribunal, "if it considers that the circumstances so require", to "recommend any provisional measures which should be taken to preserve the respective rights of either party." Rule 39 of the ICSID Rules sets out a more specific framework for the request and consideration of such measures. Although Rule 39 allows the tribunal to grant interim relief of its own accord, parties facing threatened harm to their interests should of course make a proactive request for relief. Rule 39(1) allows a party to do so "[a]t any time after the institution of the proceeding"– ie, at any time after the ICSID secretary general has registered the request for arbitration.[7]

Before a tribunal may grant provisional relief, it must give both parties an opportunity to be heard, but the rules do not set out more specific guidance as to the procedure to be filed. In particular, Rule 39(4) does not specify the number or type of written submissions that the parties are entitled to file, nor does it provide specific guidance on the timing of such submissions or the process for establishing a briefing schedule.

As a practical matter, if the parties reach agreement on how to proceed, it is fair to assume that the tribunal – or the secretary general, if the parties are proceeding under Rule 39(5) – will likely defer to the parties' agreement, but, in the absence of such agreement, the tribunal must impose a schedule that is fair and meets the objectives of the rules. Some guidance on this score may be drawn from Rule 31, which governs the exchange of written submissions on the merits, and requires a memorial on the merits from the requesting party and a counter-memorial from the responding party, and then allows a reply and responsive rejoinder either at the order of the tribunal or upon agreement by the parties. Although such a procedure might be cumbersome, particularly where time is of the essence, such a process could be unavoidable or even desirable, particularly where the issues could be complex and the tribunal is unfamiliar with the facts of the case. Accordingly, in such circumstances, the party seeking relief should consider invoking the Rule 39(5) process immediately upon registration of its claim and file its opening observations in support of provisional measures at the earliest possible opportunity. Indeed, to the extent a party's request for provisional measures could require a substantial evidentiary showing, including witness statements and expert reports, the party would be well advised to begin developing its case on provisional measures well before the dispute is registered by ICSID.

Rule 39(2) requires tribunals to "give priority to the consideration" of these requests. As a practical matter, this rule prevents the tribunal from devoting substantial time to complicated jurisdictional questions before ruling on a request for provisional measures.[8] Where a request is particularly urgent, parties may ask the tribunal to streamline both the number of written submissions and the time allowed for such submissions so that a decision can be made expeditiously. At least in theory, a tribunal could be willing to grant very rapid temporary relief on a tight briefing schedule in the face of genuine urgency, and then to revisit the issue later under Rule 39(3), which allows the tribunal to "at any time modify or revoke its recommendations".

It is important to note that, although the ICSID Convention and the ICSID Rules speak in terms of a tribunal recommending provisional measures, the weight of ICSID authority treats compliance with provisional measures as mandatory.[9] Although an ICSID tribunal may not have the coercive authority to enforce provisional measures against a recalcitrant party, most parties, including state parties, are reluctant to disobey orders from a tribunal, and there is clear authority that the tribunal can take a party's failure to comply with provisional measures into consideration when fashioning any ultimate award,[10] for example, by adjusting the amount of damages or imposing other forms of permanent injunctive relief.

### Grounds relied on by ICSID tribunals in granting requests for provisional measures

As the number of ICSID cases increases, it is easier to draw some conclusions about the grounds that ICSID tribunals have relied on in granting requests for provisional relief. We summarise these grounds below.

Rule 39 requires parties to demonstrate "the circumstances that require [provisional] measures." In considering this requirement, ICSID tribunals and expert commentary have discussed a range of grounds that may justify the imposition of provisional measures, including the following (somewhat overlapping) grounds:

- *Preventing irreparable injury:* Some ICSID tribunals have viewed irreparable harm as arising only from those injuries that cannot be adequately compensated by a damages award.[11] There is more flexible authority on this point, however, in the private commercial arbitration context, where 'irreparable injury' is sometimes understood to be satisfied by a showing of serious injury, whether technically reparable or not.[12]
- *Preventing aggravation of the dispute:* There is a long line of ICSID cases recognising that parties should not materially exacerbate or aggravate a dispute.[13] Similarly, provisional measures are appropriate to preserve the status quo, particularly when a specific piece of property is in dispute.[14] Note, however, that perfectly appropriate provisional measures can sometimes disrupt the status quo, where for example the other party's current practices are inflicting ongoing injury.
- *Preserving the tribunal's ability to issue a final award:* Provisional measures are sometimes necessary to preserve a tribunal's ability to issue a meaningful final award.[15] This may include, for example, orders requiring parties to preserve evidence or conserve a unique piece of property.
- *Enjoining parallel proceedings:* Article 26 of the ICSID Convention – which provides that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy" – has been cited by parties seeking provisional measures that would enjoin domestic proceedings relating to an ICSID dispute. The scope of article 26 and the authority of ICSID tribunals to issue anti-suit injunctions, however, are complicated questions and require careful research if such relief is under consideration

In addition to the grounds listed above, it is generally recognised that parties seeking provisional measures must demonstrate some degree of urgency. Given the overarching purpose of provisional measures, urgency is best understood as requiring, at a minimum, some likelihood that the threatened injury could occur before a final award can be issued.[16] The showing required under this head, however, will likely vary with the degree of harm that is threatened and the type of measures that are requested.[17]

Finally, a pair of ancillary matters often relevant in the context of interim relief also bear discussion. First, parties may need to

show a prima facie case for jurisdiction before a tribunal will issue provisional measures in their favour. Although there is support in both commentary and case law for a tribunal to decline to address jurisdiction at this phase of the proceedings,[18] the weight of authority holds that, if challenged, parties requesting provisional measures must demonstrate at least a prima facie case for jurisdiction.[19]

Second, in contrast to the practice in some domestic legal systems, ICSID tribunals have not required parties to demonstrate a likelihood of success on the merits as a prerequisite for obtaining provisional measures. Indeed, tribunals have frequently endorsed the principle that they should avoid 'pre-judging' the merits of the dispute when resolving a request for provisional measures.[20] That said, parties are still well advised to set forth succinctly and persuasively their basic case for relief along with any request for provisional measures. Legally, a tribunal might reasonably decline to exercise its discretion to grant provisional measures where the claimant's case appears unpersuasive on its face. And, the more that the tribunal feels the justice of a party's claim, the more likely it is to decide that the equities weigh in favour of granting provisional measures.

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With the April 2006 amendments, the ICSID procedures governing provisional measures have become significantly more attractive as a route for parties facing an urgent need for relief at the start of arbitral proceedings. Careful attention to the strategic considerations outlined above will enable parties to maximise their ability to successfully take advantage of this important mechanism for protecting their rights.

## Notes

1 The last decade has seen remarkable growth in the number of bilateral investment treaties. By the end of 2004, there were nearly 2,400 BITs in existence worldwide, up from roughly 1,100 ten years earlier (UN Conference on Trade and Development, IIA Monitor No. 4 (2005) UNCTAD/WEB/ITE/IIT/2005/2, at 3 No. 7). Not surprisingly, the number of investor–state disputes has also soared, with the known number of treaty-based cases rising over this same time period from less than 10 to nearly 220 at the end of 2005 (ibid at 1).

2 ICSID's founding document is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the Washington Convention or the ICSID Convention), which entered into force in 1966 and has been ratified by some 140 countries. Pursuant to the Convention, ICSID's Administrative Council has adopted comprehensive rules of procedure for instituting and conducting arbitration proceedings (Institution Rules and Arbitration Rules, respectively).

3 It is important to consider the exact terms of any applicable investment agreement, as agreements differ in crucial respects. Some investment agreements, for example, contain a so-called 'fork-in-the-road' provision, which precludes arbitration if the investor has already commenced an action in the local courts. Other agreements allow investors to pursue arbitration and local remedies simultaneously.

4 Arbitration Rule 39(5) (allowing parties to "request [provisional measures] before the constitution of the Tribunal").

5 Ibid (requiring secretary general to set a briefing schedule "so that the request and observations may be considered by the Tribunal promptly upon its constitution").

6 Arbitration Rule 39(6). In some instances, because of particular urgency, or because of questions about whether the opposing party will comply with ordered measures, parties will be advised to consider seeking such remedies through local courts. Of course, seeking such remedies against a state in its own courts raises potential difficulties.

7 See Institution Rule 6(2).

8 See below (discussing limited scope of tribunal's jurisdictional inquiry when considering requests for provisional measures).

9 Eg, *Maffezini v Spain*, Procedural Order No. 2, ICSID Case No. ARB/97/7, ¶ 9 (28 Oct 1999).

10 Christoph Schreuer, 'The ICSID Convention: A Commentary' 758 (2005); cf *MINE v Guinea*, Award, ICSID Case No. ARB/84/4 (6 Jan. 1988) (reducing award to reflect expenses incurred by losing party because of winning party's violation of ICSID Convention).

11 Eg, *Plama Consortium Ltd v Bulgaria*, Order, ICSID Case No. ARB/03/24, ¶ 46 (6 Sep 2005).

12 See, eg, Berger, 'International Economic Arbitration' 336 (recognising that relief is often granted on a showing of harm that is "'substantial' (but not necessarily 'irreparable' as known in common law doctrine)").

13 Eg, *Amco Asia Corp v Indonesia*, Decision on Request for Provisional Measures, ICSID Case No. Arb/81/1 (9 Dec 1983).

14 *Maffezini v Spain*, Procedural Order No. 2, ICSID Case No. ARB/97/7, ¶ 14 (28 Oct 1999).

15 *Tokios Tokelés v Ukraine*, Order No. 1, ICSID Case No. ARB/02/18, ¶ 2 (1 Jul 2003).

16 See, eg, *Tokios Tokelés v Ukraine*, Order No. 3, ICSID Case No. ARB/02/18, ¶ 8 (18 Jan 2005).

17 See *Biwater Gauff (Tanzania) Ltd v Tanzania*, Procedural Order No. 1, ICSID Case No. ARB/05/22, ¶ 76 (31 Mar 2006).

18 Eg, Tokios Tokelés v Ukraine, Order No. 1, loc cit, ¶ 6 (1 Jul 2003).

19 Eg, Ibrahim FI Shihata and Antonio R Parra, 'The Experience of the International Centre for Settlement of Investment Disputes', 14 *ICSID Review – Foreign Investment Law Journal* 299, 326 (1999); Arshed Massod, 'Provisional Measures of Protection in Arbitration Under the World Bank Convention', 1 *Delhi Law Review* 138, 144-145 (1972).

20 Eg, *Maffezini v Spain*, loc cit, ¶ 21.