INTERIM MEASURES IN ARBITRATION: TOWARDS A BETTER INJURY STANDARD

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Interim measures are instruments procuring justice and efficiency. Absent the same, regrettable outcomes ensue. Be it impracticable awards, swollen indemnification orders, and unnecessary less than desirable situations.

A survey of international practice displays a wide consensus on most requirements to be fulfilled to secure interim relief. However, difference exists as to one: the injury-

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standard to satisfy. I wish to focus on said point of contention and advocate in favor of one of the visible standards—which, admittedly, is not the most often used.

I. STANDARDS

Diverse standards are observed when assessing the issuance of interim relief. For instance, in "appropriate circumstances"; presence of threat of "not easily reparable prejudice", "serious injury", "grave injury", "substantive prejudice", "irreparable injury". The *precise* difference however is not only not easily ascertainable from case law, but often understood differently amongst practitioners and experts using any of them as their analytical frame of mind. One common point of agreement seems to be focusing on whether the injury is of the type which can be remedied with money damages. But apart from said metric, agreement —both conceptual and practical— seems more apparent than real.

Another approximation is to perform what some call "balance of interests" or "balance of convenience", which involves the task of not choosing an adjective for the harm complained of, but simply comparing its outcome with what would be required from the interim relief addressee, and then balancing both so as to decide who should prevail: the moving or the objecting party. In other words, should the costs of the measure be lower than the benefits, it shall be granted. And vice versa.

II. EMPIRICAL OVERVIEW

The standard of choice tends to vary. To show why, I shall delve into the following four sources of experience: commercial arbitration, investment arbitration, public international law and the works of UNCITRAL.

1. COMMERCIAL ARBITRATION

Commercial arbitration is a rich source of authority on the topic. Within said realm, the experience of the International Court of Arbitration of the International Chamber of

Commerce (ICC) stands out given the sheer volume of cases and the meticulousness with which they have been analyzed, both in periodic journals[1] and ICC-specialized doctrine.

Review of this corpus of material allows for interesting insights and conclusions. One is that the mayority of cases have confined their analysis to:[2]

> irreparable harm, or serious or actual damage, if the measure requested is not granted

That said conclusion is warranted may be readily verified in the cases found in the extract section of the cited ICC Bulletin. For instance:[3]

> the claimant would not incur any grave and irreparable harm if not granted the sought provisional measure …

Interestingly, a few years later, Ali Yesilirmak reexamined the topic and reiterated the conclusion that the most frequently-used standard when assessing interim measures is:[4]

> threat of grave or irreparable damage to the counterparty in the arbitration proceedings

Albeit the said tendency exists, the cases extracted in Mr. Yesilirmak's latest piece display examples all over the spectrum. From those requiring "satisfaction of irreparable harm",[5] "imminent damage",[6] "substantial harm",[7] and cases echoing doctrine requiring

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[1] Several volumes of the ICC Bulletin have analyzed the topic: the 1993 ICC Bulleting focusing on Conservatory and Provisional Measures in International Arbitration; ICC Bulletin volume 10, number 1, Spring 1999, where an experienced practitioner analyses the topic (Donald Francis DONOVAN, POWERS OF THE ARBITRATORS TO ISSUE PROCEDURAL ORDERS, INCLUDING INTERIM MEASURES OF PROTECTION, AND THE OBLIGATION OF PARTIES TO ABIDE BY SUCH ORDERS, p. 65); ICC Bulletin volume 11, number 1, Spring 2000, where Mr. Ali Yesilirmak writes an interesting piece on the matter from the ICC perspective (Ali YESILIRMAK, INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRAL PRACTICE, p. 31). The 2001 Special Supplement of the ICC Bulletin: volume 22, Special Supplement 2001, dedicated to Interim, Conservatory and Emergency Measures in ICC Arbitration, where Ali Yesilirmak takes another stab at the subject.

[2] Ali YESILIRMAK, INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRAL PRACTICE, ICC Bulletin volume 11, number 1, Spring 2000, pp. 31, 34.

[3] ICC case 8113, Partial Award, October 1995, p. 67.

[4] Ali YESILIRMAK, ICC Bulletin volume 22, Special Supplement 2001, INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRAL PRACTICE 1999-2008, p. 9.

[5] ICC Case 11225, Partial Award of 2001. ICC Case 12361, Interim Award of 2003.

[6] ICC Case 12122, Partial Award of 2002.

[7] ICC Case 12040, Partial Award of 2002. ICC Case 11740, Partial Award of 2002.

"irreparable or otherwise substantial harm".[8] Upon analyzing the cases in the 1999-2008 period, the following conclusions are advanced which are relevant to our topic:[9]

i) 'Substantial' harm is to be understood as 'irreparable' harm;

ii) The better standard is 'appropriate circumstances' since it is better suited to the language and spirit of the ICC Rules and the needs of international commerce;

iii) Arbitrators must endeavor to balance the relative harm to each party that may or may not flow from the granting or denial of the measures requested.

Messrs's Arnaldez, Derains and Hascher's *Recueil*[10] cites ICC Case 10596 of 2000 echoing the "irreparable harm" standard, understood as "significant harm". As to what this means, the following is articulated:[11]

> monetary loss is not irreparable harm … Although, strictly speaking, this view may be correct, the arbitral tribunal considers that it would be unreasonable to refuse the relief sought on those grounds. … it would be foolish for the tribunal to wait for a foreseeable, or at least plausibly foreseeable, loss to occur, to then provide for its compensation in the form of damages (assuming that B is entitled to such damages, which is not the issue here), rather than to prevent the loss from occurring in the first place. …

A good way to summarize ICC experience is by echoing what an authoritative text explains on the matter:[12]

> Arbitrators have an obligation to try to find an equitable and commercially practicable procedural solution to prevent irreparable and unnecessary injury to the parties. …

Practice under the LCIA rules mimicks the position. As described by a leading treatise:[13]

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8 ICC Case 12361, Partial Award of 2003.

9 ICC International Court of Arbitration Bulletin, INTERIM, CONSERVATORY AND EMERGENCY MEASURES IN ICC ARBITRATION, Vol. 22, Special Supplement, 2011, p. 10.

10 Jean-Jacques ARNALDEZ, Yves DERAINS and Dominique HASCHER, COLLECTION OF ARBITRAL AWARDS (Recueil des sentences arbitrales de la CCI 2001-2007), Wolters Kluwer, 2009.

11 Id., p. 321.

12 W. Lawrence CRAIG, William W. PARK, Jan PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITATION, Oceana Publications, 2000, p. 462.

As to the meaning of the notion of 'harm not adequately reparable by an award of damages'[14], it has been suggested that it should be understood in the economic sense:

> In this respect 'irreparable' must be understood in an economic, not a literal, sense. It must take account of the fact that it may not always be possible to compensate for actual losses suffered or sullied business reputation through damages.[15]

Schwartz, however, states the definition construed by arbitral bodies is even broader, in that although 'Anglo-American lawyers often understand "irreparable" harm as meaning harm that cannot readily be compensated by an award of monetary damages', ICC arbitral tribunals have sometimes also construed risk of financial loss to be included within this definition.[16]

2. INVESTMENT ARBITRATION

Investment arbitration displays its share of interim measures providing insight on our topic. To address them, I shall touch upon the textual point of departure (§a) and the case law stemming therefrom (§b), so as to finalize with a conclusion (§c).

a. Textual point of departure

Article 47 of the ICSID Convention[17] states:

> 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.

Article 39(1) of the ICSID Arbitration Rules[18] provides:

> 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

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13 Peter TURNER, Reza MOHTASHAMI, A GUIDE TO THE LCIA ARBITRATION RULES, Oxford, New York, 2009, p. 168, ¶¶ 6.121 – 6.122

14 UNCITRAL Model Law, art 17.A(1)(a).

15 *Lew, Mistelis, Kröll* 604 [citation in original]

16 Eric SCHWARTZ, The Practices and Experiences of the ICC Court, CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION, ICC Publishing, 1993, p. 45.

17 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("*ICSID Convention*"), Article 47, p. 24.

18 The Rules of Procedure for Arbitration Proceedings of ICSID ("Arbitration Rules").

recommendation of which is requested, and the circumstances that require such measures.

Review of the ICSID Convention *travaux preparatoires* of the ICSID Convention does not allow for a conclusion other than that the appropriate standard to satisfy was not solved.[19] Two remarks amongst the delegates existed on the matter however:

> …There would be very few, if any, cases of irreparable damage, because disputes would concern investments and investments could always be valued in terms of money.[20]

> provisional measures ought not be prescribed unless absolutely necessary in the circumstances, and if pecuniary compensation would be adequate in lieu of some preliminary measure, then no preliminary measure ought to be prescribed. On that basis, such measures ought to be included in the enforcement provision. That might also have the effect of discouraging tribunals from prescribing preliminary measures save in the most exceptional cases.[21]

And the following conclusory statement: [22]

> The provision in the Working Paper defines the measures which a tribunal may prescribe as those which are "necessary for the protection of the rights of the parties". Several delegations thought the criterion might be spelled out in more detail (by specifying such matters as avoidance of frustration of an eventual award, irreparable damage and urgent necessity and clarifying the term "rights of the parties") and indication might be given in general terms of what the provisional measures would be … the latitude given to arbitral tribunals by the Working Paper … in accordance with generally accepted custom …

However, no resolution on the matter exists. The reason, one surmises, is that the different views were catered to by the adopted text, as it allows for such matter to be

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19 HISTORY OF THE ICSID CONVENTION, International Centre for Settlement of Investment Disputes, Washington, D.C., 1970. **Doc. 25**, Vol. II, pp. 268-270, Vol. III, pp. 94 and 96. **Doc. 27**, Vol. II pp. 337- 338 and 347, Vol. IV, pp. 103-105 and 115 **Doc. 29**, Vol. II, p. 442, Vol. III, p. 198. **Doc. 31**, Vol. II, pp. 515-516, 518 and 523, Vol. III, pp. 315-318 and 325. **Doc. 33**, ¶¶70-72, Vol. II, pp. 573, Vol. III, pp. 384, Vol. IV, pp. 160-161. **Doc. 45**, Vol. II, pp. 655, 664 and 668, Vol. III, pp. 459-460, 470 and 474, Vol. IV. pp. 239 and 249. **Doc. 84**, Vol. II, pp. 812-815, Vol. III, pp. 641-644, Vol. IV, pp. 434-437. **Doc. 85**, Art. 50, Vol. II, p. 818, Vol. III, p. 647, Vol. IV, p. 441. **Doc. 104**, Art. 50, Vol. II, p. 864, Vol. III, p. 695, Vol. IV, p. 498. **Doc. 113**, Vol. II, p. 891, Vol. III, p. 723, Vol. IV, p. 530. **Doc. 124**, Vol. II, p. 939, Vol. III, p. 775 and Vol. IV, p. 591. **Doc. 132**, ¶40, Vol. II, p. 987. **Doc. 142**, Art. 47, Vol. IV, p. 640. **Doc. 143**, Art. 47, Vol. IV, p. 663.

20 Comment voiced by Mr. Tsai (China), Id., 1968, Vol. II-1, p. 516.

21 Comment articulated by Mr. O'Donovan (Australia), Id., p. 523.

22 HISTORY OF THE ICSID CONVENTION, Vol. II-1, Washington, D.C., 1968, p. 573, ¶72.

determined by the tribunal. I would also venture to explain that focus was on other aspects of the topic deemed more salient, such as jurisdiction and the power of the tribunal to issue interim relief. And doctrine reflects this. For instance, Professor Professor Schreuer analizes the matter but does not posit a standard; he only expresses what most tribunals have done.[23]

b. Interpretation

i) Irreparable harm

Most cases have used "irreparable harm" as the analytical lodestar. For instance, *Millicon v Senegal,*[24] *Occidental v Ecuador,*[25] *Cemex v Venezuela*,[26] *Tethyan Copper v Pakistan,*[27] *Tokios Tokelés v Ukraine*,[28] *Plama Consortium v Bulgaria*,[29] *Phoenix v Czech Republic.*[30] In doing so, however, a definition of the concept is usually not advanced. Exceptions exist, however. In *Plama v Bulgaria* the tribunal stated that "… harm is not irreparable if it can be compensated by damages".[31] Understood thus, other cases exist which use the criteria, but do not voice the term of art "irreparable harm", such as *Tanzania Electrical Supply Company Limited v*

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23 Christopher H. SCHREUER, THE ICSID CONVENTION, A COMMENTARY, Second Edition, Cambridge University Press, Cambridge, 2009, p. 776.

24 *Millicom International Operations B.V. and Sentel GSM SA v The Republic of Senegal,* ICSID Case No. ARB/08/20, Decision on the Application for provisional measures submitted by the Claimants of 24 August 2009, ¶46.

25 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Provisional Measures, Order of 17 August 2007, ¶59.

26 Where the standard was described to be "irreparable prejudice" (*Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures, Order of 3 March 2010, ¶41).

27 *Tethyan Copper Company Pty Limited v The Islamic Republic of Pakistan,* ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures, Order of 13 December 2012, ¶138.

28 *Tokios Tokelés v Uraine,* ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶8.

29 *Plama Consortium Ltd. v Bulgaria*, ICSID Case No. ARB/03/24, Order of 6 September 2005, ¶38.

30 "Irreparable prejudice of rights involved" was the standard employed on *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶¶33 and 47.

31 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order of 6 September 2005, ¶46.

Independent Power Tanzania Limited, which favored *sub silentio* the 'monetary compensation' standard when it reasoned:[32]

> …There is no reason to believe that TANESCO would be unable to satisfy any award of damages in respect of this …

Other examples exist that follow this approach. In *Burlington v Ecuador* the test was "harm not adequately reparable by the award of damages".[33] In *Perenco v Ecuador and Petroecuador* it was "irreparable loss" ("*pérdida irreparable*"),[34] understood as injury not monetarily compensable.[35] *Occidental v Ecuador* elaborated that:[36]

> … an order for provisional measures may be made when it is concluded that they are necessary and urgent to avoid imminent and irreparable harm …[37]

> …provisional measures to protect rights of one party may not be effected if they cause irreparable damage to the rights of the other[38]

In *Quiborax v Bolivia* the tribunal was specific as to the notion:[39]

> The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. ...

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[32] *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited,* ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Arbitration, Order of 22 December 1999, ¶18.

[33] *Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*. ICSID Case No. ARB/08/5, Procedural Resolution No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶82.

[34] *Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶43.

[35] Idem.

[36] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007, ¶87.

[37] My translation of the Spanish original: "… Sólo puede dictarse una orden de medidas provisionales cuando se llega a la conclusión de que éstas son necesarias y urgentes para evitar perjuicios inminentes e irreparables …".

[38] *Ob. Cit.*, ¶93. My translation of "…no pueden disponerse medidas provisionales para la protección de los derechos de una parte si ellas han de causar perjuicios irreparables para los derechos de la otra parte".

[39] *Quiborax S.A., Non Metallic Minerals S.A. y Allan Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case ARB/06/2, Decision on Provisional Measures, 26 February, 2010, ¶156.

ii) Other criteria

Criteria different from 'irreparable harm' have also been used. For instance, in *Victor Pey v Chile* the assessment of the issuance of the measure followed a comparative analysis and whether the concern evoked was "hypothetical", which would not justify the measure.[40] A somewhat similar approach was followed in *Maffezini v Spain*[41] where the emphasis was the existence of the rights,[42] that the fear not be deemed "hypothetical",[43] and relation to the subject-matter of the dispute.[44]

iii) Balancing, even if by another name

Cases exist performing a balancing of interest analysis—some of them without ostensibly recognizing it. For instance, *Burlington v Ecuador*, where, after taking note of the irreparable harm test,[45] a balancing of interests and the "degree of harm" was the preferred course of action when the tribunal considered that:[46]

> The words "necessity" or "harm" do not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by ***balancing the degree of harm*** the applicant would suffer but for the measure. ...
>
> In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of "harm not adequately reparable by an award of damages" to use the words of the UNCITRAL Model Law. It will also ***weigh the interests of both sides in assessing necessity***.
>
> (emphasis added)

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40 *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Interim Measures of 25 September 2001, ¶¶66, 89.

41 *Emilio Agustin Maffezini v Spain*, ICSID Case No. ARB/97/7, Procedural Order No 2, October 28, 1999.

42 Id., ¶13 *et seq*.

43 Id., ¶16 *et seq*.

44 Id., ¶24.

45 *Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*. ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶81.

46 Id., ¶78

In *Railroad v Guatemala*[47] the request involved safeguarding evidence which *could* allegedly be destroyed (no evidence of shredding or imminent danger thereof was advanced). An "analysis of interests in play" was effected as evidenced by the following:

> … the Request would place an unfair burden on the Government because of its excessive breadth and that no need or urgency has been proven to justify the recommendation.

Another interesting case is *Saipem v Bangladesh* where, in ruling upon the interim relief sought, the tribunal's reasoning touches upon both irreparable harm and balancing of interests when it said to have:[48]

> ...weigh[ed] the ***parties' divergent interests*** in the light of all the circumstances of the case ...
>
> the Tribunal considers that there is both necessity and urgency. This finding is reinforced by the facts that, apart from denying that it called the Warranty Bond, Bangladesh does not contest Saipem's contentions and that there is a risk of ***irreparable harm*** if Saipem has to pay the amount of the Warranty Bond.[49]
>
> (my emphasis)

And then concluded that the measure (a "recommendation"):[50]

> ... strikes a fair ***balance*** between the parties' ***interests***...
>
> (my emphasis)

Something similar occurs in *Biwater Gauff v Tanzania* where the tribunal reasoned that:[51]

> The determination of this application for provisional measures entails a ***careful balancing between two competing interests***: (i) the need for transparency in treaty proceedings such as these, and (ii) the need to protect the procedural integrity of the arbitration.
>
> (emphasis added)

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47 *Railroad Development Corporation v Republic of Guatemala,* ICSID Case No. ARB/07/23, Decision on Provisional Measures, Order of 15 October 2008, ¶36.

48 *SAIPEM S.p.A. v The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, Order of 21 March 2007, ¶175.

49 Id., ¶182

50 Id., ¶184.

51 *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICC Case ARB/05/22, Procedural Order No. 3, Order of 29 September 2006, ¶112, ICSID Review, Foreign Investment Law Journal, Vol. 22, No. 1, Spring 2007, p. 204.

An interesting approach was followed in *Cemex v Venezuela*. Although "irreparable damage" was employed,[52] the tribunal made an interesting point by echoing the ICJ distinction between:[53]

> (a) Actions which should be restrained, because their effects, though capable of financial compensation, are such that compensation cannot fully remedy the damage suffered; from
>
> (b) and actions which may well prove to have infringed a right and caused harm, but in respect to which it will be sufficient to award damages, without taking provisional measures.

After doing so, it reasoned that:[54]

> … ICSID Tribunals, when considering government actions which may well prove to have infringed a right and caused harm, make a distinction between:
>
> (a) situations where the alleged prejudice can be readily compensated by awarding damages;
>
> (b) and those where there is a serious risk of destruction of a going concern that constitutes the investment.
>
> In the first category of cases, provisional measures were denied because of the absence of an "***irreparable harm***". In the second category of cases they were granted, the tribunals using other standards -- although they could have based their decision on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an "**irreparable harm**".
>
> (my emphasis)

The outcome of such analytical route was that the generally accepted standard of "irreparable harm" was not retained.[55]

The tribunal in *Sergei Paushok Qsc Golden East Company Qsc Vostokneftegaz Company v The Government Of Mongolia* did something similar but with nuances when it reasoned

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[52] *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/08/15, Decision on the Claimant's Request for Provisional Measures, Order of 3 March 2010, ¶46.

[53] Id., ¶49.

[54] Id., ¶55

[55] Id., ¶46. It is worth noting that the standard was understood to form part of the "necessity" requirement under Article 47 of the ICSID Convention.

that:[56]

> 39. ... interim measures are extraordinary measures not to be granted lightly ... Even under the discretion granted to the Tribunal under the UNCITRAL Rules, the Tribunal still has to deem those measures urgent and necessary to avoid ***"irreparable" harm*** and not only convenient or appropriate. ...
>
> 45. It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of ***serious prejudice*** (necessity) and (5) proportionality. ...
>
> **4- Imminent danger of serious prejudice (necessity)**
>
> 68. ... the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the *Behring* case to the effect that, in intemationallaw, the concept of "irreparable prejudice" does not necessarily require that the injury complained of be not remediable by an award of damages. To quote K.P. Berger who refers specifically to Article 26 of the UNCITRAL Rules,
>
> > *"To preserve the legitimate righfs of the requesting party, the measures must be "necessary". This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a* ***"substantial" (but not necessarily "irreparable"*** *as known in common law doctrine)* ***prejudice***[57] *for the requesting party. "*[58]
>
> 69. The Tribunal shares that view and considers that the ***"irreparable harm" in international law has a flexible meaning***. ...
>
> 77. ... the Tribunal has come to the conclusion that Claimants are facing ... ***very substantial prejudice*** unless some interim measures are granted.
>
> (my emphasis)

As may be observed, the analysis has a notorious 'balancing' flavour. However, it stated that *substantial* —in contrast to *irreparable*— prejudice need be proven, but that it has a "flexible meaning". One surmises from the text and outcome that the level of injury was in fact lowered by the widening of the (*sic*) 'flexible' definition.

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56 Under The Arbitration Rules Of The United Nations Commission On International Trade Law, Order On Interim Measures, 2 September 2008, ¶¶39, 45, 68, 69, 77.

57 Emphasis not in original.

58 Berger, KP., INTERNATIONAL ECONOMIC ARBITRATION, in Studies in Transnational Economic Law, vol 9, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993, p. 336.

c. Conclusion

Most cases that have addressed the matter have used "irreparable harm" as the prism. Exceptions exist which have employed related criteria, and a few others have balanced the interests of parties involved, whether they recognized it or not.

3. PUBLIC INTERNATIONAL LAW

Article 41(1) of the Statute of the International Court of Justice reads:

> The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

The *jurisprudence constante* of the International Court of Justice (***ICJ***) flowing from said proviso is particularly interesting. From the corpus of interim measures the ICJ has issued,[59] in order to work with a manageable sample, I have focused on the most recent cases from the last 10 years.

In *Construction Of A Road In Costa Rica Along The San Juan River (Nicaragua v. Costa Rica)* the ICJ echoed *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*[60] thus:[61]

> The power of the Court to indicate provisional measures 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
>
> (emphasis added)

Having found that Nicaragua had not established that the ongoing construction works led to a substantial increase in the sediment load in the river, no real and imminent risk of

[59] Although the ICJ website displays 315 results, out of the 156 published ICJ cases from 1947 to 2014, 43 cases exist where interim relief was considered or issued. (Date of consultation: February 2014).

[60] Provisional Measures Order of 8 March 2011, I.C.J. Reports 2011 (I), pp. 21-22, ¶64.

[61] *Construction Of A Road In Costa Rica Along The San Juan River (Nicaragua v. Costa Rica) Certain Activities Carried Out By Nicaragua In The Border Area (Costa Rica v. Nicaragua).* Request Presented By Nicaragua For The Indication Of Provisional Measures. Order of 13 December 2013, ¶25.

irreparable prejudice to the rights invoked was found to be substantiated, and hence rejected the request for provisional measures.[62] In *Cambodia v Thailand* the ICJ reasoned that:[63]

> … the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when ***irreparable prejudice*** could be caused to rights which are the subject of the judicial proceedings;[64] … [the] power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that ***irreparable prejudice*** may be caused to the rights in dispute before the Court has given its final decision …
>
> it is for the Court to ensure, in the context of these proceedings, that no ***irreparable damage*** is caused to persons or property in that area pending the delivery of its Judgment on the request for interpretation …[65]
>
> (emphasis added)

In *Certain Activities Carried Out By Nicaragua In The Border Area (Costa Rica v. Nicaragua)* the ICJ stated:[66]

> the Court … has the power to indicate provisional measures when ***irreparable prejudice*** could be caused to rights which are the subject of the judicial proceedings
>
> … the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that ***irreparable prejudice*** may be caused to the rights in dispute before the Court has given its final decision …
>
> (emphasis added)

Identical rationale was advanced in:

i) *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal);*[67]

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62 Id., pp. 34-35.

63 Request for Interpretation of the Judgment of 15 June 1962 in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*. Request for the Indication of Provisional Measures. Order of 18 July 2011, ¶¶46-47.

64 See, for example, Request for Interpretation of the Judgment of 31 March 2004 in the *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008, p. 328, ¶65; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 21, ¶63.

65 Request for Interpretation of the Judgment of 15 June 1962 in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Request for the Indication of Provisional Measures, Order of 18 July 2011, ¶61.

66 *Certain Activities Carried Out By Nicaragua In The Border Area (Costa Rica v. Nicaragua)*, Request For The Indication Of Provisional Measures. Order of 8 March 2011, ¶¶63-64.

ii) *Request For Interpretation Of The Judgment Of 31 March 2004 In The Case Concerning Avena And Other Mexican Nationals (Mexico v. United States Of America);*[68]

iii) *Case Concerning Pulp Mills On The River Uruguay (Argentina v. Uruguay)*;[69]

iv) *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,[70] where rejection was premised on absence of "imminent risk of ***irreparable prejudice*** to the rights of Uruguay in dispute before it";

v) *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*,[71] where the following interesting *ratio* was advanced:[72]

> Whereas the power of the court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action ***prejudicial to the rights*** of either party might be taken before the court has given its final decision
>
> (emphasis added)

vi) *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*,[73] where the following was said:[74]

> Whereas, independently of the requests for the indication of provisional measures submitted by the parties to **preserve specific rights**, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that ***circumstances so require*** …[75]

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67 Request for the Indication of Provisional Measures. Order of 28 May 2009, ¶¶ 62-63, 72.

68 Request For the Indication of Provisional Measures. Order of 16 July 2008, of ¶¶66, 68 and 73.

69 Request For the Indication of Provisional Measures. Order of 13 July 2006, ¶62.

70 Request For the Indication of Provisional Measures. Order of 23 January 2007, ¶50.

71 Request for the Indication of Provisional Measures. Order of 15 October 2008, ¶¶24, 118.

72 Id., ¶ 129.

73 Request for the indication of a provisional measure. order of 17 June 2003, ¶22, 29, 36.

74 Id., ¶39.

75 Cf. Land and Maritime Boundary between Cameroon und Nigeria (Cameroon v. Nigeria), Provisional Measures. Order OJ 15 March 1996, 1. C. J. Reports 1996 (I), p. 22, ¶41; Frontier Dispute (Burkina Fasol Republic of Mali), Provisional Measures. Order of 10 January 1986, 1. C.J. Reports 1986, p. 9, ¶18.

(emphasis added)

As may be observed, "irreparable prejudice" is the most commonly used standard to assess whether interim relief should be ordered, albeit not the only one. Other standads employed are "prejudice to rights", "preservation of rights" and "if the circumstances so require".

4. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The UNCITRAL Model law on International Commercial Arbitration was recently amended precisely on our topic. In the context of conditions for granting interim measures, (revised) Article 17A(1)(a) reads:

> The party requesting an interim measure … shall satisfy the arbitral tribunal that … ***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***;
>
> (my emphasis)

The import of the change is not addressed by the Explanatory Note, which focuses on other aspects of the innovations of (revised) Article 17. Nor does it articulate reasons involving the use of the balance of interests language *in lieu* of[76] irreparable harm.[77]

The Digest of UNCITRAL Case law points to one single case indicating:[78]

> Whether the *harm* caused by the defendants is adequately *reparable* by an award of damages … and whether that harm substantially outweighs the harm that the defendants are likely to suffer if the interim relief is granted, is essentially an assessment of the ***balance of convenience***.[79]
>
> (emphasis added)

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[76] Or in addition to? Admittedly, the text could be read to provide for *additive* —not *alternative*— prongs of analysis.

[77] Explanatory Note by the UNCITRAL Secretariat, United Nations documents A/40/17, annex I and A/61/17, annex I, p. 31. UNCITRAL Model Law on International Commercial Arbitration, as amended by the United Nations Commission on International Trade Law on 7 July 2006.

[78] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 87.

[79] *Safe Kids in Daily Supervision Limited v McNeill*, High Court, Auckland, New Zealand, 14 April 2010 [2010] NZHC 605.

However, the case is premised on the language of Article 17 *before revision*. Hence, it is not fruit from the textual seed in comment. Fortunately, the *travaux preparatoires* do shed light into the issue:[80]

> Subparagraph (a) follows the proposal made by the Working Group to replace the words "irreparable harm" with the words "harm not adequately reparable by an award of damages" …
>
> ***irreparable harm might present too high a threshold*** and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure …
>
> the Working Group expressed concerns that that provision could be interpreted in a very restrictive manner, potentially excluding from the field of interim measures any loss that might be cured by an award of damages. The Working Group also noted that, in current practice, ***it was not uncommon for an arbitral tribunal to issue an interim measure merely in circumstances where it would be comparatively complicated to compensate the harm with an award of damages***. …
>
> the paragraph should be interpreted in a flexible manner, keeping in mind ***balancing the degree of harm suffered by the applicant*** if the interim measure was not granted ***against the degree of harm suffered by the party opposing the measure*** if that measure was granted.
>
> (emphasis added)

As may be observed, balancing was underscored as the new trend in interim relief. The development has merited the criticism of a renowned expert.[81]

5. CONCLUSION

The following conclusions follow from the above survey:

i) 'Irreparable harm' is the most often used standard to assess whether interim relief should be issued;

ii) 'Irreparable harm' is understood as harm not adequately addressed through monetary compensation; and

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80 A/CN.9/WG.II/WP.1388 August 2005, ¶16.

81 Gary B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, Wolters Kluwer, Kluwer Law International, Vol. II, The Netherlands, 2009, p. 1979.

iii) An exceptional trend is visible in some cases and rules that tends to lower the standard. Sometimes, the exercise is alluded as balancing. Sometimes it is not.

III. BALANCE OF INTERESTS AS A BETTER STANDARD

Although 'irreparable harm' is the most commonly accepted and used standard to assess the issuance of interim measures, I wish to argue in favor of 'balance of interests' (or 'balance of convenience', as it is sometimes referred to). The reasons are threefold. Namely, it makes for a:

1. More apposite tool;

2. More efficient tool; and

3. More refined concept.

I shall explain each.

1. MORE APPOSITE TOOL

Interim measures are the response of procedural law to urgency. Should the need surface during procedure to address circumstances provoking injury that cannot await the final outcome, interim relief will be the means.

The prevalent paradigm has been that not just *any* injury merits immediate attention. Should the injury involved be of the type which may be remedied with money, it is not worth addressing prematurely. After all, the tribunal will in all likelihood not be adequately educated as to the intricacies of the dispute at the time the interim relief is sought. And risk of error militates in favor of avoiding premature decisions.

The paradigm, it is to be admitted, has merit. It recognizes the limits of adjudication and favors prudence. I wish to question it however.

Granted, risk of mistake abounds when taking decisions before the entire picture is presented before the decision maker. However, under the balance of convenience test, the issuance of the measure will turn on whether harm can be avoided with less burden

than that placed on the shoulders of the party resisting it. The determination of the issue will therefore need only consider pros and cons of the measure, including impact on the parties. And if the requested measure provokes less inconvenience than the injury it avoids, it will be in the best interest of *both parties* to secure it.

Taking a moment to reflect on this last statement is worthwhile. Should an interim relief-seeking claimant not prevail in the case, it will have to assume the costs it tried to avoid through the interim relief. If the relief was granted, it will *ex hypothesi* be inferior to the counterfactual. Should interim relief-addresee respondent lose the arbitation, it will have been saved the need to indemnify claimant for the injury claimant was trying to avoid through interim relief. In both scenarios, the tab to shoulder will be inferior—irrespective of *who* shoulders it. This makes balance of convenience a better tool if the lodestar is reducing unnecessary costs. It is also the better if the goal is efficient dispute resolution proceedings, to which I now turn to.

2. MORE EFFICIENT TOOL

Premising interim relief on 'irreparable' harm necessarily means that injury of less import, which does not satisfy said threshold, will be forced upon one of the parties. Doing so is unnecessary. As explained in the preceding section, by using balance of interests the arbitral tribunal will be able to assess to what extent a measure is justified in the goal of avoiding waste. And if it is less wasteful to order that certain conduct take place, it will do so. In the jargon of law and economics, it will be more *efficient*. An example may illustrate why.

Consider moving party (***A***) who is inconvenienced by a set of circumstances inflicting her a cost of $100. Avoiding said cost involves asking that another, respondent (***B***), perform certain conduct costing $30. $30 is evidently a preferable outcome than $100. However, *B* will naturally prefer avoiding the said conduct (and cost): it only benefits *A*, and the cost is borne by *B*. The canvassed scenario is such that *A* would be willing to pay *B* for its inconvenience. After all, irrespective of who wins, the damage will be lower. Therefore, forcing the outcome through an interim measure makes sense: *B* is the cheaper cost avoider. Absent interim relief, *B* will not act. After all, they are involved in

litigation! And under the standard of irreparable harm, it need not do so. As a result, *A* will always have to shoulder $100. And should it prevail over *B* in the arbitration, it is fair to assume that *B* will be forced to pay as damages the $100 *A* wanted to avoid in the first place. As may be observed, such scenario is lose-lose. The only question is *who*.

Balance of convenience avoids such outcome. It allows for harm reduction — irrespective of who's harm. Viewed game-theoretically, it is a win-win outcome: irrespective of who foots it, the bill will be smaller.

Efficiency therefore militates in favor of prefering balance of convenience. And for those with a palate for law and economics, it will be what such theoreticians call "Kaldor Hicks efficiency".[82]

3. More Refined Instrument, Better Suited to the Needs of Arbitration

Restricting interim relief to irreparable harm scenarios is not only suboptimal, but a more rudimentary use of the instrument: it is unnecessarily restrictive. As a result, it condemns cases displaying otherwise remediable circumstances to costly outcomes—which need not be so. And *should not* be so. One of the reasons parties choose arbitration is the want for quality of justice. That includes avoiding waste and suboptimal outcomes—such as those fostered by using an unnecessarily high threshold, like irreparable harm.

IV. *POST SCRIPTUM*

I am delighted to see the (avalanche) in response that my (provocative) proposal has had. During my speech at ICCA I sensed a skeptical response from the panel and public. After the Q&A session, our moderator, John Barkett asked for a vote on my proposal, and a meager four hands were raised. I thought to myself "this is natural. After all, questioning an age-old paradigm always triggers reticence. Not only for *status quo* bias

[82] Kaldor Hicks efficiency is an economic term of art bearing the name of its fathers: Nicholas Kaldor and John Hicks. The gist of the concept is applauding scenarios where a change of circumstances benefits a party more than it hurts another. That said outcome occurs is illustrated by the possibility that the party standing to gain from the change would be willing to pay the party standing to lose from it, even if this does not happen. The reason: the aggregate result is better, more efficient, even if in the process someone stood to lose something.

reasons, but also because of *adaptive preferences*: we tend to prefer that which we know and have become accostumed to".

Interestingly, however, upon walking down the steps of the podium, I was approached by several colleagues who stated that, upon reflection, they *did* agree with my proposal. And during the next day or so, my inbox swelled with emails echoing approval.

Hence, it is fair to say that, whilst many ICCA-attendees opposed the proposal, many approved it. It is against this background that I wish to do one thing, and one thing only: comment upon *the* reason evinced by those opposing the idea, so as to allow the reader to come to her own informed conclusion.

1. LOWERING THE STANDARD MAY FOSTER LITIGIOUSNESS

Although there may admittedly be more,[83] the only argument I was made privy to against the proposal was that lowering the standard would have the effect of fostering over-litigiousness. Relaxing the (currently-high) standard ("irreparable harm") would have the effect of throwing fire onto what already is a burning issue.

2. RESPONSE

I avow that the outcome *could* ensue. Albeit it is not self-evident that this will necessarily occur, I query whether it is a sufficiently good reason not to improve.

As explained above,[84] the zeitgeist is that 'irreparable harm' need be shown to secure an interim measure. As explained, the consequence of this paradigm is that regrettable situations will ensue which could have been avoided — including costs. Should the articulated concern be deemed sufficient to quash my initiative, *ex hypothesi* the outcome will be that we accept a suboptimal scenario for fear of abuse.

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83 Sharing them will be appreciated at fgcossio@gdca.com.mx

84 §III of this essay.

I submit to the reader that the concern voiced incurs in an unwarranted assumption (§a) and overlooks the fact that the fear evinced can be catered to by another procedural device: distribution of costs (§b).

a. Unacceptable assumption

The view contrary to my proposal assumes lack of sophistication. The assumption is unwarranted not only as a matter of fact, but as a basis to construct a legal theory.

Granted, parties *could* be tempted to advance more interim measure requests simply because they are (apparently) easier to obtain. However, under the proposed standard, it would need to be shown that the balance of harm outweights the balance of inconvenience placed on the shoulders of the interim measure addresee — not an easy task. Hence, albeit the lowering of the standard may appear to some to facilitate the obtention of interim measures, in fact it does not: a balance test is a more difficult intellectual (and factual) exercise.

So, in reality, the better view, the better understanding, of the idea I am advancing is that *it does not involve a lowering of the standard, but replacing it with a better one*. A mechanical rule is substituted by a balance exercise. In itself, this makes for a better procedural instrument. Better law.

b. Cost allocation

The fear articulated by the skeptical view iscatered to by the cost-distribution power of arbitral tribunals: Parties abusing the system will be made to shoulder the costs of the measure. Hence, the danger is self-contained.

In and of itself, this is a sufficiently good counterargument to rebut the concern advanced. Parties abusing the system will be made to shoulder the costs they inflict. This includes cases where interim measures were granted to a party who eventually loses the case: they would be made to compensate their adversaries who were put to the task of defending against and effecting an interim measure.

These two circumstances have the effect of sending a powerful message to practitioners: *beware what you wish for, you may get it!*