ABHANDLUNGEN

Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal

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Contents

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Abbreviations: AJIL = American Journal of International Law; BYBIL = British

Judicial and arbitral proceedings take time – occasionally a great deal of time. As a result courts and tribunals may be called upon to preserve the alleged rights of the parties during the pendency of the proceedings. What should a court or tribunal do when, for example, a party institutes an action seeking the return of a valuable piece of property which is stored under conditions that will have rendered the item worthless by the conclusion of the proceedings? An area of procedural law often referred to as "interim measures of protection" addresses this question[2].

This Article analyzes the practice of the Iran-United States Claims Tribunal[3] (hereinafter "Tribunal") under the UNCITRAL Rules of Arbitral

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Year Book of International Law; ICC = International Chamber of Commerce; ILM = International Legal Materials; RIAA = Reports of International Arbitral Awards; Y.B. Com.Arb. = Yearbook Commercial Arbitration.

[2] This area of procedure also has been termed provisional relief. For a recent extensive annotated bibliography on the subject, see Reichert, Provisional Remedies in International Litigation: A Comprehensive Bibliography, 19 Int'l Lawyer, 1429 (1985).

[3] The Iran–United States Claims Tribunal was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter the "General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter the "Claims Settlement Declaration"), collectively referred to as the Algiers Accords. As to the Tribunal, see generally The Iran-United States Claims Tribunal 1981–1983 (R. Lillich ed., 1984); and Stewart, The Iran-United States Claims Tribunal: A Review of Developments 1983–84, 16 Law & Policy in International Business, 677–754 (1984).

Citations to Tribunal awards include the names of the arbitrators who were members of the panel rendering the award. The Chairman is always listed first with the other arbitrators following in alphabetical order. Parenthetically following each name is, as appropriate, a letter or letters reflecting the arbitrators' position *vis-à-vis* the Tribunal's award. These symbols are:

C Concurring
D Dissenting
CS Concurring via statement by signature
DS Dissenting via statement by signature
CO Concurring Opinion
DO Dissenting Opinion
SO Separate Opinion
RS Refusal to sign

An indication of dissent or concurrence with a whole award does not necessarily indicate dissent or concurrence with the particular procedural point being discussed in this study. Specifically relevant dissents or concurrences are cited directly.

Procedure[4] in the area of interim measures. In doing so the Article also attempts to provide a restatement of the customary practice which is often drawn upon to supplement the usually brief procedural provisions authorizing interim measures in both public and private international arbitration. In conclusion, the Article discusses the primary considerations that should govern procedural decision-making in the area of interim measures.

I. The Extent and Significance of the Interim Measures Practice of the Iran-United States Claims Tribunal

Interim measures proceedings are not common in international arbitration. A recent study by Jerzy Sztucki shows that out of 60 public international judicial or arbitral bodies, only 16 were ever confronted with requests for interim protection, and nine of these sixteen were Mixed Arbitral Tribunals established after the First World War[5]. Moreover, these bodies most often received only one to four requests each[6]. Likewise, the number of interim measures requests presented to tribunals in private international arbitration, although not precisely known, is commonly thought to be small, in part because resort may be had instead to municipal courts. With the exception of the International Court of Justice, the practice of the Iran-United States Claims Tribunal in the area of interim measures is very extensive.

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[4] After three years of development involving all interested nations, the UNCITRAL Rules of Arbitral Procedure were adopted by the United Nations Commission on International Trade Law (UNCITRAL) on April 28, 1976 and recommended without further debate by the U.N. General Assembly for use on December 15, 1976. See K. Rauh, Die Schieds- und Schlichtungsordnungen der UNCITRAL (1983); Sanders, Commentary on UNCITRAL Arbitration Rules, Y.B. Com.Arb., 172 (1977). Art.III (2) of the Claims Settlement Declaration provides that the Tribunal shall use the UNCITRAL Rules "except to the extent modified by the Parties or by the Tribunal ...". See Aksen, The Iran–United States Claims Tribunal and the UNCITRAL Arbitration Rules – an early comment, in: The Art of Arbitration, Liber Amicorum for Pieter Sanders 1 (J.C. Schultsz & A.J. van den Berg eds., 1982).

[5] J. Sztucki, Interim Measures in The Hague Court, An Attempt at a Scrutiny, 19 (1983), citing to listings provided in K. Oellers-Frahm, Die einstweilige Anordnung in der internationalen Gerichtsbarkeit (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.66), 146–149 (1975). Sztucki provides a succinct review of the 60 institutions, ibid., at pp.4–11.

[6] Ibid.

As of September 1, 1986, the Tribunal had rendered 29 awards and one decision dealing with interim measures and at least double that number of significant procedural orders relating to interim measures (see Tables 1 and 2). The extensiveness of this practice is somewhat undercut by the fact that 17 of the 29 awards involved the same factual and legal situation, a request for interim measures ordering the stay of Iranian court proceedings that duplicated proceedings before the Tribunal[7]. Even with this qualification, however, the Tribunal's practice is substantial when compared to other international tribunals.

The experience of the Tribunal in the area of interim measures is significant because the Tribunal is the first institution to apply the UNCITRAL Rules of Arbitral Procedure[8]. The UNCITRAL Rules are a globally agreed-upon set of rules that will in the coming decades no doubt emerge as one of the leading sets of rules of arbitral procedure employed. They are used as a part of the complex dispute settlement procedure set forth in the 1982 Law of the Sea Convention[9], have been adopted for use by the Inter-American Commercial Arbitration Commission and by the Asian-African Legal Consultative Committee Regional Arbitration Centers in Cairo and Kuala Lumpur[10], and are designated in the optional arbitration clause for contracts in U.S.-U.S.S.R. trade[11]. The interpretations the Tribunal has made of the UNCITRAL Rules thus will have direct relevance to many future arbitrations.

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[7] A large portion of the interim measures granted by the Iran-U.S. Claims Tribunal in this area was based upon special considerations stemming from Art.VII (2) of the Claims Settlement Declaration, see *infra* note 103.

[8] Art.III (2) of the Claims Settlement Declaration provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal ...". The article of the UNCITRAL Rules dealing with interim measures was not modified by the Parties or by the Tribunal.

[9] See, *e.g.*, 1982 Law of the Sea Convention, Annex III, Art.5 (4), reprinted in 21 ILM 1245, 1332 (1982).

[10] Herrmann, The Contribution of UNCITRAL to the Development of International Trade Law, in: The Transnational Law of International Commercial Transactions, 35, 40 (N. Horn & C. Schmitthoff eds., 1982).

[11] Lebedev, The 1977 Optional Clause for Soviet-American Contracts, 27 American Journal of Comparative Law, 469 (1979). The UNCITRAL Rules are likewise designated for use in U.S. trade with Bulgaria and Hungary.

TABLE 1

Interim Measures Awards of the Iran-United States Claims Tribunal

Interim Award Number[1]	Issuing Chamber	Hearing	Stay of Iranian Ct. on Basis of Art. VII (2)[2]	Stay of Iran Ct. On Other Bases	Other Measures
13	FT	Y		Granted	
15	1	N		Granted	
16	2	N	Granted		
17	1	N		Granted[3]	
19	2	Y	Granted		
20	1	N		Granted	
21	1	N			Granted[3]
22	1	N	Granted[3]		
25	3	N			Granted[3]
26	1	N	Granted		
27	1	N			Granted[3]
28	3	N	Granted[3]		
29	1	N		Granted	
30	1	N			Denied
31	3	N	Granted		
33[4]	2	N			Granted
34	1	N			Denied
38	1	N			Denied
39	3	Y	Granted		
40	1	N			Denied
44	1	N	Granted[3]		
46	3	N			Granted
47	1	N	Granted		
48	2	N		Granted	
50	1	N			Denied
51	3	Y		Granted	
52	3	N			Granted
56	3	N		Granted	
62	1	N			Denied

[1] Award numbers are not continuous because Interlocutory Awards are also included by the Tribunal in the same numbering sequence. It should also be noted that one interim measures request was denied by the Full Tribunal without a hearing by "Decision". See *The Islamic Republic of Iran and the United States of America*, Decision No.35-A15-FT (Böckstiegel, Holtzmann, Mostafavi (SO), Riphagen, Aldrich, Bahrami (SO), Mangård, Ansari (SO) & Brower arbs., March 5, 1985).

[2] See *infra* notes 49–59 and accompanying text.

[3] Only temporary restraining measures were granted.

[4] Officially characterized as an "Interlocutory Award".

TABLE 2

Measures Other Than Stay of Iranian Court Proceedings Addressed by the Iran-United States Claims Tribunal[1]

Measures Requested	Interim Award Number	Tribunal Holding
1. Stay of Sale of Goods in Possession of Claimant	25-382-3	Granted (Temporary Restraining Measure)
	27-11875-1	Granted (Temporary Restraining Measure)
	33-A4/A15-2[2]	Granted
	35-A15-FT[3]	Denied (Request found to be moot)
2. Transfer of Goods in Possession of Claimant	46-382-3	Granted
	52-382-3	Granted
3. Stay of Execution of Judgment Obtained by Claimant in U.S. Courts	34-222-1	Denied (Lagergren & Aldrich – lack of irreparable harm)
	38-222-1	Denied (Lagergren & Holtzmann – lack of new facts justifying reconsideration)
4. Stay of Proceedings by Claimant in ICC	21-28-1	Granted (Temporary Restraining Measure)
	62-333-1	Denied
5. Withdrawal by Claimant of Attachment Obtained in U.S. Courts	50-396-1	Denied (Böckstiegel) Holtzmann – lack of irreparable harm, contrary to preservation of *status quo*

[1] In addition to the Awards listed in this Table, early in its work the Tribunal also denied, by Order and without substantial discussion, several requests for interim measures. Restraint of misuse of trade name and trade mark see: *Dow Chemical and The Islamic Republic of Iran* Case 257, Chamber 1, Order of January 29, 1982; *Dow Chemical and The Islamic Republic of Iran* Case 499, Chamber 1, Order of April 20, 1982. Transfer of property in possession of respondents, see *Fluor and The Islamic Republic of Iran* Case 333, Chamber 1, Order of March 22, 1982; *Itel and The Islamic Republic of Iran* Case 490, Chamber 1, Order of April 13, 1982.

[2] This request previously had been denied by Chamber Two in its Order of January 18, 1984 for lack of showing of irreparable harm.

[3] Rendered as a "Decision," rather than Interim Award, of the Tribunal.

Measures Requested	Interim Award Number	Tribunal Holding
6. Stay of Execution of Attachment Obtained by Claimant in German Courts	40-375-1	Denied (Lagergren & Kashani lack of *prima facie* jurisdiction; Holtzmann-Art. 26 (3) and lack of urgency)
7. Vacating of Judgment Obtained by Respondent in Iranian Courts	30-160-1	Denied (Lagergren – holder of judgment not party to arbitration, identity of issues unclear; Kashani lack of jurisdiction)

The Tribunal's practice is significant also in that it supplements the necessarily limited interim measures guidance provided by the UNCITRAL Rules. Interim measures are addressed in the three brief paragraphs of Art.26. The discussions of the drafters of Art.26 are, if for no other reason, interesting because of the absence of consideration of the majority of issues addressed by the Tribunal. Given the large task of the drafting group, it is not surprising that it did not seek to define more fully the limits of the power to order interim measures of protection. Nor do procedural provisions for interim measures in other sets of rules go significantly further. The absence of detail, however, does raise the issue of how more specific jurisprudence should be developed by international arbitral tribunals while still promoting a fundamental goal of the UNCITRAL Rules, the development of a uniform set of rules for international arbitral procedure. In particular, should a private international arbitral tribunal supplement its rules with the procedural law of the municipal legal system governing the arbitration, thereby inviting a nonuniform development, or by reference to the customary practice of other international tribunals? Although some rules of arbitral procedure, absent an agreement of the parties otherwise, direct the tribunal to refer to a particular municipal procedure for supplementary guidance[12], the UNCITRAL Rules quite significantly provide that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate ..."[13]. This

[12] See, *e.g.*, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art.5, reprinted in Arbitration in Sweden, 212 (rev. ed., 1984).

[13] Art.15 (1).

presumption toward a delegation of authority to the tribunal has been followed in other recent rules of arbitral procedure[14].

The Iran-United States Claims Tribunal consistently filled gaps in its procedural rules by reference to customary international arbitral practice and not, for example, by reference to Dutch law. This choice is the only means by which the UNCITRAL Rules will develop in a uniform fashion, and come to be a predictable and desired part of the international dispute settlement process. Indeed, such practice promotes the development not only of the UNCITRAL Rules, but also of a customary international arbitral procedure generally, whether such arbitration be public or private.

In this last respect it is also significant that the Tribunal has before it arguably both public and private international arbitration. Although both public and private international arbitration are concerned with legal resolution of disputes arising in an international context, these two processes have remained quite distinct. In large part this separation is a sociological one: "Commercial lawyers regard arbitrations between states as wholly irrelevant; and public international teachers, advocates and officials view commercial arbitration as an essentially alien process ..."[15].

The sociological separation can result in differences in practice and has done so to a degree in the area of interim measures. The appropriateness of granting interim measures of protection in international commercial arbitration has been decided in the past generally by each arbitrator applying his personal experience on a case by case basis. The doctrine relating to such measures in institutions such as the International Court of Justice, on the other hand, has been the subject of much scholarly discussion and become quite refined[16]. Because of the mixed nature of the claims before it, the Tribunal serves as a vehicle for the exchange of ideas between public and private arbitration.

Finally, the applicability of the Tribunal's experience to other tribunals must be approached with care[17]. Comparisons are difficult to make not

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[14] See, *e.g.*, 1985 Rules of the London Court of Arbitration, Rule 5, reprinted in 24 ILM 1137, 1150 (1985). See also UNCITRAL Model Law on International Commercial Arbitration, Art.19, adopted June 21, 1985, reprinted in 24 ILM 1302, 1307 (1985).

[15] 1 J. Gillis Wetter, The International Arbitral Process – Public and Private, xxiv (1979).

[16] See, *e.g.*, Sztucki, *supra* note 5; J. Elkind, Interim Protection, A Functional Approach (1981); Oellers-Frahm, *supra* note 5; N. Toraldo-Serra, Le misure provvisorie internazionali (1973); Borchardt, The Award of Interim Measures by the European Court of Justice, 22 Common Market Law Review, 203 (1985).

[17] See Sztucki (*supra* note 5), at 15.

only when shifting from the municipal to the international context[18], but also when the natures of the international tribunals differ[19]. Yet, if dangers are recognized they can be avoided and benefits can be gained. For each institution the function of interim measures is essentially the same – to preserve the rights of the parties pending full adjudication of the claim. But this functionally necessary power (some have said inherent power[20]) certainly may be limited by express provision of the parties, and the development of doctrine is greatly influenced by the legal, and often the political, context of the arbitration. Thus the interim measures jurisprudence of other tribunals may be of little importance to, for example, an institution such as the International Court of Justice which has been confronted with requests for interim measures quite a number of times, which has in several respects a unique express provision addressing interim measures and which already has developed a quite extensive jurisprudence on the subject[21]. The vast majority of international tribunals, however, formed for the purpose of deciding a particular case and for which no specific municipal law has been designated to supplement the procedural rules, must refer to the practice of other tribunals. It is for such international arbitrations, whether public or private, that the Tribunal's practice under the UNCITRAL Rules of Arbitration is significant.

II. A Critical Analysis of the Interim Measures Practice of the Iran-United States Claims Tribunal

1. The Function and Source of the Power to Order Interim Measures

Interim measures in both municipal law and international law generally are intended to "preserve the respective rights of the parties pending the decision" of the tribunal[22]. Given the complexity of most international

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[18] See Adede, The Rule on Interlocutory Injunctions under Domestic Law and the Interim Measures of Protection under International Law: Some Critical Differences, 4 Syracuse Journal of Int'l Law & Commerce, 277 (1976/77).

[19] See Sztucki (*supra* note 5), at 16 ("They differ as to the applicable law, their relationship to national legal systems, etc. Above all, they differ regarding the categories of subjects admitted to the bar").

[20] See *infra* notes 27–40 and accompanying text.

[21] See Sztucki (*supra* note 5), at 21–22.

[22] *Anglo-Iranian Oil (U.K.* v. *Iran)*, 1951 I.C.J. Reports 8, 93 (Interim Protection Order of 5 July). Other functions may be ascribed to an institution such as the International Court of Justice whose considerations may encompass more than those presented by the parti-

disputes and the long periods of time often required to arbitrate them, interim measures can be of particular importance for such proceedings. The function of preserving the rights of the parties can be restated several ways, all of which center on the parties and their interests. If the respective rights of both parties are preserved during the pendency of proceedings then necessarily the *status quo ante* is also preserved. Likewise in preserving the rights of one party, the tribunal prevents the other party from aggravating the dispute.

The Tribunal quite often has referred to the function of interim measures in terms of its power "to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective"[23]. The second half of this statement of the function of interim measures potentially says more than the first. To the degree that it states that the conservation of the rights of parties thus results in protecting the interests of the parties in an effective tribunal, the statement likewise centers on the parties and their interests. To the degree that it states that a separate function of interim measures is to ensure the tribunal's effectiveness, it focuses not on the parties but on the tribunal and its interests[24]. This distinction is not merely academic. It manifests itself, for example, in the question of whether a tribunal may order interim measures on its own initiative (tribunal-centered) or whether it may do so only at the request of a party (party-centered). This distinction surfaces at several points in this Article; suffice it to say for the present that a tribunal-centered function arises when the duties of the tribunal extend to communities larger than the two specific parties before it. In this sense, a tribunal-centered function is more likely to arise for an institutionalized tribunal than an *ad hoc* one. The UNCITRAL Rules were intended for use primarily before *ad hoc* international commercial arbitration tribunals and, as will be seen, Art. 26 focuses on the interests of the parties. The Iran-United States Claims Tribunal, however, with thousands of claims before it and specific treaty obligations on Iran and the United States with respect to the arbitration of

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cular parties before it. See, *e.g.*, Elkind (*supra* note 16), at 30. Compare Sztucki (*supra* note 5), at 1 ("Today probably no one will regard the provisional measures ... as an integral part of peace-keeping machinery") and Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 AJIL 258, 277 (1974) ("Interim measures are useful as a 'cooling-off' mechanism").

[23] *E-Systems and The Islamic Republic of Iran*, Interim Award No. 13–388–FT, at 10 (Lagergren, Holtzmann (CO), Kashani (CO), Bellet, Aldrich, Shafeiei (CO), Mangård, Mosk (CO) & Sani (CO) arbs., February 4, 1983) (emphasis added).

[24] Cf. Sztucki (*supra* note 5), at 84.

such claims, arguably has concerns reaching beyond the framework of any particular claim.

The UNCITRAL Rules empower a tribunal to order interim measures in Art.26 (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".

Interestingly, the Iran-United States Claims Tribunal rarely has stated that it was relying on Art.26 alone for its authority to order interim measures. Instead, the Tribunal from the first has relied, either alone or with Art.26, on its "inherent power to issue such orders ..."[25]. The reason for this reliance on inherent powers is unclear. In part, it reflects the past experience of members of the Tribunal with other tribunals where inherent powers provided the only basis for the granting of interim measures, a past practice which once adopted by the Tribunal came to be repeated in subsequent interim measures awards[26]. Whatever the cause for such reliance on inherent powers, the practice is strikingly unusual and thus deserves scrutiny given the fact that Art.26 provides ample authority on its own.

Actions of tribunals often have been based on inherent powers. Such actions are consistent with the views of a number of commentators who have noted that international tribunals exercise inherent powers in order to carry out their responsibilities. Thus, for example, inherent powers have been asserted as the basis of a tribunal's competence to determine its jurisdiction[27] and to establish rules of procedure[28]. Likewise it has been stated

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[25] *E-Systems,* Interim Award No.13–388–FT (*supra* note 23), at 10. But see Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk, at 7 (February 9, 1983) to *E-Systems,* Interim Award No.13–388–FT, *supra* note 23 ("In our view, the action of the Tribunal is supported not only by its 'inherent power', upon which the Tribunal relies, but also is authorized by article 26, paragraph 1 ...").

[26] See, *e.g., Veerman* v. *The Federal Republic of Germany,* I Decisions of the Arbitral Commission, No.1, 119, 120 (Lagergren, Arndt & Edelman arbs., 1958) (a Tribunal has "inherent power to issue orders as may be necessary to conserve the respective rights of the parties").

[27] See *Nottebohm* (Preliminary Objection) (*Liechtenstein* v. *Guatemala*), 1953 I.C.J. Reports 111, 119 (Judgment of November 18) ("an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction"); I. Shihata, The Power of the International Court to Determine its own Jurisdiction, 47 (1965).

[28] See J. Ralston, International Arbitration From Athens to Locarno, 76–77 (1929).

that an arbitral tribunal has the power to rule on challenges to its members[29].

Despite the widespread reliance on inherent powers, there is very little authority on the scope or theoretical nature of such powers. Although this Article is not intended to be a study of inherent powers, an examination of the inherent power of a tribunal to grant interim measures requires a brief excursus into the theoretical underpinnings of inherent powers generally.

Inherent powers may be described as those powers which, even if not expressly conferred upon a tribunal, must be presumed because of the nature of tribunals. The significance of the term "inherent" may be understood in part by examination of the ability of the arbitrating parties to deny expressly powers regarded as inherent.

One view accepts that by an express *clause contraire* the parties may deprive an arbitral tribunal of inherent powers by reserving such powers to the parties themselves, vesting such powers in another institution, or foregoing any express allocation of such powers altogether[30]. A second and minority view argues that certain powers are intrinsic in the nature of a tribunal and may not be denied to the arbitral tribunal by the parties even through an express provision[31].

It is difficult to see the basis for the minority view that there exists a legal limitation on the ability of the parties to deny certain powers to a tribunal. Most certainly there is not any applicable *jus cogens* limitation on such ability in the case of states. Thus, it can be seen that "inherent powers" are,

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[29] «*De lege lata,* seul le tribunal arbitral lui-même est en mesure de se prononcer sur la récusation d'un Arbitre, en l'absence d'une clause du compromis fixant une autre procédure». 1 P. Lalive, Questions actuels concernant l'arbitrage international, 64 (Université de Paris, Institut des Hautes Etudes Internationales 1959–1960). – «La cause d'incapacité ou de récusation est déférée au tribunal arbitral, dans lequel ne siègent pas les arbitres prétendus incapables ou récusés. Le tribunal arbitral a compétence pour statuer sur l'exception, pourvu que les arbitres qui prendront part au jugement, soient plus nombreux que ceux contre lesquels elle est soulevée». A. Mérignhac, Traité théorique et pratique de l'arbitrage international, 253 (1895). Accord J. C. Witenberg, L'organisation judiciaire, la procédure et la sentence internationales, 46–47 (1937).

[30] See, *e.g.*, Shihata (*supra* note 27), at 47.

[31] See, *e.g.*, Iaccarino, Della c.d. competenza sulla competenza dei tribunali internazionali, 14 Diritto Internazionale, 357 (1960). Iaccarino writes at 403/404 (translation): "A tribunal so constituted would be a true *contresense juridique*, and thus in contradiction with the very nature and functional organization of international justice. It follows that an agreement of the parties designed to deprive the tribunal of the power to determine its own jurisdiction must be considered inadmissible, or, to take a radical approach, an 'abrogation' of the instrument whereby the Tribunal in question was constituted".

at least in this regard, "implicit" rather than "inherent"[32]. Parties in creating a judicial institution are presumed to intend to grant the institution certain powers. Powers not granted expressly are imparted implicitly. In this sense the inherent powers of the tribunals may be seen to be quite analogous to the implied powers of international organizations[33].

Nonetheless, in a practical sense, certain "implicit" powers – those that may be necessary for an institution to retain its judicial significance – are more important than others. For example, states may create a tribunal that expressly does not have the power to review decisions induced by fraud. Yet intergovernmental decisions rendered by such a tribunal would lose some significance because of their increased susceptibility to unresolvable claims of nullity. In this sense certain powers, although strictly speaking not inherent, are very necessary to the performance of judicial tasks by an international institution. Such necessary powers therefore are more implicit in the sense that if the intention of the parties to create a judicial institution is to be realized, such powers must be found to exist.

In a somewhat similar fashion, inherent powers have been characterized as powers necessary to fulfill the objective intentions of the parties. For example, an inherent power commonly mentioned in the literature is that of a tribunal to deliberate and to render a judgement despite the absence of one or more arbitrators, when such absence is attributable to a party's bad-

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[32] In this regard, I note that "implicit" is defined as "implied though not plainly expressed", The Concise Oxford Dictionary, 501 (1982), while "inherent" is defined as "existing in ... something esp. as permanent or characteristic attribute; vested in (person etc.) as right or privilege" (ibid. at 515).

Although cases have held that the parties may deny powers by a *clause contraire*, a distinction in terminology has been ignored. See, *e.g., Rio Grande Irrigation and Land Company, Limited (Great Britain)* v. *United States*, 6 RIAA 131, 135–136 (1923) where in deciding that the inherent power to decide one's own competence "is inseparable from and indispensible to the proper conduct of business", the arbitral tribunal went on to note that "this power can only be taken away by a provision formed for that purpose".

To some degree, the use of the term "inherent" reflects the source of the term. As is the case with the majority of international judicial procedure, the term "inherent powers" was probably first drawn from municipal legal systems as a general principle of law. In such legal systems, the term, inherent, is more appropriate inasmuch as the nature of the courts is relatively fixed and generally beyond the control of the parties. Such conditions are not generally the case in international adjudication where the arbitration agreement determines not only the content of the dispute but also the task of the tribunal.

[33] Indeed, international tribunals created by states are a specialized form of international organization, see F. Kirgis, Jr., International Organizations in their Legal Setting, 413 (1977); see also D. Bowett, The Law of International Institutions, 10 (4th ed. 1982). As to the "implied powers" doctrine, see Rama-Montaldo, International Personality and Implied Powers of International Organizations, 44 BYBIL 111 (1970).

faith attempt to paralyze the tribunal. Lalive observes that this power is implied from the *compromis* by applying to its interpretation the principles of effectiveness and good faith, which grant the powers necessary for the tribunal to carry out its task in the face of one party's attempt to frustrate it[34]. This analysis is applicable whenever the question arises as to whether by implication a *compromis* grants some power necessary for the tribunal to carry out its task in the face of behavior which is, in essence, a threat to the original agreement to submit to arbitration.

In summary, tribunals possess the inherent powers necessary for carrying out the functions for which they are responsible. Inherent powers may be limited or denied by the parties, but the more such powers are necessary to the judicial nature of the tribunal then the more strictly the limitation or denial is construed so as to preserve the overall intentions of the parties.

An inherent power to grant interim measures is generally recognized[35]. How critical the power to grant interim measures is to the judicial nature of a tribunal, however, is debatable[36]. Equally important is the fact that normally the power to grant interim measures also is authorized expressly by the instrument governing the institution[37]. And when an express power exists, the question arises as to the degree to which the corresponding

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[34] «C'est bien ce principe de l'effectivité qui, en définitive, avec celui de la *bonne foi*, commande d'interpréter l'accord de l'arbitrage en ce sens que le retrait illicite de l'Arbitre, sur la pression ou les ordres d'une Partie, n'empêche pas le tribunal de poursuivre sa tâche et de rendre une sentence obligatoire». Lalive (*supra* note 29), at 84 (emphasis in original).

[35] See *e.g.*, *Northern Cameroons* (Preliminary Objection) (*Cameroon* v. *U.K.*), 1963 I.C.J. Reports 15, 103 (Sep. Opin. of Fitzmaurice, J. to Judgement of December 2); V. S. Mani, International Adjudication, Procedural Aspects, 287 (1980) ("A tribunal expected to perform its judicial functions must be presumed to have power to regulate matters of its incidental jurisdiction"); Crockett, The Effects of Interim Measures Protection in the International Court of Justice, 7 California Western Int'l Law Journal, 342, 355 (1977).

[36] Although the power to grant interim measures is certainly necessary to ensure effective arbitration, the express denial of such a power does not necessarily negate the judicial nature of an arbitration. For example, it is quite clear from the drafting history of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done March 18, 1965, 575 U.N.T.S. 159 ("The Washington Convention") that the interim measures "recommended" by the International Center for Settlement of Investment Disputes ("ICSID") are only morally binding. See ICSID, ICSID-History of the Convention, 815 (1970). Although this may reduce the effectiveness of ICSID, it is not argued to have negated the judicial nature of ICSID. See also Thompson, The UNCITRAL Arbitration Rules, 17 Harvard International Law Journal, 141, 151 (1976) ("In order to recognize more fully, however, the principle of the autonomy of the parties' will, perhaps article 2 [6] should be amended to permit interim measures only if the parties have so agreed ...").

[37] See, *e.g.*, E. Dumbauld, Interim Measures of Protection in International Controversies, 129–131 (1932) (of the 34 sets of procedural rules for the Mixed Arbitral Tribu-

inherent power survives the explicit grant[38]. For example, it still remains somewhat debated whether interim measures "indicated" by the International Court of Justice under Art.41 of its Statute are binding[39]. The possibility of concurrently existing inherent powers has not decided the question because it can be contended that the arguably nonbinding language of Art.41 reflects a choice of the state parties to displace any otherwise existing inherent power to grant binding measures[40]. Yet again the Tribunal unreservedly has stated on at least two occasions that the "inherent power [to order interim measures] is in no way restricted by the language in Article 26 of the Tribunal Rules"[41].

If not the plain wording of Art.26, then the discussion throughout the remainder of this Article demonstrates that the UNCITRAL Rules alone could have provided the authority for all of the interim measures actions of the Tribunal. Given this circumstance, it was unnecessary for the Tribunal to invoke its inherent powers when its expressly granted ones sufficed. Inherent powers exist to the extent that they are not expressly denied by the parties and to the extent that they are necessary to preserve the judicial character of the institution. Reliance on inherent powers by the Tribunal was not necessary.

Moreover, because the definition of inherent powers is quite general and can be used to justify a variety of powers, "inherent powers" are subject to suspicion and their use can be easily called into question. For example, in

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nals established after World War I, only three did not expressly provide for the granting of interim measures).

[38] See, *e.g.*, Crockett (*supra* note 35), at 355–356. Discussing the International Court of Justice, Crockett notes: "If one assumes the Court to have at least the power to issue interim protection orders absent Article 41, then the approach to an interpretation of Article 41 will be a critical factor. In other words, a restrictive interpretation could lead to the conclusion that Article 41 was imposed as a limitation upon any inherent power ...".

[39] See, *e.g.*, K. Oellers-Frahm, Interim Measures of Protection, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 1, 69, 71 (1981) ("Whether [I.C.J.] interim measures of protection are binding upon the parties is as yet an unsettled question. There is a strongly held view as to the non-binding character ...").

[40] See, *e.g.*, J. P. A. Bernhardt, The Provisional Measures Procedure of the International Court of Justice through "U.S. Staff in Tehran": Fiat Iustitia, Pereat Curia?, 20 Virginia Journal of International Law, 558, 607 (1980) ("without additional textual support, this inherent basis for the binding nature of interim orders has won few followers").

[41] *Rockwell International Systems and The Islamic Republic of Iran,* Interim Award No.20–439–1, at 4 (Lagergren, Holtzmann & Kashani (D) arbs., June 6, 1983); see also *RCA Globcom and The Islamic Republic of Iran,* Interim Award No.29–160–1, at 5 (Lagergren, Holtzmann & Kashani (DO) arbs., October 31, 1983).

RCA Globcom and The Islamic Republic of Iran[42], where Chamber One requested a stay of proceedings in Iranian courts on the basis of its inherent powers when it equally could have rested its holding on the basis of Art.26 (1)[43], Mahmoud Kashani dissented, stating:

> "In the absence of any explicit text whatsoever ... the majority in Chamber One has had recourse to an [sic] non-legalistic argument, adducing something by the name of the 'inherent power' of the Tribunal to preserve its jurisdiction. The 'inherent power' of a tribunal if not supported by any confirmed and recognized legal text or rule of jurisprudence, is nothing other than the exercise of despotism and dictatorship; and this is something which has been prohibited by the law of numerous nations, including Article 166 of the Constitution of the Islamic Republic of Iran"[44].

The earlier discussion has shown that the concept of inherent power is in fact a legal one. The difficulty in ascertaining the scope of inherent powers, however, requires that they be used sparingly and only when necessary in order that their legality be maintained. It is the concept of necessity that legally accommodates the political sensitivities of states toward tribunals assuming inherent powers; it is the limit of necessity that allows acceptance.

2. The Precondition of a Request by a Party

Article 26 (1) of the UNCITRAL Rules provides that the arbitral tribunal may take interim measures it deems necessary "[a]t the request of either party". The request should be in writing and should set forth sufficient reasons to enable comments by the other party and deliberations by the tribunal[45].

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[42] Interim Award No.29–160–1, *supra* note 41.

[43] Respondent argued "that the interim relief sought by the Claimant falls outside the scope of the discretion to take interim measures conferred upon the Tribunal by Article 26 ...". As to the broad scope of Art.26 see *infra* section II (4) (f). The Tribunal rather than addressing the scope of Art.26, however, relied instead upon its inherent powers. *RCA Globcom*, Interim Award No.29–160–1 (*supra* note 41), at 5.

[44] Dissenting Opinion of Mahmoud Kashani at 12 (January 31, 1984) to *RCA Globcom*, Interim Award No.29–160–1, *supra* note 41.

[45] See, *e.g.*, Rule 39 (1) of the ICSID Arbitration Rules ("The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures"). The Tribunal accepted initially, in at least one instance, an oral request by a party for interim measures. The Tribunal in its Order of April 17, 1982 in *The Islamic Republic of Iran and The United States of America* (Military Sales), Case B1, Full Tribunal, invited the parties to submit briefs on the interim measures requests

Unlike other international tribunals and courts[46], a tribunal under the UNCITRAL Rules is not expressly authorized to take interim measures on its own initiative. Although such action is not expressly denied either, the requirement of a request was added to Art.26 at the suggestion of several representatives who thought it desirable "that this power could only be exercised at the request of both parties, or at least at the request of one party ..."[47].

A situation in which interim measures would be required but where no party makes a request is difficult to conceive. Nevertheless, if such a situation arose because of, for example, the interests of non-parties, there would be a legal issue as to whether a tribunal's inherent power to authorize interim measures empowers action despite the lack of the expressly required request by a party.

It must be recognized that an arbitration agreement cannot take into consideration every conceivable situation that may confront a tribunal. Many possibilities are simply too remote to be considered during the drafting of rules. In this sense it would be a mistake to assume that rules, by providing expressly one mechanism that does not satisfactorily cover a particular situation, preclude the tribunal from resorting to its inherent powers to devise a mechanism that does. While the parties to the *compromis* can grant powers expressly, and can channel the tribunal's powers into specific procedures, the existence of inherent powers in the tribunal implies residual power to deal with instances which, for legal or practical reasons, cannot be or were not meant to be addressed by the procedures expressly provided[48].

In the case of *ad hoc* arbitration, any inherent power of the tribunal to

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of both parties before the Tribunal, the Iranian request having been presented orally on April 17, 1982.

[46] See Rule 75 (1) of the Rules of the International Court of Justice ("The Court may at any time decide to examine *proprio motu* whether the circumstances ... require ... provisional measures"); Rule 39 (3) of the ICSID Arbitration Rules ("The Tribunal may also recommend provisional measures on its own initiative").

[47] Summary of Discussion on Preliminary Draft, 8th Sess., U.N. Doc. A/10017, para.164. See also Commentary on Revised Draft, 9th Sess., U.N. Doc. A/CN.9/112/Add.1, ("only if requested by one or both parties").

[48] The operation of such residual power has been apparent in cases involving the power of a tribunal to proceed in truncated form. In a number of cases tribunals have gone forward in truncated form, despite the existence of express compromissory clauses providing for replacement of absent arbitrators. They did so precisely because that procedure, while applicable, presented legal or practical difficulties of application that would have hampered or paralyzed the tribunal. See, *e.g.*, *Columbia* v. *Cauca Co.*, 190 U.S. 524 (1903).

grant interim measures without a request of either party was generally intended to be displaced by Art.26. This conforms with the notion that it is the two parties and the two parties alone which define the scope of issues presented to the tribunal. In such instances the parties know best when they need protection and on what matters they wish the tribunal to spend its efforts.

Different considerations may be present in institutional multi-claim arbitration, such as the Iran-United States Claims Tribunal, because the tribunal in those cases has responsibilities to more parties than the two before it; it is from this larger community that broader institutional duties arise.

3. The Power to Order Temporary Restraining Measures

Often, international tribunals cannot respond to a request for interim measures as quickly as the urgency of the situation may require. This is true even in the case of permanent international arbitral tribunals because it may take a significant amount of time to assemble the members of the panel for deliberations on the request. As noted by Charles N. Brower:

> "In various municipal systems 'interlocutory relief is granted within weeks, days or even hours of the threatened detriment and this is anticipated in the procedure by which it is granted in most jurisdictions' ... Such speed of deliberation cannot be assumed in international claims litigation, however"[49].

In such cases, the tribunal or, if necessary, the chairman of the tribunal has the power to order temporary restraining measures[50] pending the tribunal's decision on the request for interim measures[51].

The Iran-U.S. Claims Tribunal has found it necessary to order temporary restraining measures often, either because the Members of the Chamber were not in The Hague at the time or because the panel wished to reserve its final decision on the interim measures request until after it received comments from the party against whom interim measures were

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[49] Concurring Opinion of Charles N. Brower at 3 (January 16, 1985) to *Component Builders and The Islamic Republic of Iran,* Case 395, Chamber Three, Order of January 10, 1985, citing to Elkind (*supra* note 16), at 191.

[50] Sztucki refers to such a temporary restraining measure as a "provisional measure of the second order", Sztucki (*supra* note 5), at 161.

[51] See, *e.g.*, Rules of the International Court of Justice, Art.74 (4) ("Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect").

sought[52]. In this way temporary restraining measures reduce the urgency of the tribunal's rendering its final decision on the interim measures request, and the time necessary to fully and properly consider the request is gained[53].

This practice is discussed by Charles N. Brower in a Concurring Opinion to an Order of Chamber Three granting temporary restraints[54]. In Brower's view, the source of the Tribunal's power to order temporary

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[52] As to temporary restraining measures granted in the form of an Award as of 1 September 1986, see *Rockwell International Systems and The Islamic Republic of Iran,* Interim Award No.17–430–1, at 3 (Lagergren, Holtzmann & Kashani (D) arbs., May 5, 1983) ("the Tribunal finds it appropriate immediately to request [a certain interim measure] until such time that the Tribunal can make a decision on the Claimant's request based on the view of both Parties); *Reading & Bates and The Islamic Republic of Iran,* Interim Award No.21–28–1, at 3 (Lagergren, Holtzmann & Kashani (C) arbs., June 9, 1983); *Touche Ross and The Islamic Republic of Iran,* Interim Award No.22–480–1, at 4–5 (Lagergren, Holtzmann & Kashani (DS) arbs., June 13, 1983); *Behring International and The Islamic Republic of Iran,* Interim Award No.25–382–3, at 5 (Mangård, Holtzmann & Shafeiei arbs., August 10, 1983); *Shipside Packing and The Islamic Republic of Iran,* Interim Award No.27–11875–1, at 2 (Lagergren, Holtzmann & Kashani arbs., September 6, 1983); *Ford Aerospace and The Islamic Republic of Iran,* Interim Award No.28–159–3, at 5 (Mangård, Mosk (CO) & Ansari (DS) arbs., October 20, 1983); *Aeronutronic Overseas and The Islamic Republic of Iran,* Interim Award No.44–158–1, at 5 (Lagergren, Holtzmann & Kashani (D) arbs., August 27, 1984).

Temporary restraining measures were also granted by Order, a choice in part reflecting the practice of Chamber Two generally and in part reflecting instances when not all the Members of the panel were available to sign an award. See, *e.g., E-Systems and The Islamic Republic of Iran,* Case 388, Full Tribunal, Order of October 11, 1982; *Touche Ross and The Islamic Republic of Iran,* Case 480, Chamber One, Order of May 30, 1983; *RCA Globcom Communications and The Islamic Republic of Iran,* Case 160, Chamber One, Order of June 2, 1983; *Teledyne and The Islamic Republic of Iran,* Case 10812, Chamber 2, Order of September 9, 1983; *Reading & Bates and The Islamic Republic of Iran,* Case 28, Chamber One, Order of October 25, 1983; *Tadjer Cohen and The Islamic Republic of Iran,* Case 12118, Chamber Two, Order of November 30, 1983; *Westinghouse Electric and The Islamic Republic of Iran,* Case 389, Chamber Two, Order of January 12, 1984; *Linen, Fortinberry and The Islamic Republic of Iran,* Case 10513, Chamber Two, Order of March 2, 1984; *Component Builders and The Islamic Republic of Iran,* Case 395, Chamber Three, Order of January 10, 1985; *Harris International Telecommunications and The Islamic Republic of Iran,* Case 409, Chamber One, Order of February 18, 1986.

[53] Without such temporary measures one is left with a difficult situation that Pierre Lalive describes: "The difficulty in which an arbitration tribunal ... finds itself when called upon to decide [a request for interim measures] at the very beginning of arbitration proceedings will be readily appreciated. At such an early stage, when no evidence whatever has yet been adduced, nor any pleadings filed, the tribunal has little or no possibility of ascertaining the truth, but it has to make a quick, though cautious, decision". Lalive, The First "World Bank" Arbitration (*"Holiday Inns* v. *Morocco"*) – Some Legal Problems, 51 BYBIL 123, 136 (1980).

[54] Concurring Opinion of Charles N. Brower, *supra* note 49.

restraints lies in the fact that such power "may be vitally necessary to preserve the *status quo* and thereby ensure due consideration of a request for interim measures ..."[55]. This necessity may be viewed either as what Judge Fitzmaurice termed the "inherent jurisdiction" of a tribunal[56] or as a power necessarily implied by Art.26's authority to order interim measures. Indeed, statements made during the drafting of Art.26 suggest that in urgent matters the parties do not have a right to be heard before interim measures are ordered[57]. As inherent powers (and inherent jurisdiction) should be invoked only when absolutely necessary, the preferable view is that by implication Art.26 (1) encompasses a power to order temporary restraints.

Given a situation where it is desirable to order temporary restraints because of an inability to deliberate upon an interim measures request, what test should the tribunal apply to consider the granting of such temporary restraints? Charles N. Brower has set forth one aspect of a general test. Recognizing that the Tribunal requires *prima facie* jurisdiction for the granting of interim measures, he states that "[i]n order to preserve its ability to act effectively on a request for interim measures, the Tribunal may as necessary impose temporary restraints unless there is a manifest lack of jurisdiction"[58]. For Brower, "the 'benefit of the doubt' given a claimant as to the existence of jurisdiction when interim measures are considered ... must be given all the more where temporary restraints are sought to preserve the Tribunal's power to consider such interim measures"[59]. The benefit of the doubt can be extended likewise to the other conditions for issuance of interim measures. For example, temporary restraining measures may be granted unless there is a manifest lack of prejudice.

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[55] Concurring Opinion of Charles N. Brower (*supra* note 49), at 3–4. See also Dumbauld, Relief Pendente Lite in the Permanent Court of International Justice, 39 AJIL 391, 404 (1945) ("The object of [both temporary measures of restraint and interim measures of protection] is 'to enable the Court to give an effective decision' in a succeeding state of the litigation").

[56] See *Northern Cameroons* (Preliminary Objections) (*Cameroon* v. *U.K.*), 1963 I.C.J. Reports 15, 103 (Sep. Opin. of Fitzmaurice, J. to Judgement of 2 December). See also Mani (*supra* note 35), at 287 ("A tribunal expected to perform its judicial functions must be presumed to have power to regulate matters of its incidental jurisdiction").

[57] See, *e.g.*, Observation of Norway on Preliminary Draft, 8th Sess., U.N. Doc. A/CN.9/97/Add.3, Annex I.

[58] Concurring Opinion of Charles N. Brower (*supra* note 49), at 4–5.

[59] Id. at 5.

4. The Scope of the Power to Order Interim Measures

(a) Limitations Arising from the Subject-Matter of the Dispute

An established rule is that interim measures are intended to protect rights relating to the subject-matter of the dispute[60]. Therefore the parties are not protected from actions prejudicial to rights not a part of the dispute. In practice this distinction is not always as clear as it may seem.

For example, in *RCA Globcom Communications and The Islamic Republic of Iran*[61], Claimant filed a claim based upon a contract for services with the Iranian Army Joint Staff (the "MSPO Contract") and asserted that the contract was cancelled by it because of *force majeure* in March of 1979. In accordance with the MSPO Contract, Claimant had taken out an insurance policy relating to the work through Iran Insurance Company, not a respondent in the case. Iran Insurance brought suit in an Iranian court and obtained a judgement against Claimant for, *inter alia*, premiums due after the alleged cancellation of the MSPO Contract. Claimant requested the Tribunal to order as an interim measure that the Iranian judgement be vacated. The Tribunal denied Claimant's request because, *inter alia*, "the proceedings before the domestic court concern a dispute arising out of a separate contract", and "[t]he alleged interrelationship between [that case and the case before the Tribunal] is not quite clear"[62].

In a dissenting opinion, Howard M. Holtzmann argued that the insurance policy "provides that upon termination of the MSPO contract or stoppage of work thereunder 'the Policy shall be avoided' [and that the same issues] are thus central to the claim before us and to the claim in the Tehran Court"[63]. Holtzmann's conclusion that the proceedings were sufficiently related to one another rests at least in part on specific language of provisions of the Algiers Accords providing the Tribunal with the exclusive jurisdiction to render final and binding decisions and awards in regard to certain claims. But if one assumes that the circumstances of *RCA Globcom* were presented without possible special considerations arising from

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[60] "[A] request for the indication of interim measures should ... have the effect of protecting the rights forming the subject of the dispute ...", *Polish Agrarian Reform and the German Minority (Germany* v. *Poland)*, 1933 P.C.I.J. Reports, ser. A/B, No.58, 175, 177 (Order of July 29).

[61] Interim Award No.30–160–1 (Lagergren, Holtzmann (DO) & Kashani (CS) arbs., October 31, 1983).

[62] *RCA Globcom*, Interim Award No.30–160–1 (*supra* note 61), at 5.

[63] Dissenting Opinion of Howard M. Holtzmann, at 5 (November 29, 1983) to *RCA Globcom*, Interim Award No.30–160–1, *supra* note 61.

the Accords, then although the facts of *RCA Globcom* indicate that there was a common issue in the proceeding in Iran and the claim before the Tribunal, the two proceedings concerned rights relating to disputes with different subject-matters[64]. In this sense, the decision of the common issue in one context would not be prejudicial to rights in the other. When confronted with such an alleged interrelationship that is "not quite clear", yet not manifestly deficient, a reasonable course of action for a tribunal, suggested by Holtzmann, is to grant temporary restraining measures pending further clarification by the parties[65]. Of course the petitioner would still have the burden of supporting its motion for interim measures.

While in *RCA Globcom* a non-party was suing the Claimant in Iranian courts on a different contract, *Tadjer-Cohen Associates and The Islamic Republic of Iran*[66] involved a suit in Iranian courts by one of the Respondents against a non-party on the same contract. The Tribunal granted Claimant's motion for interim measures ordering the Respondent to stay the proceedings in Iranian Court. Why the suit against the non-party was regarded by the Tribunal as an act prejudicial to Claimant's rights before the Tribunal is explained by the rather unique relationship between the Claimant, Tadjer-Cohen Associates ("TCA"), and the non-party, TCSB. Specifically, TCSB was the party to the contract disputed in the claim before the Tribunal, and TCA was merely the holder of an assignment from TCSB of the right to pursue the claim, TCA having paid a nominal sum and promised "to pay TCSB all sums actually received on said claims ..."[67]. Thus the Tribunal regarded TCSB as the real party in interest before the Tribunal and therefore regarded the action in Iran as prejudicial to the rights involved in the claim.

These two cases demonstrate that whether an act is prejudicial to a right relating to the subject-matter of a dispute cannot be separated from consid-

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[64] Howard M. Holtzmann also pointed out that "[t]he Government of Iran is a named party in the case before [the Tribunal], along with its Army Joint Staff; it is also effectively a party in the Tehran court action instituted in the name of one of its nationalized insurance companies" id., at 8. Even if, however, it is accepted that the Government of Iran is a party in both proceedings, the rights in dispute in the two proceedings remain distinct. The *force majeure* issue in the Iranian proceeding relates to rights under an insurance contract while the same issue in the proceeding before the Tribunal relates to a purchase agreement.

[65] See id., at 9.

[66] Interim Award No.56–12118–3 (Virally, Ansari (D) & Brower arbs., November 11, 1985).

[67] Id. at 3.

eration of whose rights and whose corresponding obligations are involved[68].

The subject-matter of the dispute also limits the availability of interim measures in the oft-stated rule that such measures may not operate to grant the final relief sought[69]. To state this rule, however, does not always solve the problem presented to a party. An appreciation of the limits of this rule is provided by *Behring International and The Islamic Republic of Iran*[70].

In this case, as a part of its counterclaim and also as an interim measures request, the Respondent sought the return of its property allegedly deteriorating in Claimant's warehouse. Ultimately the Tribunal granted Respondent's request for interim measures, but subject to certain conditions. The Tribunal held that "granting of the full interim relief requested by Respondents, in particular, the transfer to Respondents of possession, custody and control of the warehouse goods ... would be tantamount to awarding Respondents the final relief sought in their counterclaim [and that the Tribunal] cannot award such relief prior to determining as a final matter that it has jurisdiction"[71]. The Tribunal went on to hold unanimously that it had jurisdiction, not merely *prima facie* jurisdiction, and that where "as here, Respondent's right to eventual possession of the goods is uncontested ... and such right will be prejudiced to the extent of deterioration damage presently occurring to unique goods, an order transferring the goods is an appropriate interim measure of protection and does not constitute an interim judgement"[72].

What may be learned from this case? First, the final interim measures award was reached only after other possible measures proved unavailable or unpractical. Previously, the Tribunal had granted Claimant the opportunity to move the goods to the "modern" portion of its warehouse so as to avoid further deterioration and yet not grant the final relief sought by the

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[68] See J. Simpson/H. Fox, International Arbitration, 167 (1959); Crockett (*supra* note 35), at 352 ("The 'rights' which may be protected ... are those ... belonging to one or the other of the parties").

[69] See *Chorzów Factory* (Indemnification Phase) *(Germany* v. *Poland)*, 1927 P.C.I.J. Reports, ser. A, No.12, at 10 (Order of 21 November) (Applicant's request for interim payment denied because it "cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgement in favour of a part of the claim formulated in the Application").

[70] Interim and Interlocutory Award No.52–382–3 (Mangård, Ansari & Brower arbs., June 21, 1985).

[71] *Behring International and The Islamic Republic of Iran,* Interim Award No.46–382–3, at 4 (Mangård, Ansari & Brower arbs., February 22, 1985).

[72] *Behring International,* Interim Award No.52–382–3 (*supra* note 70), at 57, n.46.

counterclaim. "Claimant, however, sought to impose conditions on such use which the Tribunal determined to be unreasonable"[73]. The Tribunal also found that it was "impractical for this international Tribunal to maintain control of the goods through a warehouse selected by and subject to the direction of the Tribunal"[74]. Although the alternatives were not available in *Behring* and somewhat unnecessary given Respondent's uncontested right to possession, the Tribunal award demonstrates that it may be possible by creative thinking on the part of the tribunal and parties to find measures that will not simultaneously grant the final relief requested.

Second, the Tribunal in *Behring* actually did not grant interim measures; rather, it expedited a portion of the proceedings relating to the counterclaim. Given that Respondent's right was uncontested and that the Tribunal's jurisdiction over that part of the proceedings was fully established, the Tribunal merely speeded up its adjudication of a part of the counterclaim and thereby obviated the need for interim measures[75]. Although the Tribunal characterized its action as interim measures, reality would have been better reflected if it had been termed a partial award[76].

Therefore a more positive restatement of the traditional rule that interim measures should not operate to grant the final relief requested is: Where a party is confronted with circumstances, the prejudice of which apparently can be avoided only by the granting of the final relief in whole or in part, the party must either be imaginative and conceive of an interim measure that forestalls the prejudice without granting the final relief or it must ask that the proceedings be expedited in whole or in part.

(b) The Requirement of prima facie *Jurisdiction*

A contentious interim measures issue upon which much has been written[77] is the degree to which a tribunal must assure itself that it has jurisdiction over the claim before it orders interim measures. This question arises from the nature of a tribunal's jurisdiction, specifically how such

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[73] Id., at 56.

[74] Id., at 57.

[75] Indeed Dumbauld would argue "that where a rapid procedure is ordinarily available ... resort to interim measures is thereby precluded". Dumbauld (*supra* note 37), at 22.

[76] One practical difference between interim measures proceedings and partial award proceedings is the right of the parties to demand a hearing. Yet because the Tribunal in *Behring* had found it necessary to decide its jurisdiction, the Parties already had the right to a hearing.

[77] See, *e.g.*, Sztucki (*supra* note 5), at 221–259; Elkind (*supra* note 16), at 167–197.

jurisdiction is limited by the agreement of the parties. Because arbitral jurisdiction is based solely on the consent of the parties, it has been argued that a tribunal cannot grant interim measures until it determines that it has jurisdiction over the dispute[78]. Indeed, Respondents before the Tribunal often objected to the ordering of interim measures prior to a full determination of jurisdiction[79], and often such arguments formed the basis of dissenting opinions by Iranian arbitrators[80]. The obvious problem with this position is that the urgency of the situation may demand relief long before a full jurisdictional determination can be made. In the International Court of Justice there arose a variety of tests requiring a less than full jurisdictional determination[81]. Quite recently, moreover, the International Court in the *Nicaragua* case unanimously adopted the test that "to indicate [interim] measures ... the provisions invoked by the Applicant [should] appear, *prima facie* to afford a basis on which the jurisdiction of the Court might be founded"[82].

In its early interim awards, the Tribunal was inconsistent in its consideration of jurisdiction: it was often silent as to jurisdiction, occasionally stated that "it would appear that" the Tribunal has jurisdiction[83], but never went so far as to determine its jurisdiction as a precondition for granting interim measures. In the summer of 1984, however, shortly after the International Court's Order for Interim Measures in the *Nicaragua* case, Chamber Three adopted the requirement that there must exist *prima facie*

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[78] See, *e.g.*, *Nuclear Tests (Australia v. France)*, 1973 I.C.J. Reports 99, 111 (Dis. Opin. of Forster, J. to Interim Measures Order of June 22).

[79] See, *e.g.*, *Aeronutronics Overseas and The Islamic Republic of Iran*, Interim Award No.47–158–1, at 3 (Böckstiegel, Holtzmann & Mostafavi (D) arbs., March 14, 1985).

[80] See, *e.g.*, Dissenting Opinion of Mahmoud Kashani, at 7 (January 31, 1984) to *RCA Globcom*, Interim Award No.29–160–1, *supra* note 41.

[81] See, *e.g.*, Merrills, Interim Measures of Protection and the Substantive Jurisdiction of the International Court, 36 Cambridge Law Journal, 86 (1977); Mendelson, Interim Measures of Protection in Cases of Contested Jurisdiction, 46 BYBIL 259 (1972/73).

[82] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *U.S.)* 1984 I.C.J. Reports 169 (Interim Measures Order of May 10). Judge Schwebel dissented to a part of the Order but not to the *prima facie* test. Of that test he writes: "It is beyond dispute that the Court may not indicate provisional measures under its statute where it has no jurisdiction over the merits of the case. Equally, however, considerations of urgency do not or may not permit the Court to establish its jurisdiction definitely before it issues an order of interim protection ... The nub of the matter appears to be that, while in deciding whether it has jurisdiction on the merits, the Court gives the defendant the benefit of the doubt, in deciding whether it has jurisdiction to indicate provisional measures, the Court gives the applicant the benefit of the doubt". Dissenting Opinion of Judge Schwebel, at 207.

[83] See, *e.g.*, *Rockwell International*, Interim Award No.20–430–1 (*supra* note 41), at 3.

jurisdiction over the relevant portions of the case[84]. A few days later, Chamber One did likewise, stating that the Tribunal lacked *prima facie* jurisdiction over the claim, and refusing a request by Respondent to block Claimant's execution of an attachment[85]. Since these awards, the Tribunal has used consistently the *prima facie* test in granting interim measures[86].

(c) The Relation of the Merits of the Underlying Claim to the Appropriateness of Granting Interim Measures

Although the likelihood of success on the merits of the underlying claim is required for injunctive relief in many municipal systems[87], it rarely is articulated in public international arbitration as a factor to be considered in the granting of interim measures[88]. It is a factor nonetheless, albeit *sotto*

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[84] *Ford Aerospace & Communications and The Islamic Republic of Iran,* Interim Award No.39–159–3, at 8 (Mangård, Ansari (DO) & Brower (CO) arbs., June 4, 1984). See Dissenting Opinion of Parviz Ansari (August 7, 1984) to *Ford Aerospace,* Interim Award No.39–159–3 (dissenting as to the existence of jurisdiction but not to the *prima facie* test *per se*).

[85] *Bendone-DeRossi International and The Islamic Republic of Iran,* Interim Award No.40–375–1, at 3–4 (Lagergren, Holtzmann (CO) & Kashani arbs., June 7, 1984). See Concurring Opinion of Howard M. Holtzmann (June 8, 1984) (Accepting the *prima facie* test, disagreeing with the lack of *prima facie* jurisdiction and on another basis concurring with the result).

[86] See *Behring International,* Interim Award No.46–382–3 (*supra* note 71), at 2; *Aeronutronics Overseas,* Interim Award No.47–158–1 (*supra* note 79), at 4; *Linen, Fortinberry & Associates and The Islamic Republic of Iran,* Interim Award No.48–10513–2, at 3 (Böckstiegel, Aldrich & Ansari (D) arbs., April 10, 1985); *Tadjer-Cohen Associates and The Republic of Iran,* Interim Award No.56–12118–3, *supra* note 66. Apparent exceptions to this statement can be distinguished: *Aeronutronics Overseas,* Interim Award No.44–158–1, *supra* note 52 (grant of only temporary restraining measures); *Component Builders and The Islamic Republic of Iran,* Interim and Interlocutory Award No.51–395–3 (Mangård, Ansari (D/C) & Brower arbs., May 27, 1985) (jurisdiction determined along with interim measures via an interlocutory award because *prima facie* jurisdiction had not been apparent, see Order of November 28, 1984); *Behring International,* Interim Award No.52–382–3, *supra* note 70 (jurisdiction determined along with interim measures via interlocutory award because the granting of interim measures requested held tantamount to final relief requested).

[87] See, *e.g., American Cyanimid* v. *Ethicon,* 2 Weekly Law Reports, 316 (1975) (Lord Diplock) ("The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried").

[88] See Oellers-Frahm (*supra* note 39), at 71 ("it has scarcely been considered either by the [International Court of Justice] or in legal writings"); Crockett (*supra* note 35), at 358 ("If it is at all feasible, [the International Court of Justice] shall not prejudge [because of a "self-imposed limitation"] in any preliminary phase the merits of the dispute in any way"). See, *e.g., Nuclear Tests (Australia* v. *France),* 1973 I.C.J. Reports 99, 103 (Interim Measures

voce. It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous. The reluctance of tribunals to openly voice their consideration of this factor probably reflects in large part a desire to avoid embarrassment to a sovereign state party to the arbitration or accusations of pre-judging the case.

There is an exception to this tendency in the Court of Justice of the European Communities, whose Rules of Procedure require a *prima facie* case[89]. To Borchardt, this provision requires "that the Court must be satisfied that there is a serious question to be tried"[90]. The European Court of Justice, however, is quite different from an international tribunal; it is "simultaneously an international, civil, constitutional and administrative tribunal"[91]. Most importantly for our purposes, the European Court of Justice is more like a municipal court in that it serves a relatively integrated group of states, and thus to some degree sovereign sensitivities are less of a factor. Likewise, because private international arbitration involves sovereigns primarily in commercial contexts where sovereign immunity may not extend, the sovereignty of the party should be less of a factor in decision-making.

(d) The Requirements of Substantial Prejudice and Urgency

The idea behind interim measures of conserving the rights of the parties pending the decision of the tribunal presupposes that there is an imminent danger to those rights. The requirement of imminent danger has often been stated in terms of an act threatening irreparable prejudice and urgently demanding action by the Tribunal.

The term "irreparable prejudice" can be misleading, and it is of questionable relevance in the international context generally and under the UNCITRAL Rules specifically. "Irreparable prejudice" in common law systems means that an injury cannot be adequately compensated for by

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Order of June 22) ("it cannot be assumed *a priori* that ... the [Applicant] Government ... may not be able to establish a legal interest in respect of these Claims entitling the Court to admit the Application"). But see Mendelson (*supra* note 81), at 259.

[89] Art.82 (2), Rules of Procedure of the European Court of Justice.

[90] Borchardt (*supra* note 16), at 210. See also Morris, Interim Measures in EEC Competition Cases, 3 Int'l Tax & Business Lawyer, 102, 113 (1985).

[91] Sztucki (*supra* note 5), at 22.

way of damages[92]. Similarly, the Permanent Court of International Justice in the 1927 *Sino-Belgian Treaty* case stated interim measures could be granted when the threatened prejudice "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form"[93]. This is a harsh standard to meet, especially in the commercial situations the UNCITRAL Rules are intended primarily to address.

"Irreparable prejudice" is a misleading standard because in common law systems, for example, so many exceptions have been allowed that one finds the world to be crowded with irreparable harm. To list only a few of these exceptions, an injury may be irreparable because "there exists no certain pecuniary standard for the measurement of the damages" or because the party committing the acts complained of is insolvent[94]. The thrust of common law doctrine is to examine not only whether the injury is theoretically reparable but whether it is in fact likely to be reparable. Under this analysis virtually any prejudicial act in an international context could be regarded as irreparable.

Initially, the Tribunal did not discuss in its awards of interim measures the notion of irreparable prejudice. The first discussion occurred in 1984 in *Boeing and The Islamic Republic of Iran,* where the Chamber asked whether the threatened harm could be remedied by a monetary award[95]. The Chamber concluded:

> "A stay of execution of judgment in the present case is not necessary ... to protect a party from irreparable harm ... Monetary damages are not irreparable harm, and the Tribunal has the power in the proceedings in Case No.222 to rectify any damages caused by the execution ...".

The Tribunal appeared to be applying in essence the Anglo-American law concept of irreparable injury. The *Boeing* award also states, however, "the Tribunal has the power ... in Case No.222 to rectify any damages"[96]. In other words, monetary damages are not irreparable harm in international arbitration when they are capable of being adjudicated by that tribunal in the form of an enforceable judgement. In municipal legal orders,

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92 See, *e.g.*, 43 C.J.S. Injunctions § 28 (1978).

93 *Belgium* v. *China*, 1927 P.C.I.J. Reports, ser. A, No.8, at 7 (Order of February 15).

94 See 43 C.J.S. Injunctions § 28 (1978).

95 See *Boeing and The Islamic Republic of Iran,* Interim Award No.34–222–1, at 4 (Lagergren, Aldrich & Kashani (DS) arbs., February 17, 1984).

96 As to the power of a tribunal to not only rule on the claim before it but in addition to "rectify any damages", see *Selwyn* case (British-Venezuelan Commission), 9 RIAA 380 (Plumley umpire, 1903).

there ordinarily is a court that is readily available, that has jurisdiction and the ability to deliver an enforceable judgement. Most certainly this is not the case in international arbitration. Indeed, compensation in an international context often is uncertain[97]. When the monetary damage may only be gained by a remedy not clearly available, then the remedy is inadequate and the damage irreparable[98]. In this sense, the Tribunal was quite correct in *Behring International and The Islamic Republic of Iran*, where a Chamber unanimously stated that "[a] definition of 'irreparable prejudice' is elusive; however, the concept of irreparable prejudice in international law arguably is broader than the Anglo-American law concept of irreparable injury"[99].

The applicability of the municipal notion of irreparable prejudice must be challenged more fundamentally, however. Whatever the municipal evolution of this notion, the requirement of irreparability is not a necessary corollary of conserving the rights of the parties. The "concept of irreparability as it was understood in the *Sino-Belgian Treaty* case has been abandoned" by the International Court of Justice[100]. Similarly, Art.26 of the UNCITRAL Rules should be interpreted as rejecting the requirement that the threatened prejudice be "irreparable". That Art.26 of the UNCITRAL Rules does not require irreparable prejudice is evident from the example in that article of an appropriate interim measure: "the sale of perishable goods". Surely the loss of goods, the sale price of which is ascertainable, is not irreparable.

But if not irreparable prejudice, what circumstances are required by Art.26 for the granting of interim measures? If the purpose of the measures is to conserve the respective rights in the dispute alleged by the parties, then all that should be required is an act prejudicing such rights. Given that

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[97] Adede provides another view on the domestic court/international tribunal distinction arguing that "the domestic rule governing the granting of injunctive relief, which relies heavily on plaintiff's and defendant's ability to make monetary reparations, is not suitable for international proceedings for interim measures. So long as this rule, which tends to equate 'might' with 'right' is applied in domestic proceedings, there is no reason why, in similar situations involving international relations, the argument against this rule should not be given serious consideration", Adede (*supra* note 18), at 295–296.

[98] See, *e.g.*, *Agricolo Commerciale Olio* v. *Commission of the European Communities*, Case 232/81 R, 1981 European Court Reports, 2193, 2200 (Interim Measures Order of August 21). See also Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 University of Florida Law Review, 346 (1981).

[99] Unanimous opinion of Chamber Three in *Behring International*, Interim and Interlocutory Award No. 52–382–3 (*supra* note 70), at 54, n.42.

[100] Sztucki (*supra* note 5), at 107. See also Goldsworthy (*supra* note 22), at 268.

interim measures proceedings are costly and often delay the adjudication of the claim, it is appropriate that such prejudice also be substantial[101]. A substantial prejudice approach is appropriate given that an act prejudicial to a right should not be characterized as being acceptable simply because damages are available. The approach makes sense commercially given that the disruption to business relations and the waste resulting from such acts cannot be truly compensated by damages.

A specific example of "prejudice" addressed often by the Tribunal is the degree to which prejudice may be said to be presented by a party's instigation of duplicative proceedings in another forum. In the case of a municipal court faced with a request for an injunction staying duplicative litigation in a foreign court, it is argued that such measures should rarely be granted[102]. On the other hand in such circumstances the Tribunal has stayed, as an interim measure, such litigation. In some cases, the Tribunal justified such action on the basis that such litigation was contrary to Art. VII (2) of the Claims Settlement Declaration providing the Tribunal with sole jurisdiction[103]. Indeed, a Chamber One award states that when this treaty provision is applicable, the question of "grave or irreparable harm become[s] irrelev-

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[101] As to the occasional use by the European Court of Justice of a "serious harm" standard, see Gray, Interim Measures of Protection in the European Court, 4 European Law Review, 80, 88 (1979).

[102] See Baer, Injunctions Against the Prosecution of Litigation Abroad: Towards a Transnational Approach, 37 Stanford Law Review, 155 (1984). "Courts should enjoin parties from proceeding with parallel litigation in foreign countries only in rare circumstances". Id., at 186. See also *Laker Airways* v. *Sabena, Belgian World Airlines,* 731 F.2d 909 (D.C. Cir. 1984).

[103] The provision dealing with the exclusivity of the Tribunal's jurisdiction is contained in Art. VII (2) of the Claims Settlement Declaration: "Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other Court".

The Full Tribunal interpreted "claims" in the above provision to include claims in the form of counterclaims. *E-Systems,* Interim Award No. 13–388–FT (*supra* note 23), at 9 ("Consequently, it follows from this provision that once a counterclaim has been initiated before the Tribunal such claim is excluded from the jurisdiction of any other Court"). In *E-Systems,* Iran had brought an action in Iranian courts which could have been, but was not at the time of the Tribunal's decision, a counterclaim – thus Iran in that case was not in violation of Art. VII (2). However, in later interim measures proceedings where a stay of Iranian court litigation was requested, the violation by the Iranian respondent of Art. VII (2) frequently was relied upon by the Tribunal for the granting of such measures. Indeed, of the 17 interim measures proceedings addressing prejudicial Iranian court actions, a full 9 granted relief on the basis of Art. VII (2).

ant"[104]. Being specific to the Algiers Accords, this basis has limited application outside of the Tribunal.

In other cases the Tribunal stated that such a stay was necessary "to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective". This basis rests on a broad definition of the function of interim measures which deserves scrutiny. In particular it suggests that the function of interim measures is not only to conserve the rights of the parties but also to protect the jurisdiction of the Tribunal. The definition is most interesting because it can be read to suggest that two different sets of criteria might be relevant to decision-making in regard to interim measures. At least for the factual situations presented thus far, however, it does not appear that any criterion is required other than substantial prejudice to a right alleged by a party. The function of conserving the respective rights of the parties is the function suggested clearly by the language of Art.26. The function of protecting the tribunal's jurisdiction, on the other hand, appears to cross once again into the realm of inherent powers inasmuch as conservation of the rights of the parties also protects the jurisdiction of the tribunal except when a party does not make a request for interim measures.

Having said this, there still remains the question of what prejudice is posed by duplicative litigation. Analyzed in terms of irreparable prejudice, Howard M. Holtzmann in *Boeing* suggests that "[t]he loss of a treaty right to be free of litigation in another forum may itself be irreparable"[105].

Certainly the breach of Art. VII (2) of the Claims Settlement Declaration (or more generally any agreement to arbitrate) by the simultaneous conduct of duplicative proceedings in another forum is itself an act upon which a claim could be based[106]. To the degree that damages could be fairly ascertained, such a breach would be reparable. It is likely that the damage

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[104] *Aeronutronics Overseas*, Interim Award No.47–158–1 (*supra* note 79), at 5. Accord *Ford Aerospace & Communications and The Islamic Republic of Iran*, Interim Award No.16–93–2, at 3 (Bellet, Aldrich & Shafeiei (D) arbs., April 27, 1983). But see *Questech and The Islamic Republic of Iran*, Interim Award No.15–59–1 (Lagergren, Holtzmann & Kashani (C) arbs., March 1, 1983).

[105] Concurring Opinion of Howard M. Holtzmann, at 7 (August 27, 1984) to *Boeing and The Islamic Republic of Iran*, Interim Award No.38–222–1 (Lagergren, Holtzmann (CO) & Kashani (D) arbs., May 25, 1984). A similar view was taken by Claimant's counsel in *Holiday Inns* v. *Morocco*. See Lalive (*supra* note 53), at 134.

[106] There is, for example, little doubt that the United States could file with the Tribunal an interpretation and application dispute under Art. VI (4) of the Claims Settlement Declaration alleging that Iran's filing of suits in Iranian courts and its later refusal to stay those suits were violations of Art. VII (2) directly damaging the United States government and United

arising from such breaches, however, would be negligible compared to the amounts in controversy, and thus the award of such damages would not discourage further breaches. In essence the right to be free of such litigation would be lost. An injury is also irreparable when the only remedy is a large number of suits for damages which by reason of the limited damages available in any given suit will produce no substantial results[107].

Another approach to the prejudice of duplicative litigation would be that the existence of the right to be free from litigation in other forums or the right to demand arbitration reflects the agreement of the parties that such litigation is prejudicial to the tribunal's ability to deal with disputes before it. That is, the parties have agreed that parallel litigation would be so costly and prejudicial to effective arbitration that they waived any right to invoke the authority of other forums. Indeed, the provision for arbitration is generally so crucial in international commerce that the right to a decision by arbitration should be regarded as an intrinsic part of a party's rights in the dispute. It is this agreement of the parties that distinguishes tribunals from municipal courts where it is argued that only rarely should parties be enjoined from pursuing foreign duplicative litigation. The argument is appropriate for municipal courts which, as a matter of comity, should respect the courts of another sovereign. This presupposes, however, that neither court has a greater claim to the suit. The agreement of the parties to arbitrate, on the other hand, clearly establishes the primacy of the tribunal's jurisdiction[108]. Indeed the majority of courts in the world will not entertain duplicative proceedings for this reason[109].

Finally, it is important to note that the Tribunal regards an assurance by a party that an allegedly prejudicial action would not be taken as negating

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States nationals through the diversion of their time and resources and of the time and resources of the Tribunal (half of whose budget is paid by the United States).

[107] Accord 43 C.J.S. Injunctions § 28 (1978). Such breaches capable of repetition are particularly problematic for international arbitration where the availability of punitive damages is unclear. See *infra* Section II (9).

[108] See, *e.g.*, *Libyan American Oil Co.* v. *Libya* (Mahmassani sole arb., April 12, 1977) reprinted in 20 ILM 1, 42 (1981) where the sole arbitrator stated that a tribunal established pursuant to an arbitration clause, with no further explicit statement as to exclusivity, "should have exclusive jurisdiction over the issues of the dispute, [n]o other tribunal or authority ... has competence in the matter".

[109] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II (3) done June 10, 1958, 330 U.N.T.S. 38; Domke, International Arbitration of Commercial Disputes, in: Private Investments Abroad, 131, 133 (1960). See also Pryles, Comparative Aspects of Prorogation and Arbitration Agreements, 25 International and Comparative Law Quarterly, 543, 582 (1976).

the potential prejudice of such an act. This was true regardless of whether the assurance came from a sovereign state or a private party[110]. Thus in *AVCO Corporation and Iran Aircraft Industries,* the Tribunal stated on August 22, 1983, that in view of the fact that "Claimant asserts that no sale of any of the goods in question is planned to take place before 31 December 1983 ... the Tribunal need not now take a decision with regard to the Respondents' request for interim measures of protection"[111].

The requirement of urgency, though sometimes treated separately, is best viewed as a part of prejudice, inasmuch as substantial prejudice may exist only when the threatening act is likely to occur in the immediately foreseeable future[112]. This relationship can be seen in *Atlantic Richfield and The Islamic Republic of Iran*[113], where Respondent requested the Tribunal to order as interim measures, *inter alia,* that Claimant withdraw writs of attachment obtained in U.S. courts against assets allegedly belonging to Iran. Proceedings relating to writs of attachment had been suspended after the signing of the Algiers Accords by Executive Order 12279; for reasons which need not be detailed here, these particular attachments were not later nullified in accordance with the Accords but did remain subject to the earlier suspension of proceedings. Not only was the nature of the prejudice unclear but the lack of urgency was manifest given the indefinite ongoing 1981 freeze of proceedings relating to the attachment. The Tribunal denied the request on several grounds including that it did "not consider that there exists any threat of grave or irreparable damage ... [o]n the contrary, the preservation of the *status quo* appears to be assured by the continued blocking of the LAPCO account and the suspension of the New York Court proceedings pending the Tribunal's determination of the present case"[114].

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[110] The International Court of Justice and its predecessor have likewise accepted the assurances of states. See, *e.g., Southeastern Territory of Greenland (Norway* v. *Denmark)* 1932, P.C.I.J. Reports, ser. A/B, No.48 (Order of August 3) at 286–287 (the Court "must not and cannot presume that the two Governments concerned might act otherwise than in conformity with the intentions thus expressed ...").

[111] Case 261, Chamber Three, Order of August 22, 1983. Claimant subsequently made a further assurance that no sale would occur before January 1, 1985. Order of January 27, 1984. As to an assurance by a state, see *Ford Aerospace & Communications and The Islamic Republic of Iran,* Case 159, Chamber Three, Order of May 4, 1984.

[112] Accord Borchardt (*supra* note 16), at 219 ("Urgency is to be understood ... in the sense that interim measures are necessary in order to avoid serious and irreparable damage"); Oellers-Frahm (*supra* note 39), at 71 ("if no irreparable damage is imminent there is no urgency").

[113] Interim Award No.50–396–1 (Böckstiegel, Holtzmann & Mostafavi (D) arbs., May 8, 1985).

[114] *Atlantic Richfield,* Interim Award No.50–396–1 (*supra* note 113), at 5.

(e) Against Whom Interim Measures May be Ordered

An international arbitral tribunal's jurisdiction is consensual and thus encompasses only the parties before the tribunal. A party therefore may be protected from prejudicial actions only to the extent that the other party can prevent such prejudice from occurring[115]. Thus in *Atlantic Richfield and The Islamic Republic of Iran,* Chamber One denied Respondents' request for an Interim Award directing the U.S. government to ensure that certain writs of attachment be withdrawn "because THE GOVERNMENT OF THE UNITED STATES OF AMERICA is not a party to Case No.396"[116].

To stay Iranian court litigation, one would expect the Tribunal to order the particular party involved to cease the prosecution of such litigation. Interestingly, in addition to particular State agencies and controlled entities, the Government of the Islamic Republic of Iran is also generally a party to claims before the Tribunal. Thus the Tribunal has been able to direct interim measures not only against the party who initiated the litigation but also against the Government of Iran, which at least tolerates both the bringing and the hearing of the suit. In these cases the Government of Iran also has been ordered to "take all appropriate measures to ensure that the proceedings ... be stayed ..."[117].

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[115] In other words, it has been said in some municipal legal systems that a private international arbitral tribunal may grant noncoercive interim measures while the courts of the country should grant coercive ones. The "assumption underlying this distinction is that coercive power is reserved to the government" and a chief distinguishing feature of coercive measures is whether "the order of provisional relief will be directed to persons who are not parties ...", McDonell, The Availability of Provisional Relief in International Commercial Arbitration, 22 Columbia Journal of Transnational Law, 273, 276 (1984).

[116] Interim Award No.50–396–1 (*supra* note 113), at 5. But see Dissenting Opinion of Howard M. Holtzmann at 8 (November 29, 1983) to *RCA Globcom,* Interim Award No.30–160–1, *supra* note 61.

[117] See, *e.g., Component Builders and The Islamic Republic of Iran,* Interim and Interlocutory Award No.51–395–3, *supra* note 86. Direction of interim measures against the Government of Iran was somewhat important for the Tribunal given that the particular State agencies who brought suit in Iranian courts contended that Iranian law did not permit them unilaterally to gain a suspension of proceedings. See Concurring Opinion of Charles N. Brower to *Ford Aerospace,* Interim Award No.39–159–3, *supra* note 84.

(f) What Actions are Subject to Interim Measures and What Types of Measures May be Granted

Actions subject to interim measures are those that are "capable of prejudicing the execution of any decision, which may be given by the tribunal"[118]. Art.26 (1) of the UNCITRAL Rules addresses this subject, providing that "the arbitral tribunal may take any interim measures it deems necessary ... 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".

When the Tribunal first granted a request for an interim award staying litigation in Iranian courts prejudicial to the rights of the claimant, the three Iranian arbitrators concurred, providing the following interpretation of Art.26 (1):

> "Article 26 of the Provisionally Adopted Rules of the Tribunal permits the Tribunal to make an interim measure at the request of the interested party only in cases where the prompt intervention of the Tribunal is deemed necessary for the conservation of the goods forming the subject-matter in dispute; where the subject-matter is in danger of being perished during the course of arbitral proceedings ... Reasons relied upon by the claimant in the present case for his request of an interim measures ... however, do not come within any of the above-mentioned instances"[119].

This view of the intent of Art.26 is mistaken. The article provides that a tribunal may take measures in response to any act which threatens the "subject-matter of the dispute", i.e., the rights of the parties at issue. These actions "include" the two described instances, but are not limited to them. Likewise, the Tribunal may order whatever type of measure "it deems necessary". The measures mentioned in Art.26 (1) are meant as examples rather than as a listing of all measures available[120]. Professor Sanders, who was closely involved with the drafting of the UNCITRAL Rules, states that although the article "gives as examples the sale of perishable goods, or the deposit of goods forming the subject matter of the dispute with a third person ... [t]hese are merely

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[118] Simpson/Fox (*supra* note 68), at 162.

[119] Concurring Opinion of Mahmoud Kashani, Shafie Shafeiei and Jahangir Sani at 2 (March 16, 1983) to *E-Systems*, Interim Award No.13–388–FT, *supra* note 23. See also Dissenting Opinion of Mahmoud Kashani, at 11 (January 31, 1984) to *RCA Globcom*, Interim Award No.29–160–1, *supra* note 41.

[120] Accord *Behring International*, Interim Award No.52–382–3 (*supra* note 70), at 58, n.47. Cf. Thompson (*supra* note 36), at 150.

examples, many others could be given of where an interim measure might be appropriate"[121].

5. The Right to a Hearing on Interim Measures

Arbitration rules vary considerably on the question of whether a party may demand an oral hearing in regard to an interim measures request. Art.15 (2) of the UNCITRAL Rules recognizes the general right of either party to request, at any stage of the proceedings, that the arbitral tribunal hold a hearing. The limits of this right are somewhat unclear, but the nature of interim measures and the Tribunal's practice indicate that the right does not extend to consideration of interim measures.

The Tribunal has consistently afforded the defending party an opportunity to comment in writing on a request for interim measures[122]. Of the twenty-nine Interim Awards rendered by the Tribunal, however, oral hearings were held in regard to only four[123]. Two of these reflect special considerations: in one case, a hearing was no doubt felt to be desirable because it was the Full Tribunal's first consideration of a request to stay Iranian court proceedings[124], and in the other the hearing was necessary because the issue of jurisdiction was decided concurrently[125].

The last two instances could be read to suggest that the Tribunal accepted a right to a hearing on interim measures. In *Watkins-Johnson and The Islamic Republic of Iran*[126], Chamber Two indicated that it would decide upon Claimant's request for a stay of Iranian court proceedings on the basis of the written pleadings unless a party filed a request for a hearing[127]. Respondent made such a request and a hearing was scheduled[128]. The hearing was unusually brief, however, lasting only a

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[121] Sanders (*supra* note 4), at 196.

[122] If such written comments were not filed by the ordered date, the Tribunal would continue its proceedings and decide upon the interim measures request without the benefit of such comments. See, *e.g.*, *Touche Ross and The Islamic Republic of Iran*, Interim Award No.26–480–1 (Lagergren, Holtzmann & Kashani (DS) arbs., August 17, 1983).

[123] *E-Systems*, Interim Award No.13–388–FT, *supra* note 23; *Watkins-Johnson and The Islamic Republic of Iran*, Interim Award No.19–370–2 (Bellet, Aldrich & Shafeiei (D) arbs., May 26, 1983); *Ford Aerospace*, Interim Award No.28–159–3, *supra* note 52; and *Component Builders*, Interim and Interlocutory Award No.51–395–3, *supra* note 86.

[124] *E-Systems*, Interim Award No.13–388–FT, *supra* note 23.

[125] *Component Builders*, Interim and Interlocutory Award No.51–395–3, *supra* note 86.

[126] Interim Award No.19–370–2, *supra* note 123.

[127] Order of January 26, 1983.

[128] Order of April 6, 1983.

portion of an afternoon[129]. Similarly, in *Ford Aerospace and Communications and The Islamic Republic of Iran*[130], Chamber Three had before it a request by Claimant for a stay of proceedings brought by Respondent in Respondent's national courts. The Chamber issued an Order granting temporary restraining measures and stating that the Tribunal intended to render its decision on the request on the basis of the written pleadings unless either Party requested a hearing[131]. Having received such a request from the Respondent and "[i]n the light of the Tribunal's Order" the Tribunal deemed it "appropriate" to schedule a hearing and to renew the temporary restraining measures for the interim[132]. Richard M. Mosk concurred with the temporary restraining measures but objected to scheduling a hearing arguing that the right to a hearing provided by Art.15 (2) "seems" to apply only to "a decision on the merits of the case" and that certainly hearings would not be required for every decision, especially procedural decisions – a category he believed "arguably" to include requests for interim measures[133].

It is also Chamber Three that has denied most explicitly the right to a hearing in the context of interim measures. In *Component Builders and The Islamic Republic of Iran,* Chamber Three expressed concern whether *prima facie* jurisdiction existed for the issuance of interim measures. Consequently, it ordered temporary restraining measures and scheduled a hearing "on the request for interim measures and on related jurisdictional issues"[134]. Shortly before the scheduled hearing, the Tribunal was informed that the respondents' representatives were unable to attend "due to non-availability of air tickets" and that a postponement of the hearing was therefore requested[135]. The Chamber denied the request for postponement stating "that neither the Tribunal Rules nor Tribunal practice requires that ... a Hearing be held on requests for interim measures ..."[136]; Chairman Mangård's apparent change in position from his Award in *Ford Aerospace* may simply be that. One reconciliation of the two Chamber Three actions,

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[129] Order of May 6, 1983.

[130] Interim Award No.28–159–3, *supra* note 52.

[131] Order of February 22, 1983.

[132] *Ford Aerospace,* Interim Award No.28–159–3 (*supra* note 52), at 5.

[133] Concurring Opinion of Richard M. Mosk, at 1–3 (October 21, 1983) to *Ford Aerospace,* Interim Award No.28–159–3, *supra note 52.*

[134] Order of January 10, 1985.

[135] *Component Builders,* Interim and Interlocutory Award No.51–395–1 (*supra* note 86), at 4–5.

[136] Order of February 19, 1985.

however, is that in *Ford Aerospace* the Chamber's Order of February 22, 1983 was regarded by Chairman Mangård as a special undertaking by the Tribunal that if a hearing were requested it would be scheduled.

The significance of the many instances where no hearing was held is undercut by the fact that the awards do not reveal whether a request by either party was refused. Importantly, however, in rendering these awards the Tribunal generally did not follow its practice on the merits of announcing its intention to decide on the basis of the written submissions unless a hearing was requested[137].

It is Richard M. Mosk's substantive/procedural distinction that ultimately justifies the conclusion that there is no right under the UNCITRAL Rules to a hearing in the case of interim measures. A tribunal constantly makes decisions without hearings. The vast majority of these decisions are merely procedural and, although important, do not ordinarily dispose of the rights of the parties. Although the procedural/substantive distinction is not always easy to make, it is clear that if disposition of the rights of the parties is the test then interim measures more properly are regarded as procedural[138]. Indeed, the doctrines relating to interim measures all aim at avoiding final adjudication of rights; alleged rights are affected for at most a limited time, and provision for security ameliorates even such temporary effects. To conclude there is no r i g h t to a hearing, however, is not to say that special circumstances might not indicate that a hearing should be held nonetheless.

6. The Cost of Interim Measures

Although the granting of interim measures to preserve the rights of one party without p e r m a n e n t l y affecting the rights of the other party is laudable, the t e m p o r a r y effect of ordering interim measures may be the imposition of attendant costs on the other party. Who properly should bear such costs may not be clear until the case is finally resolved[139]. In

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[137] In addition to the above described exceptions of *Ford Aerospace*, Interim Award No.28–159–3, *supra* note 52, and *Watkins-Johnson*, Interim Award No.19–370–2, *supra* note 123, a further exception was *CBA International and The Islamic Republic of Iran*, Interim Award No.31–928–3, at 3 (Mangård, Ansari (DS) & Mosk arbs., November 18, 1983), where in the event neither party requested a hearing.

[138] See also D u m b a u l d (*supra* note 37), at 7–21.

[139] See as to British law, W a l l i n g t o n, Injunctions and the "Right to Demonstrate", 35 Cambridge Law Journal, 82, 83 (1976). "The object of an interlocutory injunction is to protect the plaintiff from irreparable loss during the inevitable delay pending the determina-

Art.26 (2), the UNCITRAL Rules provide that the "arbitral tribunal shall be entitled to require security for the costs of such measures"[140].

The Tribunal practice in this area is sparse because the vast majority of the measures it has granted have given rise to few, if any, costs. In only two cases were costs a potentially significant consequence of the measures ordered. In *The Islamic Republic of Iran and The United States of America* (Consular Property)[141], the Tribunal ordered the stay of a sale by the United States government of Iranian diplomatic and consular properties that, by their nature, were irreplaceable; no mention was made, however, of who should bear the costs of continued storage. The other case, *Behring International and The Islamic Republic of Iran,* has been the subject of three separate interim measures awards. The first of these also ordered the stay of a sale of Respondents' property located in Claimant's warehouse. However, in this case the Tribunal also invited the Parties to brief "the question of which party should bear any costs incurred by Claimant as a result of not carrying out the sale ..."[142]. The second and third Interim Awards dealt with the transfer of the property located in Claimant's warehouse so as to, *inter alia,* prevent deterioration. The Tribunal initially indicated that the property should be transferred to the "modern portion" of Claimant's warehouse and ordered that "if Claimant does make its modern warehouse space available ... it will be compensated, upon application to the Tribunal, for the reasonable value of the use of such facility ..."[143]. The Chamber went on to order Respondent, "in accordance with Article 26, paragraph 2", to deposit a stipulated amount with the Tribunal toward the expense of, *inter alia,* the leasing of the full Behring warehouse[144]. The move within Claimant's warehouse proved not to be feasible

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tion of his claims against the defendant. Since the defendant's interests might be prejudiced by a restraint that later proves to have been legally unwarranted, the plaintiff usually has to give an undertaking to reimburse the defendant's losses if his action is unsuccessful at the trial". – See as to U.S. law, Dobbs, Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?, 52 North Carolina Law Review, 1091 (1974).

[140] As to a similar requirement with the European Court of Justice, see Art.86 (2) of the Rules of Procedure of the Court. – Although Art.26 (2) of the UNCITRAL Rules is silent on the question of who should provide the security, generally it is the party requesting interim measures that should post security for the costs of such measures, with the security being forfeited if the rights threatened prove to have been unfounded.

[141] Interim Award No.33–A4/A15–2 (Riphagen, Aldrich (CS) & Shafeiei arbs., February 1, 1984).

[142] *Behring International,* Interim Award No.25–382–3 (*supra* note 52), at 5.

[143] *Behring International,* Interim Award No.46–382–3 (*supra* note 71), at 5.

[144] Ibid., at 6.

and subsequently, in the third Interim Award in this case, the Chamber ordered the release of the property to Respondent. No doubt because little expense would be generated by such a measure no reference to costs was made in the Award[145].

The ability to require security for the costs of interim measures greatly reduces the need to "balance the convenience" of the measures to both parties, a task undertaken in several municipal systems[146]. The requirement of substantial prejudice necessarily means that the petitioner is exposed to substantial inconvenience. On the other hand, requiring security for the costs incident to interim measures avoids prejudice to the defendant to the petition and therefore reduces sharply the possibility of any inconvenience to that party[147]. Thus it is only in very rare circumstances that both parties will be faced with substantial prejudice and that the conveniences of the parties will need to be balanced by the tribunal.

7. Tribunal and Municipal Court Relations on the Granting of Interim Measures

The relationship between tribunals and courts in regard to the issuance of interim measures is an issue primarily for private international arbitration, whose process is governed or supervised, as the case may be, normally by the municipal legal system of the place of arbitration. Two particular issues which arise in this area are: (1) to what extent, if any, do provisions of the law of the place of arbitration displace Art.26 of the UNCITRAL Rules; and (2) to what extent may a party seek interim measures outside of the arbitral tribunal without violating the agreement to arbitrate.

As to the first issue, Art.1 (2) of the UNCITRAL Rules recognizes that the Rules govern the arbitration "except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that [municipal] provision shall prevail". A municipal law system can take four possible approaches to the question of how its courts and arbitral tribunals under its supervision share control of the granting of interim measures: the power may be divided in

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[145] *Behring International*, Interim and Interlocutory Award No.52–382–3, *supra* note 70.

[146] As to British law, see Wallington, *supra* note 139.

[147] Inasmuch as interim measures have only a temporary effect on the rights of the defendant to the petition, it will be rare that monetary security does not make him whole.

time or by subject-matter, may be shared concurrently, may be exclusively the court's or may be exclusively the tribunal's. Each of these approaches, except for the last, has been employed by one or more countries[148].

The Iran-United States Claims Tribunal has before it certain private claims that arguably are supervised by Dutch law inasmuch as the place of arbitration is The Hague. Under Dutch law, courts and tribunals share the power to order interim measures[149]. As of the date of this Article, parties to claims before the Tribunal have directed their requests for interim measures only to the Tribunal. This is not surprising, however, given that such parties would otherwise require local counsel in order to overcome language difficulties and their lack of familiarity with Dutch procedure.

The second issue is addressed by Art.26 (3) of the UNCITRAL Rules, which states that:

> "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".

This provision is often included in other rules of arbitral procedure[150] and indeed also in municipal arbitration statutes[151]. The provision recognizes that, because of the limited competence and enforcement powers of a tribunal, a "judicial authority" may provide the only adequate means to address the threatened prejudice[152].

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148 See McDonell (*supra* note 115), at 275–279.

149 Pieter Sanders, an authority on Dutch arbitration law writes "Arbitrators may be called upon to issue an interim measure of protection. As such they may order the sale of perishable goods [etc.] ... The law is silent on these subjects, but in my opinion nothing prevents arbitrators to do so on request of one of the parties. Although such a request is theoretically possible, parties are more inclined to demand ... an order from the President of the Court ...". Sanders, The Netherlands, 6 Y.B. Com. Arb., 60, 71 (1981).

The situation is similar in U.S. law, see McDonell (*supra* note 115), at 279–280.

150 See, *e.g.*, ICC Arbitration Rules, Art.8 (5); AAA Arbitration Rules, Art.47 (a); European Convention on International Commercial Arbitration, Art.6 (4) ("A request for interim measures ... addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court").

151 See, *e.g.*, Matray, Belgium, 5 Y.B. Com. Arb., 1, 14 (1980). See also UNCITRAL Model Law on International Commercial Arbitration, Art.9, reprinted in 24 ILM 1302, 1304 (1985).

152 See, *e.g.*, Commentary on Revised Draft, 9th Sess., U.N. Doc. A/CN.9/112/Add.1. – Indeed some writers have argued that Art.26 (3) is evidence that the 1958 New York Convention does not require municipal law to place all authority for the ordering of interim measures with the arbitral tribunal, the later position being taken in, for example, *McCreary Tire & Rubber Co.* v. *CEAT*, 501 F.2d 1032 (3rd Cir. 1974). See Brower/Tupman, Court-Ordered Provisional Measures Under the New York Convention, 80 AJIL 24, 34

In recognizing the right of parties to seek interim measures elsewhere, Art.26 (3) may lead to a conflict between the court to which a request is directed and the tribunal. For example, interim measures sought elsewhere by one party may be viewed by the other party as prejudicial to its interests, and the second party may thus seek from the tribunal interim measures stopping the actions of the first party[153].

Such a conflict between forums is a complex problem. It must be first seen that although Art.26 (3) sets the stage for the conflict, it does not resolve it. Consider the situation presented by *Bendone-DeRossi and The Islamic Republic of Iran* where Respondent requested the Tribunal to stay the execution of an attachment obtained by the Claimant as a measure of protection in German courts[154]. Lagergren and Kashani denied the request on the grounds that "the Tribunal is not at present satisfied that it appears, *prima facie*, that there exists a basis on which it can exercise jurisdiction over the present claim"[155]. Howard M. Holtzmann, agreeing with the result but not the reasoning, argued that the request should be denied on the ground that "Respondent has made no showing of urgency"[156] or, alternatively that:

> "Article 26 [(3)] of the Tribunal Rules [unchanged from the UNCITRAL Rules] makes it clear that the Claimant, in obtaining an order of attachment from the German Court, did not do anything 'incompatible' with proceedings before this Tribunal"[157].

An important assumption underlying this second basis is that the statement in Art.26 (3) that resort to a municipal court for interim measures "shall not be deemed incompatible with the agreement to arbitrate" means that such an act also shall not be considered "'incompatible' with the proceedings". The assumption does not allow for the possibility of an act not incompatible with the agreement to arbitrate yet prejudicial to the arbitral proceeding. The commentary to a draft provision identical to Art.26 (3) states that the article "makes it clear that a party ... may ... request an appropriate judicial authority to take interim protection

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(1986); and McDonell (*supra* note 115), at 288. See generally Reichert, Provisional Remedies in the Context of International Commercial Arbitration, 3 Int'l Tax & Business Lawyer, 368 (1986).

[153] See, *e.g.*, Lalive, *supra* note 53.

[154] Interim Award No.40–375–1, *supra* note 85.

[155] Ibid., at 4.

[156] Concurring Opinion of Howard M. Holtzmann (June 8, 1984) to *Bendone-DeRossi*, Interim Award No.40–375–1 (*supra* note 85), at 12.

[157] *Id.*, at 11.

measures, without thereby violating the agreement to arbitration ..."[158]. Thus, Art.26 (3) makes clear that by resorting to courts for interim measures a party does not lose the right to demand arbitration and does not become subject to suit for breach of its agreement to arbitrate[159]. Art.26 (3) does not preclude, however, a finding by the tribunal that the content of the petitioner's action or the foreign court's decision on the petition prejudices the rights of the other party[160].

Whether the tribunal may in fact grant interim measures conflicting with those ordered by a court is a difficult question. In private international arbitration if the court involved is a court of the place of arbitration, then it is very doubtful that the tribunal, which is governed by the law of the place of arbitration, could entertain a motion for interim measures that opposes measures granted by such a court. But where the court involved is of a state other than the place of arbitration, as in *Bendone-DeRossi*, then the tribunal quite likely is not subordinated to that court by municipal law and, therefore, is not constrained from considering contrary interim measures.

At the other end of the spectrum, by virtue of international law, the interim measures of certain municipal courts may be displaced expressly by measures granted by the tribunal. For example, it is implicit in the third interim measures award in *Behring International and The Islamic Republic of Iran* that the Tribunal believed that although the Claimant had

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[158] Commentary on Revised Draft, 9th Sess., U.N. Doc. A/CN.9/112/Add.1.

[159] Accord Rules of Arbitration, International Chamber of Commerce, Art.8 (5) ("the parties shall be at liberty to apply to any competent judicial authority ... and they shall not by doing so be held to infringe the agreement to arbitrate ...").

[160] A separate question raised by *Bendone-DeRossi* is whether an attachment is an "interim measure" within the meaning of Art.26 (3). If the purpose of Art.26 (3) is to make clear that a request for interim measures from a court rather than the tribunal is neither a waiver nor breach of the agreement to arbitrate, then "interim measures" in Art.26 (3) need include only those measures that can be granted by the tribunal. Certainly resort to a court for measures not available from the tribunal could not be regarded as a waiver or breach of the agreement to arbitrate. Preaward attachments are rarely, if ever, within the power of a tribunal to grant. Even if one interprets Art.26 (3) more generally and posits that the phrase "interim measures" refers to all such measures available from a municipal court rather than a tribunal, the facts of *Bendone-DeRossi* further complicate matters. In particular, the attachment in this case was not a preaward attachment pending the decision of the Tribunal but was rather an attachment aimed at ensuring enforcement of an 1980 ICC award, such unsatisfied award constituting also the basis of the claim before the Tribunal. It can be argued that the German attachment was, in effect, an interim measure to safeguard enforcement of the ICC award if the Tribunal, for example, were ultimately to hold that it did not possess jurisdiction over the claim. Most importantly, however, even if the attachment were characterized as an interim measure of protection, the enforcement of that attachment could not be.

the right to apply for interim measures in a U.S. court, those interim measures by virtue of the Algiers Accords could not contradict those of the Tribunal.

Specifically, in ordering the transfer of Respondents' property from Claimant's warehouse to Respondents', Chamber Three noted that "this Tribunal is not the appropriate forum for determining just how any possessory lien of Claimant [over Respondents' property] is to be protected"[161]. The Award goes on to discuss the relationship between U.S. municipal courts and the Tribunal on the question of interim measures.

> "Nonetheless, the Tribunal may allow for a court of the United States, if and to the extent it deems it appropriate, to take interim measures not in conflict with this Award to safeguard such security interest and stay its order transferring the goods to afford Claimant an opportunity to petition a court of competent jurisdiction for such provisional relief and to implement any order issued by such court. See Article 26 (3) of Tribunal Rules. Such cooperation between this international Tribunal and the municipal courts of one of the States Parties to the Algiers Accords is made necessary by the operation of the peculiar jurisdictional provisions of the Accords upon the even more peculiar facts and circumstances of this case. Simply stated, our jurisdiction does not encompass the entirety of the transaction in which the Parties are involved, yet those aspects within our jurisdiction cannot be adjudicated without potentially prejudicing the rights of the Parties in related disputes outside our jurisdiction"[162].

Article 26 (3) therefore addresses solely the effect of a request for interim measures to municipal courts on the requesting party's rights and duties *vis-à-vis* the agreement to arbitrate. It does not address the tribunal's relationship to the precise content of such a request or to interim measures issued because of the request. These later relationships are determined by the governing municipal and international law.

8. The Mandatory Character and Enforceability of Interim Measures

Although the mandatory character of interim measures is a debated issue with other international bodies because of the wording of the express grants of authority[163], interim measures "take[n]" under Art.26 (1) clearly may place mandatory obligations upon the parties.

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[161] *Behring International*, Interim and Interlocutory Award No.52–382–3 (*supra* note 70), at 60.

[162] Ibid. (footnotes omitted).

[163] For example, in the case of the International Court of Justice, Art.41 of the Statute of the Court only empowers the Court of Justice to "indicate" interim measures, while ICSID

A tribunal may, however, indicate non-mandatory interim measures if it desires and, thus, clarity in drafting of the interim measure award is essential. As a matter of style, the Tribunal often has used the operative term "request" to the annoyance of some and the confusion of many. In its first award of interim measures, the Full Tribunal wrote that it "requests the Government of Iran to move for a stay of the proceedings before the Public Court of Tehran ..."[164]. In a Concurring Opinion, Howard M. Holtzmann and Richard M. Mosk wrote:

> "One might have preferred to express the obligatory nature of the Interim Award by use of the word 'orders' instead of 'requests'. It must be recalled, however, that this is addressed to one of the Governments which established the Tribunal by international agreement. It is to be presumed that such Government will respect the obligation expressed in the Interim Award stating what it 'should' do. Accordingly, we join with those who consider that the term 'requests' is adequate in this context. In these circumstances we consider that a 'request' is tantamount to and has the same effect as an order"[165].

Indeed it does appear that several arbitrators were reluctant to use the term "order" when granting interim measures against a sovereign state[166]. This was the case despite the fact that in the majority of such awards, the preceding reasoning of the award leaves no conclusion other than that "requests" means "orders"[167]. Yet confusion was engendered. Regarding one such "request," Mahmoud Kashani wrote that because it is only a request "it might be possible on this basis to overlook the invalid premises employed in the taking of the Decision ..."[168].

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by Art.47 of the Washington Convention is only authorized to "recommend" interim measures.

[164] *E-Systems and The Islamic Republic of Iran,* Interim Award No.13–388–FT (*supra* note 23), at 11 (emphasis added).

[165] Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk, at 14–15 (February 9, 1983) to *E-Systems,* Interim Award 13–388–FT, *supra* note 23 (footnote omitted).

[166] See Crockett (*supra* note 35), at 354 (discussing "the diplomatic flavor of the language" used by the International Court of Justice in the area of interim measures).

[167] See *Pious Fund* case (*U.S.* v. *Mexico*), Hague Court Reports, 1, 5 (Hague Ct. Perm. Arb. 1902): "[A]ll the parts of the judgement ... enlighten and mutually supplement each other, and ... they all serve to render precise the meaning and bearing of the dispositif (decisory part of the judgement) ...". Quoted *id.,* at 15; *Polish Postal* case, 1925 P.C.I.J. Reports, ser. B, No.11, at 30 (Advisory Opinion of May 16) ("... all the parts of a judgement concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion").

[168] Dissenting Opinion of Mahmoud Kashani, at 8 (January 31, 1984) to *RCA Globcom,* Interim Award No.29–160–1, *supra* note 41.

The mandatory meaning of "request" necessarily became clear as a result of potential or actual non-compliance. In *Behring International and The Islamic Republic of Iran,* Chamber Three "request[ed] the Claimant to take whatever measures are necessary to assure that the sale of assets scheduled ... is not carried out"[169]. After inquiries of the Tribunal as to the meaning of "requests" were made by the two States Parties, the Chairman of Chamber Three rendered an explanatory text stating that "[t]he word 'request' in this type of case and in this context is tantamount to and constitutes an order"[170]. Likewise, when the Tribunal was informed of an alleged violation by Iran of an Interim Award requesting a stay of proceedings in Iranian courts, an Order was issued stating that "it is incumbent on the [Respondents] urgently to take all appropriate measures ..."[171].

Interim measures granted in the form of awards, as allowed by Art.26 (2) of the UNCITRAL Rules[172], also can be enforced. The key practical issue with enforceability of awards of interim measures, at least in private international arbitration, is whether the court from which enforcement is sought regards the award as final or interlocutory, the latter generally not being enforceable[173]. Thus in *Sperry International Trade* v. *Government of Israel*[174], the United States District Court for the Southern District of New York enforced an award of interim measures characterizing it as "a final Award on a clearly severable issue"[175] and stated that

> "Only awards that are final are subject to judicial review [and enforcement]. Final awards are those that 'purport to resolve finally the issues submitted to them' ... Disposition of an issue that is severable from other issues still before the arbitrators may be deemed final and subject to confirmation"[176].

Given that an award of interim measures under the UNCITRAL Rules is final and binding upon the parties[177], such awards likewise should be

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[169] Interim Award No.25–382–3 (*supra* note 52), at 5.

[170] Interpretation of August 12, 1983 to Interim Award No.25–382–3.

[171] *Ford Aerospace & Communications and The Islamic Republic of Iran,* Case 159, Chamber Three, Order of November 19, 1984 (emphasis added).

[172] Art.26 (2) provides in part that "interim measures may be established in the form of an interim award".

[173] See *Michaels* v. *Mariforum Shipping S.A.*, 624 F.2d 411 (2nd Cir. 1980) (U.S. district courts may not review an interlocutory ruling of an arbitration panel).

[174] 532 F. Supp. 901 (S.D.N.Y. 1982), aff'd F.2d 301 (2nd Cir. 1982), reprinted in 21 ILM 1066 (1982).

[175] 532 F. Supp., at 909.

[176] 532 F. Supp., at 906. See also McDonell (*supra* note 115), at 294; von Mehren, The Enforcement of Arbitral Awards under Conventions and United States Law, 9 Yale Journal of World Public Order, 343, 362–364 (1983).

[177] See notes 163 and 187 and accompanying texts.

enforceable. Indeed, the provision in Art.26 (2) allowing for interim measures in the form of an interim award was intended "to facilitate the enforcement of [the] interim measures taken ..."[178].

9. Sanctions for Failure to Implement Interim Measures

The sanctions available to a tribunal for the failure of a party to implement interim measures are few, if any. This is not to say, however, that a tribunal may not encourage compliance with the interim measures ordered by it.

Tribunals generally do not have the power to penalize parties. The area of tribunal sanctions against parties deserves extensive study but is beyond the scope of this Article. Suffice it to say that at present the power of a tribunal to sanction a party, unless expressly authorized by the arbitral agreement, is nascent at best. Indeed, during the drafting of the ICSID Convention, the "First Draft" of the article addressing interim measures provided that "[t]he Tribunal may fix a penalty for failure to comply with provisional measures"[179]. This provision was deleted, however, by the "nearly unanimous vote" of the drafting committee[180].

The Tribunal has been reticent thus far in exploring the range of its sanctions. When one party failed to stay prejudicial municipal court proceedings as had been ordered, the other party petitioned for sanctions. The Tribunal denied the request, stating that sanctions such as taking Claimant's facts as established, refusing to allow Respondent to oppose the Statement of Claim or introduce evidence, striking the counterclaim or entering a default judgement "are not provided for under the Tribunal Rules"[181].

It must also be recognized that the failure to implement binding interim measures is a breach of the agreement to arbitrate that gives rise to a cause

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[178] Commentary on Revised Draft, 9th Sess., U.N. Doc. A/CN.9/112/Add.1.

[179] 1 ICSID, ICSID-History of the Convention, 206 (1970). Three types of penalties mechanisms were considered: (1) "a sum to be forfeited to a court"; (2) "an amount ... forfeited to a party"; and (3) a predesignated liquidated damage to be added to the final award if the party violating the interim measures order lost its case. 2 ICSID, ICSID-History of the Convention, 812–813 (1970).

[180] 2 ICSID, ICSID-History of the Convention, 815 (1970). "The duty to abide by the decisions ... is a moral duty, and, as such, incompatible with material penalties". Ibid., at 818.

[181] *Questech and The Ministry of National Defence of Iran,* Case 59, Chamber One, Order of March 2, 1984.

of action for proximate damages[182]. An award of such damages could, of course, serve as an incentive to a party to implement the measures. In the case of the Tribunal, either State Party could seek damages under the interpretation and application jurisdiction the Tribunal possesses over the Accords[183]. In addition, the failure to implement interim measures raises the costs of arbitration for the other party who normally files further motions with the tribunal seeking reaffirmation of the measures. The tribunal could award such costs to the affected party as an additional (albeit small) incentive toward compliance with the interim measures.

In large part, the difficulty of any tribunal encouraging compliance with its orders stems from the nature of the body. For a private international arbitral body, the municipal law governing or supervising the arbitration normally reserves to the state any matter requiring coercion or punitive sanctions. Indeed, where immediate enforcement is necessary, the Commentary on the Revised Draft of the UNCITRAL Rules thought it better that the measures be requested of judicial authorities[184]. Thus the simple answer is that sanctions are not generally thought to be the job of such tribunals – rather tribunals render awards of interim measures, which may be enforced by municipal courts by a variety of means including sanctions. The case of public international arbitration is only slightly different with sanctions stemming not from the tribunal but rather through an action of the U.N. Security Council, self-help, or through a municipal court that has recognized and agreed to enforce the award[185].

All this is not to say, however, that a tribunal does not have options regarding the real issue, that is, preservation of the rights of the parties pending the decision of the tribunal. If a tribunal cannot preserve these rights by interim measures because a party refuses to implement such measures, then it can reduce the time the rights are in jeopardy by expediting its decision on the merits. I do not propose that the process be accelerated so much that other rights of the parties, such as the right to a hearing, are denied. Rather, I suggest that the often generous amounts of time

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182 As to the possibility of such damages before the International Court of Justice, see Crockett (*supra* note 35), at 371–372.

183 See *supra* note 106.

184 Commentary on Revised Draft, 9th Sess., U.N. Doc. A/CN.9/112/Add.1. See also Summary of Discussion on Preliminary Draft, 8th Sess., U.N. Doc. A/10017, para. 163.

185 See E. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law (1966); Reisman, Enforcement of International Judgments, 63 AJIL 1 (1969); and Schachter, The Enforcement of International Judicial and Arbitral Decisions, 54 AJIL 1 (1960).

granted for preparation of memorials be kept to a minimum and that motions for postponement of hearing dates not be entertained except for the most serious of reasons. In one case before the Tribunal, for example, where a claimant indicated that the respondents were not obeying the Tribunal's order to suspend litigation in Iran, the Tribunal moved the pre-hearing conference scheduled in that case forward by two months[186].

If a tribunal did not have the power to order interim measures, its likely response to an action threatening the rights of one of the parties under adjudication would be to render its decision as quickly as possible. It is difficult to see why a tribunal should not do so when the power is denied effectively by the failure of a party to implement measures ordered.

10. Reconsideration and Revocation of Interim Measures

A chief factor determining whether a tribunal may revise or revoke a grant of interim measures under the UNCITRAL Rules is whether such measures are granted via an "Award" or an "Order". Unlike an order, an award granting interim measures is "final" under Art.32 (2) of the UNCITRAL Rules and thus is not itself subject to revision or revocation[187].

The irrevocable nature of interim measures awards rendered under the UNCITRAL Rules can be understood by contrasting the practice of the International Court of Justice. The *Sino-Belgian Treaty* case[188] has been cited by several scholars as illustrative of revocation of interim measures by the International Court[189]. In this case an order for provisional measures was issued to protect the rights of Belgian nationals in China under a treaty renounced by China. Subsequently, Belgium and China reached an agreement on a provisional régime for the Belgian nationals that appeared likely to replace the treaty. Given the new circumstances, the President of the International Court revoked the interim measures.

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[186] See, *RCA Globcom Communications and The Islamic Republic of Iran,* Case 160, Chamber One, Order of January 17, 1985.

[187] Art.32 (2) states only that the "award" is final. However, Art.32 (1) makes it clear that the term "award" embraces "[i]n addition to ... a final award ... interim, interlocutory, or partial awards". See *Chas T. Main International and Khuzestan Water and Power Authority,* Case 120, Chamber Two, Order of January 13, 1984 (Interlocutory Awards are final and binding under Art.32 (2)).

[188] *(Belgium* v. *China)* 1927 P.C.I.J. Reports, ser. A, No.8 (Order of February 15).

[189] See Elkind (*supra* note 16), at 90; and Sztucki (*supra* note 5), at 198 ("In the Court's practice interim measures were revoked only once – in the *Sino-Belgian Treaty Case*").

The International Court of Justice grants interim measures on the basis of Art.41 of its Statute, which states that:

> "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".

It is significant that the International Court in preparing its Rules[190] interpreted Art.41 as authorizing the following Rule of the Court:

> "At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification"[191].

Thus it could be argued by analogy that a tribunal under the UNCITRAL Rules also has the power to revoke an interim measures award when "some change in the situation justifies such revocation or modification". The analogy breaks down, however, because the International Court and a tribunal under the UNCITRAL Rules afford different degrees of finality to such measures. As noted International Court scholar Edvard Hambro writes,

> "The [International Court] rule of *res judicata* is laid down in Article 60 of the Statute which states that 'the Judgment is final and without appeal'. This means a judgment of the Court. It does not mean an advisory opinion. It does not mean an order. And provisional measures are invariably indicated in the form of an order"[192].

A tribunal operating under the UNCITRAL Rules, on the other hand, can grant interim measures via an Award and such an "Award" falls squarely within the "final and binding" language of Art.32 (2) of the Rules. In this sense, a request for revocation of an award of interim measures should be treated the same as a request to reconsider, revise or revoke any other award of the tribunal.

On the more general issue of revocation, the Tribunal consistently has concluded that "awards" are not subject to reconsideration, revision or revocation. As stated by Chamber One in *Mark Dallal and The Islamic Republic of Iran:*

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[190] Art.30 (1) of the Statute of the Court provides that "the Court shall frame rules for carrying out its function ... [and] lay down rules of procedure".

[191] Art.76 (1) of the 1978 Rules of the Court (emphasis added); see also Art.61 (2) of the 1946 Rules, and Art.61 (7) of the 1936 Rules of the Permanent Court of International Justice.

[192] Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice, in: Rechtsfragen der internationalen Organisation, 152, 163 (1956). See also Crockett (*supra* note 35), at 351.

"In order to promote the finality of Awards, the Tribunal Rules limit the powers of the Tribunal after an Award has been issued. Thereafter, the arbitrators may only give an interpretation of their Award (Article 35), or 'correct any errors in computation, any clerical or typographical errors, or any errors of similar nature' (Article 36), or make an additional Award 'as to claims presented in the arbitral proceedings but omitted from the award' (Article 37) ...

Nor is there any provision for the rescission of, or appeal from, an Award of the Tribunal, or for the re-hearing of a case in which an Award has been rendered"[193].

The issue presented by a request for revocation is in part only a formal one given that the substantive effect of an interim award may be cancelled by rendering of a further interim award superceding the earlier interim relief[194]. In such a case the earlier relief is not revoked *ab initio* but rather the temporary period for which it was to exist is drawn to a close[195]. The difference between revocation and supercession is not only formal, however, because supercession implicitly recognizes that the earlier measures were binding for some time and that a failure to observe those measures for that time would be a breach of the agreement to arbitrate.

Furthermore, because of the *res judicata* effect of the first award of interim measures, any subsequent motion cannot seek merely to readjudicate the first award. Instead subsequent motions must present new circumstances for consideration. Such circumstances normally will have arisen since the first award, although it is possible that a party will present older circumstances that have been newly discovered or that could not have been presented because, for example, the first award was rendered *ex parte*.

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[193] Decision No.30–149–1 (Lagergren, Holtzmann & Kashani arbs., January 12, 1984). See also *Henry Morris and The Islamic Republic of Iran,* Decision No.26–200–1 (Lagergren, Holtzmann & Kashani arbs., September 16, 1983); and *Dames & Moore and The Islamic Republic of Iran,* Decision No.36–54–3 (Mangård, Ansari (D) & Brower arbs., (April 23, 1985) (discussing also reconsideration/revision arguments based on Arts.15 (1) and (2) and 29 (2)). A possible basis for revision or revocation mentioned but left undecided by the Tribunal in all three of these cases is procurement of an award by fraud or perjury. See generally *Lehigh Valley Railroad (U.S.)* v. *Germany* (U.S.-German Mixed Claims Comm., December 15, 1933) reprinted in 8 RIAA 160, 182 (Held that "[e]very tribunal has inherent power to reopen and to revise a decision induced by fraud"); W. Reisman, Nullity and Revision (1971).

[194] Accord Borchardt (*supra* note 16), at 207 ("the interim measures may only have a temporary nature as the order only has an interim effect ...").

[195] See Request of the United States for Revocation of Interim Award of February 1, 1984, at 8, filed February 21, 1984, reprinted in Iranian Assets Lit. Rep., 8,019 (February 24, 1984) ("interim relief is by nature temporary, and the Tribunal has discretion under Article 26 to terminate or limit the continuing effect of an interim award").

Thus Chamber One denied a second request by Respondents for interim measures in *Boeing and The Islamic Republic of Iran* because "[n]o new relevant facts have come to the Tribunal's attention ... which would warrant reconsideration of the [earlier] Interim Award ..."[196].

III. Concluding Observation: Procedural Decision-Making in the Area of Interim Measures

No matter how detailed the jurisprudence of interim measures becomes, one can be certain that new questions will continue to arise. It is appropriate therefore to discuss the primary considerations that should guide tribunals making decisions in the area of interim measures.

Interim measures are to be favored. They are the necessary price of the time-consuming procedural safeguards so deeply imbedded in modern litigation and arbitration. This bias in favor of interim measures is manifest in many aspects of the doctrine pertaining to such measures. Unfortunately, the doctrine is often couched in negative terms. For example, the rule that interim measures may not operate to grant the final relief sought provides a tribunal an answer to a situation. The rule, however, does not contribute positively to conserving the rights of the parties pending the decision of the tribunal. A more positive statement of this rule is that although interim measures cannot grant the final relief requested, the tribunal and parties working together can ordinarily devise interim measures that will conserve the rights of the parties without granting the final relief requested.

The tribunal as a part of the system for resolution of international disputes should work positively toward conserving the rights of the parties pending the decision of the tribunal. Interim measures are only one means of doing so. If interim measures are not available or are not effective, and the rights of a party are threatened, then the tribunal should proceed expeditiously with its work to minimize the time the party's rights are at risk.

A request for interim measures may be made in bad faith to delay the proceedings and harass the opposing party. When the challenged action

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[196] Interim Award No.38–222–1, *supra* note 105. See also *The Islamic Republic of Iran and The United States of America* (Consular Properties), Case Nos. A4/A15 (III), Chamber Two, Order of January 18, 1984 (while denying the request the Tribunal stated "this decision ... does not prevent the Party which has made the request from making a fresh request in the same case on new facts"); *Fluor Corporation and the Islamic Republic of Iran,* Interim Award No.62–333–1, at 4 (Böckstiegel, Holtzmann & Mostafavi (SO) arbs., August 7, 1986).

TABLE 3

Decision-Making in Interim Measures

The Choice: The Arbitral Process Used	The Motivation: The Urgency Required of a Decision	The Effect: The Rights Afforded and the Substantive Test Used	The Justification: The Scope and Effect of Relief Granted
Temporary Measures of Restraint	Very urgent, insufficient time to request comments or to assemble the tribunal.	Very few rights, temporary measures are granted unless the request or claim is manifestly deficient and may, if necessary, be issued *ex parte*.	Very temporary, to be reconsidered upon receipt of comments.
Interim Measures of Protection	Urgent, the problem must be addressed prior to a decision on the merits.	Interim measures are granted if a *prima facie* case is presented. The defending party has the right to comment on the petition but not to demand a hearing.	Binding only until a decision on the merits is reached. The costs resulting from such temporary measures are potentially compensated for.
Expedited Arbitral Proceedings	Urgent, interim measures are not available or not effective.	All rights normally present are afforded including the right to an oral hearing; except that only serious postponements of proceedings are granted.	Final adjudication of the rights of the parties.
Normal Arbitral Proceedings	No or insufficient urgency.	All rights normally present are afforded including the right to an oral hearing.	Final adjudication of the rights of the parties.

poses little prejudice to the rights of the petitioner, the arbitrator should consider carefully the intent behind the request. A manifestly abusive request should be rejected quickly.

Consideration of the Tribunal's practice shows decision-making in the area of interim measures to be dominated by a tension between the desire to protect a party quickly from a prejudicial act and the danger of rushing to a decision that in fact prejudices the other party or the arbitration itself. There is thus a conflict between the speed with which an urgent situation must be addressed and the time which any structured decision process takes.

Ultimately the necessary speed may be gained only by streamlining the decision process. The dangers of such simplification are avoided by limiting the scope and the effect of the interim measures on the rights of the parties. The scope is limited by the granting of relief for only a limited period of time; the effect is limited by provision for indemnification of the cost of such relief. In other words, the relief is designed to address the urgency presented but not to adjudicate the alleged rights involved. Thus as urgency requires increasing speed in decision-making there is a corresponding decrease in the protections against error afforded the parties by the procedural and substantive tests employed. This decrease in protection against error is justified by a contemporaneous decrease in the scope and effect of the decision rendered.

The relationships of the possible c h o i c e s of an arbitral panel to (1) the urgency required of a decision (the m o t i v a t i o n for the choice); (2) the procedural rights granted the parties and the substantive test used by the panel (the e f f e c t of the choice); and (3) the scope of the relief granted (the j u s t i f i c a t i o n for the effect) are summarized in Table 3.

A consequence of designing interim measures not to adjudicate the rights of the parties is that the measures are considered in a process that is a side show to the arbitration. Recognition of this is particularly important in interim measures decision-making because, for example, although a party may not have the right to an oral hearing, it certainly may seek to convince the tribunal of the advisability of holding one nonetheless. Given that interim measures are ancillary and have little effect on the central rights of the parties, considerations of cost and efficiency suggest that the tribunal should render its interim measures decision as inexpensively and quickly as possible so that it may return to its primary task, adjudication of the claim presented.