

NOTES

STRENGTHENING INTERIM MEASURES IN INTERNATIONAL ARBITRATION

STEPHEN BENZ*

ABSTRACT

Interim measures are playing an increasingly important role in the international arbitration system. However, interim measures are plagued by two inter-related problems. First, this Note analyzes institutional rules and published arbitral case law to show that some arbitral tribunals have established lower standards for issuing interim measures relative to national courts. Second, this Note analyzes the national courts of the United States, Germany, and the United Kingdom to show the discordance among national courts in the enforcement of interim measures issued by a tribunal. This paper highlights the inter-related nature of these two problems, and proposes an international convention that harmonizes the enforcement of interim measures, while at the same time raising the standard necessary to issue interim measures.

| | | |
|------|--|-----|
| I. | INTRODUCTION | 144 |
| II. | INSTITUTIONAL RULES ON INTERIM MEASURES | 148 |
| | A. <i>The ICC 2012 Arbitration Rules</i> | 148 |
| | B. <i>ICSID Arbitration Rules</i> | 149 |
| | C. <i>LCIA Arbitration Rules</i> | 150 |
| | D. <i>UNCITRAL Arbitration Rules</i> | 150 |
| III. | PUTTING MEAT ON THE BONES: EXAMINING THE FIVE FACTORS FOR ISSUING INTERIM MEASURES. | 151 |
| | A. <i>Factor 1: A Prima Facie Showing of Jurisdiction: The Case of Pey Casado v. Chile</i> | 152 |
| | B. <i>Factor 2: A Prima Facie Showing of Merit as Shown in ICC Case No. 10596</i> | 154 |
| | C. <i>Factor 3: Irreparable Harm or Merely Harm? An Examination of Paushok v. Mongolia</i> | 156 |
| | D. <i>Factor 4: Proportionality of the Interim Measure</i> | 162 |
| | E. <i>Factor 5: Urgency as Shown in Railroad Development Corp v. Guatemala</i> | 163 |
| | F. <i>A Proposal for Reform: The Need to Raise the Standards</i> | 164 |

* Stephen Benz is a JD Graduate from Georgetown University Law Center. He would like to thank Professor David Stewart for comments on this draft. © 2019, Stephen Benz.

| | | |
|-----|---|-----|
| IV. | THE LACK OF HARMONIZATION IN ENFORCING INTERIM MEASURES . . . | 166 |
| A. | <i>The Approach to Enforcing Interim Measures in German National Courts</i> | 167 |
| B. | <i>The Approach to Enforcing Interim Measures in British Courts</i> | 168 |
| C. | <i>The American Approach to Interim Measures</i> | 171 |
| D. | <i>Comparing and contrasting the different approaches to enforcement</i> | 173 |
| V. | CONCLUSION: THE NEED FOR HARMONIZATION AND THE RAISING OF STANDARDS | 174 |

I. INTRODUCTION

Consider the following hypothetical: Two companies—a European battery maker and a Chinese automaker—develop a joint venture to create an electric car. At first, things go well in their contractual relationship, and both parties successfully create a prototype in the United States at the Chinese automaker’s manufacturing plant. The Chinese automaker, however, starts to miss deadlines in the contract leading to a dispute. The European company brings an action in the United States against the Chinese automaker for breach of contract. Once the European company brings its suit, however, it is concerned that the Chinese automaker will move the prototype to one of its factories in China.¹ While the dispute is being litigated, what solution could the European battery maker employ to prevent the automaker from moving the prototype? If the European company filed its complaint in a national court system, it could easily solve its problem by simply filing for an injunction to prevent the removal of the prototype. But what happens if the contract between the Chinese and European company is subject to an arbitration clause?² How can the European company prevent the Chinese company from removing the prototype?

Recognizing this problem, several private international arbitral institutions have augmented the authority of a tribunal to issue interim measures. Interim measures, sometimes called measures of protection, are “any temporary measure[s] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided.”² Interim measures that a tribunal could issue include attachments,

1. See Douglas C. Rennie & Peter J.W. Sherwin, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT’L ARB. 317, 359 (2009).

2. Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 INT’L TRADE L.J. 55 (2003).

injunctions, partial payment of claims, and orders to deposit money in an escrow account pre-judgment.³ In the late 1990s and early 2000s, more and more participants in international arbitration looked to arbitral tribunals to issue interim measures.⁴ In fact, a 2012 study by Queen Mary University and White & Case found that participants were turning more to arbitral tribunals to issue interim measures rather than national courts.⁵ Furthermore, Gary Born's analysis of interim measures found that "arbitral tribunals have demonstrated an increasing willingness over the past fifteen years or so to entertain and grant applications for provisional measures."⁶ Additionally, in a 2002 survey of international arbitrators conducted by the Global Center for Dispute Resolution Research, sixty-four respondents identified fifty separate arbitration cases in which interim measures were employed in an international dispute.⁷ Furthermore, the issuance of interim measures is significant in international arbitration even though arbitral tribunals lack the power of national courts to enforce the interim measures. Indeed, one study found that sixty-two percent of interim measures issued by tribunals are adhered to by the parties without the need for national courts to enforce the order.⁸ Even if parties do not initially comply with the interim measures issued by tribunals, some national courts—such as those in Germany, *infra*—will enforce interim measures after a tribunal has issued them even if, the tribunal is not seated there.⁹

Interim measures are essential to the efficacy of any arbitration process because they have the "effect of compelling parties to behave in a way that is conducive to the success of the proceedings, preserving the rights of the parties, preventing self-help, keeping peace among the parties, and ensuring that an eventual final award can be implemented."¹⁰ Without interim measures, a party could destroy evidence

3. *Id.*

4. Michelle Grando, *The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop*, KLUWER ARB. BLOG (July 20, 2016), <http://kluwerarbitrationblog.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop/?print=pdf/>.

5. *Id.*

6. See GARY B. BORN, *Provisional Relief in International Arbitration*, INTERNATIONAL COMMERCIAL ARBITRATION § 17 at 2462 (2d ed. 2014).

7. RAYMOND WARBICKI, *Arbitral Interim Measures: Fact or Fiction?* AAA HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR § 18 at 89, 90 (2d ed. 2010).

8. Grando, *supra* note 4.

9. See Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2 ELEC. J. COMP. L. 2 (1998), <http://ejcl.org/22/art22-2.html/>.

10. Ferguson, *supra* note 2.

in order to defy an arbitration or move assets in anticipation of an unfavorable arbitration award.¹¹ However, the imposition of excessive interim measures could result in severe financial strain on the non-moving party.¹² Consequently, the standards used by an arbitral tribunal in determining interim measures are extremely important to both the claimants and respondents in a case.

To be sure, the issue of interim measures is not a novel issue. Several academic articles and hornbooks have traced the growth of interim measures in international commercial arbitration.¹³ But scholars have yet to analyze deeply the standards that tribunals have developed for determining when to issue interim measures. Nor have scholars actually analyzed the reasoning that tribunals have used when determining whether to issue interim measures.

Attempting to fill this gap in the academic literature on interim measures, this Note traces the standards that have been developed for the issuance of interim measures, and more importantly, critically analyzes how various tribunals have implemented these standards. Through research and analysis this Note contributes to solving two interrelated problems with interim measures. First, the standards that tribunals have used and developed for issuing interim measures are woefully low. Second, national courts lack harmonization in enforcing interim measures issued by private international tribunals. This Note

11. BORN, *supra* note 6 (“Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant tribunals or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unlikely.”).

12. See Sashe D. Dimitroff & Francisco Rivero, *Interim Measures and Arbitral Clauses*, LAW360 (Mar. 1, 2001), <https://www.law360.com/articles/228330/interim-measures-and-arbitral-clauses> (“However, as a party subject to suit, interim measures can easily cripple a company’s assets, cash flow and viability — all in advance of a judgment on the underlying dispute and, often, without your participation or knowledge (via ex parte proceedings)”); Tom Jones, *Mauritian State Entity Hit with Cargo Freeze in India*, GLOBAL ARB. REV. (Dec. 5, 2017), <https://globalarbitrationreview.com/article/1151422/mauritian-state-entity-hit-with-cargo-freeze-in-india> (noting a case in which an Indian court issued interim measures that seized a shipment of crude oil scheduled to be shipped to Mauritius after a \$120 million Singapore International Arbitration Centre Award, “despite complaints from Mauritius that it would be hard hit as a result of the ‘paucity’ of petrol available.” The article further noted that as “[a]n island nation with a population of about 1.2 million, Mauritius has no exploitable natural resources and therefore depends on imported petrol products to meet most of its energy requirements – the vast majority of which is imported from India.”).

13. See BORN, *supra* note 6, at 2424-2563; William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 Brook. J. Int’l L. 1059, 1059-99 (2002); Grégoire Marchac, *Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT’L ARB. 123, 123-24 (1999).

seeks to solve these two interrelated problems by calling for an international convention which a) requires tribunals to increase the standards necessary for issuing interim measures and b) harmonizes national laws to allow for the enforcement of interim measures in national courts.

The Note is divided into three parts. In the first section, the Note compares and contrasts the rules of various arbitral institutions regarding interim measures, demonstrating that most of the institutional rules on interim measures have merely given a skeletal framework for issuing interim measures. The second part of the Note analyzes the “common arbitral law” approach that has emerged in order to flesh out the requirements for a tribunal to issue interim measures.¹⁴ Specifically, the section looks at five factors that are often cited in arbitration panel decisions when the tribunal considers issuing interim measures: a *prima facie* finding of jurisdiction, a *prima facie* showing that the claim is susceptible to resolution in favor of the claimant, a risk of irreparable harm, proportionality, and urgency.¹⁵ The Note explains each of these five factors through a varied collection of arbitration cases, ultimately critiquing the low threshold that tribunals have applied in four of the five factors. To ameliorate this problem, this Note proposes that tribunals increase the threshold needed to issue interim measures. The third part of the Note looks at the problem of enforcing interim measures through nations’ disparate court systems. This section highlights the lack of harmonization in enforcing interim measures across different national court systems by comparing and contrasting the approaches of Germany, the United States, and Great Britain in enforcing interim measures issued by a tribunal.

The Note concludes by positing that the international arbitration system would benefit from harmonizing the enforcement of interim measures via an international instrument akin to the New York Convention, the law governing the enforcement of foreign arbitral awards in the 159 countries that are signatories of the Convention. The Note recommends adoption of the German system as the best option for strengthening the international arbitral system. Concomitantly, the Note argues that harmonization should only occur if tribunals heighten the standards under which they issue interim measures. Failure of tribunals to

14. To be sure, there is not a true common arbitral law because tribunals are not bound by the decisions of their predecessors. But several tribunals cite decisions of previous tribunals when considering interim measures, which many scholars have argued have crystallized in the form of an “arbitral common law.” See generally, CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).

15. See BORN, *supra* note 6, at 2468.

elevate their standards for interim measures would have the unusual result of making private international tribunals more powerful than national courts. That is, private international tribunals would be flexing their power in a way that national courts would not normally do, which would cause national courts to decline to enforce the tribunals' interim measures. Consequently, the Note also advocates that harmonizing the enforcement of interim measures should be contingent on arbitration panels raising the standard necessary for issuing interim measures.

II. INSTITUTIONAL RULES ON INTERIM MEASURES

Any analysis of interim measures must begin with an examination of the institutional rules on interim measures to lay the framework for our understanding of interim measures. Most arbitral institutions provide only minimal guidelines for interim measures within their rules. These rules generally provide who may request interim measures and when a tribunal can issue them. The rules further generally agree that any interim measures issued by a consensually constituted tribunal are legally binding on the parties. However, only some institutions' rules give national courts a role in buttressing a tribunal's issuance of interim measures. Furthermore, only some have a procedure for emergency interim measures that may be necessary in an urgent situation.

This section compares and contrasts the arbitration rules for four of the major international arbitral institutions—the International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL), International Center for Settlement of Investment Disputes (ICSID), and the London Court of International Arbitration (LCIA).¹⁶ Three of the four arbitral institutions provide a bare skeletal framework that provides minimal assistance to tribunals, while the UNCITRAL rules provide a little more, albeit incomplete, guidance. Consequently, tribunals have had to develop a “common arbitral law”¹⁷ to flesh out the requirements for interim measures.

A. *The ICC 2012 Arbitration Rules*

The 2012 ICC Arbitration Rules are generally sparse on the issue of interim measures. The rules provide two ways to issue interim

16. These four institutions were selected because they represent the major international tribunals. For an excellent comparison of interim measures in other arbitral institutions, see Douglas C. Rennie & Peter Sherwin, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. OF INT'L ARB. 317, 317-366 (2010).

17. Brown, *supra* note 14, at 135.

measures. First, interim measures can be issued after the tribunal is constituted. For example, Article 28 grants the arbitration panel, at the request of a party, the ability to “order any interim or conservatory measure it deems appropriate so long as the requesting party furnishes appropriate security.”¹⁸ In addition, the ICC rules allow parties to apply to any competent national court before even requesting the tribunal to make such interim measures.¹⁹ In the event that a party needs interim measures to be ordered before the tribunal is constituted, the ICC rules allow for the appointment of an emergency arbitrator whose “decision shall take the form of an order.”²⁰ The rules also bind parties to comply with any order made by the emergency arbitrator but note that “the emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order.”²¹ Beyond these two methods of seeking interim measures, however, the ICC rules provide little other instruction or guidance on what factors an arbitration panel should consider before issuing interim measures.

B. ICSID Arbitration Rules

The International Centre for the Settlement of Investment Disputes formed after the signing of the Washington Convention in 1966. Currently, there are 153 signatories to the Washington Convention, which governs disputes between investors and nation-states. Article 47 of the Washington Convention also provides for the issuance of interim measures by ICSID tribunals.²² To flesh out the loose requirements of the Convention, Rule 39 of the ICSID arbitration rules allows parties to apply to the ICSID tribunal for interim measures.²³ Like a party in an ICC arbitration, a party in an ICSID tribunal can make a request for an interim measure directly to a national court.²⁴ Notably, however, an ICSID tribunal “may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.”²⁵ ICSID regulations offer no instruction on what criteria a tribunal

18. INT’L CHAMBER OF COMMERCE, ICC Arbitration Rules, art. 28 (2012).

19. *Id.*

20. *Id.* at art. 29.

21. *Id.*

22. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 47, Mar. 18, 1965, 17 U.S.T. 1270, 575, U.N.T.S. 159.

23. INT’L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, Regulations and Rules, rule 39 (2006), https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

24. *Id.* at rule 39(1).

25. *Id.* at rule 39(3).

should use in deciding whether to issue interim measures. Consequently, ICSID cases, like ICC cases, have required arbitration panels to flesh out the requirements of interim measures.²⁶

C. *LCIA Arbitration Rules*

Article 25 of the LCIA Arbitration Rules likewise grants arbitration panels the ability to issue provisional measures, including deposit of security, preservation of material items to an arbitration, and provision of any relief sought.²⁷ An important feature of the LCIA system is that interim measures can be issued only after parties have had enough time to respond to a request for interim measures and the parties have been able to argue before the tribunal.²⁸ Similar to the ICC and ICSID rules, Article 25.3 liberates parties to seek interim measures in the national court system as well as through the tribunal.²⁹ The LCIA rules, like the ICSID and ICC rules, are also noticeably silent on the criteria necessary for a tribunal to issue interim measures. Thus, all three sets of arbitral rules suffer from a lack of detail, which leaves room for confusion.³⁰ This is in contrast to the next set of arbitral rules, the UNCITRAL rules.

D. *UNCITRAL Arbitration Rules*

Interim measures under UNCITRAL serve a heightened role considering the need for a quick action in international trade, especially in situations involving the trade of perishable goods. Consequently, the UNCITRAL rules on interim measures have the most developed standards to guide a tribunal.³¹ In their original form in 1976, the rules on interim measures consisted only of three paragraphs.³² Like the ICC rules, the original UNCITRAL rules allowed the arbitration tribunal to

26. See BORN, *supra* note 6, at 2445.

27. LONDON COURT OF INTERNATIONAL ARBITRATION, Arbitration Rules, art. 25 (2014), available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.

28. *Id.* at art. 25.2.

29. *Id.* at art. 25.3.

30. See BORN, *supra* note 6, at 2445 (“Most institutional rules provide little, if any, guidance to arbitrators concerning the circumstances in which provisional measures should be granted. In contrast to the 2010 UNCITRAL Rules. . .most institutional rules do not prescribe standards for the grant of interim relief (e.g., requirements for irreparable harm, balance of hardship). Instead, institutional rules almost uniformly leave the formulation of standards for interim relief to the arbitral tribunal and applicable law.”).

31. See *id.* at 2442.

32. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL Arbitration Rules, art. 26, U.N. Doc. 38/91 (Dec. 15, 1976).

issue interim measures if one of the parties requested so.³³ On this point, the 1976 UNCITRAL rules held that a tribunal may issue 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.”³⁴

Since the 1976 rules, the UNCITRAL rules have evolved from three simple provisions to nine more developed provisions.³⁵ Notably, the 2013 amended UNCITRAL rules—unlike the ICC, ICSID, or LCIA rules—flesh out what considerations should be made by the tribunal when considering interim measures.³⁶ Specifically, subsection 3 of Article 26 of the 2013 amended UNCITRAL rules requires tribunals to consider two factors: (a) whether it is necessary to issue interim measures because the moving party will suffer an irreparable harm and (b) whether the moving party has a reasonable possibility that it will succeed on the merits of the claim.³⁷ Thus, the UNCITRAL rules are distinct in that they flesh out the criteria that a tribunal should weigh when considering whether to issue interim measures.

The inclusion of these two criteria for the issuance of interim measures in the UNCITRAL rules is no accident. Rather, both criteria codify a growing “arbitral common law,” which developed in response to the skeletal rules on international arbitration. The next section analyzes the development of the five criteria mentioned in the introduction that tribunals have increasingly turned to in determining whether to issue interim measures.

III. PUTTING MEAT ON THE BONES: EXAMINING THE FIVE FACTORS FOR ISSUING INTERIM MEASURES

Given the general lack of guidance from the institutional rules, arbitral panels have over time developed their own criteria for determining whether to issue interim measures. Professor Chester Brown argues that a “common arbitral law” has developed for the utilization of interim measures among the international adjudicative community.³⁸ In many cases, arbitration panels have looked to criteria used by public

33. *Id.* at art. 26(1).

34. *Id.*

35. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL Arbitration Rules, art. 26, U.N. Doc. 68/109 (Dec. 16, 2013).

36. See BORN, *supra* note 6, at 2442.

37. 2013 UNCITRAL Arbitration Rules, *supra* note 36, at art. 26(3).

38. Brown, *supra* note 14, at 135.

international courts like the International Court of Justice (ICJ) when it issues interim measures.³⁹ Moreover, the Chartered Institute of Arbitrators, a London-based international community of arbitrators with the goal of promoting alternative dispute resolution, asserts four factors that tribunals should consider: a *prima facie* showing of jurisdiction, irreparable harm, proportionality, and a *prima facie* showing of merit.⁴⁰ Other commentators agree with this categorization, while some commentators add the necessity for urgency as a criterion.⁴¹

This section elucidates how tribunals think about these five factors of arbitration by analyzing four published arbitral decisions in which tribunals considered the five factors that scholars have observed. In doing so, the section argues concomitantly that tribunals hold a low threshold for issuing interim measures, particularly when compared to the thresholds of national courts. When considering each factor, the Note demonstrates why the low threshold for each is problematic.

A. *Factor 1: A Prima Facie Showing of Jurisdiction: The Case of Pey Casado v. Chile*

Article 2 of the Chartered Institute of Arbitrator's *International Arbitration Practice Guidelines on the Application of Interim Measures* notes that "[b]efore considering whether to grant an interim measure, arbitrators should determine whether they have *prima facie* jurisdiction over the dispute."⁴² Article 2 also notes, however, that a tribunal may issue interim measures even if a party objects to the tribunal's jurisdiction.⁴³ The Article highlights that "[i]f arbitrators consider there is need for an interim measure, for example, to protect the status quo and/or to preserve evidence, then they do not have to delay their decision on the interim measures application pending consideration of the full jurisdictional challenge. The reason for this is that the decision as to whether to order an interim measure is not a final determination on jurisdiction."⁴⁴ The threshold for a *prima facie* showing of jurisdiction is so low that Article 2 recommends that arbitrators decline to issue interim

39. *Id.*

40. CHARTERED INSTITUTE OF ARBITRATORS, INTERNATIONAL ARBITRATION PRACTICE GUIDELINE, *Applications for Interim Measures* (2015).

41. *See generally*, ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2004).

42. CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 40, at art. 2.

43. *Id.*

44. *Id.*

measures on jurisdictional grounds only “[i]f . . . arbitrators consider that there is little or no chance that they will have jurisdiction.”⁴⁵

The low threshold for a *prima facie* showing of jurisdiction is also evident in practice. In *Pey Casado, President Allende Foundation v. Chile*, a former owner of a leftist newspaper brought an ICSID arbitration in 1998 against the Chilean government for the seizure of the newspaper’s equipment after the fall of the Allende government and beginning of the Chilean military dictatorship.⁴⁶ In order to support the litigation, the claimant urged that the ICSID Tribunal issue an interim measure commanding the Chilean Minister of National Assets to retract its Decision No. 43, which would have prevented the claimant from receiving any award.⁴⁷ In considering whether to issue the interim measure, the tribunal first considered whether the tribunal had a *prima facie* showing of jurisdiction.⁴⁸ To meet this standard, the *Pey Casado* tribunal looked to the standard established by the ICJ. The tribunal noted that “[a]ccording to majority and generally accepted opinion, the [ICJ] only requires a *prima facie* test to declare itself competent to indicate provisional measures ‘if its lack of competence is not apparent and the texts invoked by the Claimant on which the competence of the Court is founded confer upon it *prima facie* competence.’”⁴⁹ Using this standard, the *Pey Casado* tribunal determined that it had jurisdiction to issue interim measures because it had already established a *prima facie* showing of jurisdiction.⁵⁰ The tribunal noted that under ICSID “all requests, in accordance with Article 36 of the Convention, are subject to preliminary examination by the Secretary-General, of the Centre’s jurisdiction (co-called ‘screening’). The Centre registers the request, except . . . if it finds that the dispute is clearly outside the jurisdiction of the Centre, a criterion that, to an extent and despite the differences in each situation, is close to the *prima facie* test of the International Court of Justice.”⁵¹ In other words, the *Pey Casado* tribunal determined that it did have a *prima facie* showing of jurisdiction because the Secretary-General had determined that it had jurisdiction.

45. *Id.*

46. *Pey Casado, Pr sident Allende Foundation v. Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures (Sept. 25, 2001).

47. *Id.* at 2.

48. Chile contended that the tribunal did not have jurisdiction, and therefore could not even issue the interim measures.

49. *Id.* at 3.

50. In arbitration, the terms jurisdiction and competence are often used interchangeably. See BORN, *supra* note 6, at 1046.

51. *Id.*

This case leads to two significant observations regarding the decision. First, the tribunal's justification for a *prima facie* showing of jurisdiction is circular. The tribunal established that it had a *prima facie* showing of jurisdiction because the Secretary-General of ICSID has determined that it has jurisdiction. In other words, rather than actually determining whether the tribunal has jurisdiction, the tribunal is merely deferring the issue to the Secretary-General's judgment. To be sure, this circular finding is most likely a reflection of the equally circular rule of international arbitration of *kompetenz-kompetenz*, in which a tribunal determines for itself whether it has jurisdiction over the matter.⁵²

In addition, the threshold for a *prima facie* showing of jurisdiction is incredibly low and easily satisfied. Even if a party objects to jurisdiction, *Pey Casado* suggests that international arbitral tribunals do not require much to determine that they have the power to issue interim measures. This low threshold is extremely problematic because it allows the tribunal to assert power over a party even if that party is objecting to its ability to do so. Given that arbitration is a creature of consent, it is troubling that tribunals are using the slightest and most circular showing of jurisdiction as a justification for their assertion of power.

B. *Factor 2: A Prima Facie Showing of Merit as Shown in ICC Case No. 10596*

Article 2 of the Chartered Institute of Arbitrators' *International Arbitration Practice Guidelines on the Application of Interim Measures* outlines the second criterion that arbitral tribunals should analyze: a *prima facie* showing of merit. According to the Article, "[a]rbitrators considering an application for interim measures should be satisfied on the information before them that the applicant has a reasonably arguable case. This means that arbitrators should be satisfied on a very preliminary review of the applicant's case that it has a probability of succeeding on the merits of its claim; however, arbitrators should not prejudge the merits of the case."⁵³ While this principle seems fairly simple, the actual application of the criterion can be deceptively problematic.

For example, in *ICC Case No. 10596* of 2000, the ICC considered a commercial dispute between *B*, a manufacturer, and *A*, a distributor.⁵⁴ The two parties agreed to two distribution agreements for pharmaceutical

52. The principle of *kompetenz-kompetenz* essentially holds that a tribunal has the power to determine its own jurisdiction. See generally, Nigel Blackaby, Constantine Partasides, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 340 (6th ed. 2015).

53. CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 40, at art. 2.

54. Distributor A (nationality not indicated) v. Manufacturer B (nationality not indicated), ICC Case No. 10596/2000, Interlocutory Award (2000).

products in Hong Kong and the People's Republic of China (PRC). *A* began ICC arbitration after a dispute arose.⁵⁵ In response, *B* filed an application for interim and conservatory measures with the arbitral tribunal, requesting that the tribunal order *A* to deliver the registration certificate and pricing approval documents issued by the PRC and Hong Kong authorities.⁵⁶ *B* argued that without the documents it could not market the products and was thus losing money daily.⁵⁷ In considering whether to issue the interim measures, the tribunal opined the following:

The first requirement for interim relief is that the applicant render plausible that it has a prima facie contractual or legal right to obtain the relief it seeks. Art. XV(7)(1) of the Distribution Agreement reads as follows: 7. Upon expiration or termination of this Agreement for any reason, *A* shall: 7(1) Promptly and unconditionally cease any use of the Registration and put such Registration at *B*'s disposal. . . . The term Registration is defined . . . as 'any official approval, or licensing by the competent bodies of the territory regarding the Products, including, if applicable, their selling prices and social security approvals, allowing the lawful marketing of the Products within the territory'. Accordingly, *A* is prima facie under an obligation to return the Registration Certificate and the Pricing Approval to *B*.

A rather objects that it is in no position to return the documents because they are held by its Chinese distributor. *A* also stated that the situation in the PRC was created by *B* because *B*'s management of the termination was heavy-handed and contrary to local business practice. [9] **The arbitral tribunal considers that these objections are irrelevant in the present context.** Under Art. III(1) of the Distribution Agreement, *A* is deemed to be an independent trader, operating for its own profit and at its own risk. Art. III(2) provides that *A* bears the costs of performing its contractual duties.⁵⁸

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

In determining whether to issue the interim measure mandating *A* to return the document to *B*, the tribunal looked only at the contract and largely ignored *A*'s affirmative defense that *B* had caused *A*'s inability to return the document. This case illustrates that tribunals have a very low *prima facie* standard for establishing the merits of a party's request for interim measures, much like the very low bar for establishing jurisdiction. But given *A*'s reluctance and inability to return the document to *B*'s possession, one wonders if the tribunal's issuance of the interim measure has disadvantaged *A* by not considering *A*'s affirmative defense. Indeed, the tribunal's issuance of the interim measure in this case seems to effectively decide a key important point of contention between the parties without considering the plausibility of *A*'s defense. Consequently, the low threshold used to establish the merit of an individual's claim is problematic given that the issuance of an interim measure can have substantial ramifications.

C. Factor 3: Irreparable Harm or Merely Harm? An Examination of Paushok v. Mongolia

A third factor discussed by Article 2 is the "need for arbitrators to be satisfied that the party applying for an interim measure is likely to suffer harm if the measure is not granted."⁵⁹ In national courts this principle is generally known as irreparable harm.⁶⁰ But in the international arbitral context, the standard for harm appears to be lower than the irreparable harm standard.⁶¹ For example, the Article notes that the tribunal "does not need to be satisfied that the harm will definitely occur, rather they need to be satisfied that there is a significant risk that the harm is likely to occur."⁶²

Furthermore, the Article notes that "if the harm can be adequately compensated for by an award of monetary damages (that is likely to be honoured) it *may* not be appropriate to grant the interim measure."⁶³ This last provision, as we shall see, is remarkably different from the stringent rule in national courts that the possibility of making a claimant whole through money damages after litigation necessarily

59. CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 40, at art. 2.

60. See generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

61. See BORN, *supra* note 6, at 2469-70.

62. CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 40, at art. 2.

63. *Id.*

eliminates interim measures.⁶⁴ Finally, the Article concludes that “[t]he test to be applied to determine the level of harm that justifies an interim measure varies depending on the type of measure sought and the circumstances of the case.”⁶⁵

In practice, the standard with which arbitral tribunals apply the doctrine of “irreparable harm” is lower than national courts.⁶⁶ For example, in *Paushok v Mongolia*, the Russian owners of the gold mining company commenced an *ad hoc* investor-State arbitration against Mongolia that followed UNCITRAL Rules.⁶⁷ The owners contended that Mongolia had violated a bilateral investment treaty between Russia and Mongolia by passing laws which taxed the gold being mined at sixty-eight percent and required mining companies that employed more than ten percent foreign-born individuals to pay a fine equal to ten times the salary of the foreign-born individuals.⁶⁸ The investor applied to the arbitral panel to issue interim measures calling for Mongolia to retract enforcement of these laws because the laws, it contended, violated the treaty between Russia and Mongolia.⁶⁹

After finding that the tribunal had *prima facie* jurisdiction and that the claimant had *prima facie* merit, the tribunal considered whether the Russian company, GEM, would suffer irreparable harm.⁷⁰ Mongolia contended that interim measures were not appropriate because if GEM was found to suffer any harm, it could be compensated with damages

64. See, e.g., *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005) (“Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances.”).

65. *Id.*

66. See BORN, *supra* note 6, at 2470 (“Most authorities have reasoned that the injury required for provisional measures is not ‘irreparable’ harm in what is perceived to be the Anglo-American sense, but instead only a showing of grave, substantial, or serious injury.”); see also Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 CROAT. ARB. Y.B. 73, 83 (2016) (“some arbitral tribunals have gone even further and granted provisional relief even though the requesting party has not been able to show irreparable or even serious harm, simply in order to reduce the overall commercial damage to the respondent and claimant in the arbitration (e.g., by ordering continued sales of products, or continued licensing of intellectual property). However, while arguably commercially-sensible, the grant of provisional measures in such circumstances “[w]ould ordinarily exceed the limits of existing legal standards which require a genuine showing of grave harm”).

67. *Paushok v. Mongolia*, Order on Interim Measures, Ad hoc UNCITRAL Arbitration (Sept. 2, 2008).

68. *Id.* ¶ 37.

69. *Id.*

70. See *id.* ¶¶ 47-56, 63-78.

and therefore the issuance of interim measures was not necessary.⁷¹ The tribunal wrote the following in its decision:

The Tribunal does not agree with Respondent that Claimants are merely requesting damages, as is clearly demonstrated by the text of their request for relief. Moreover, the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the Behring case to the effect that, in international law, the concept of “irreparable prejudice” does not necessarily require that the injury complained of be not remediable by an award of damages . . . This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a “substantial” (but not necessarily “irreparable” as known in common law doctrine) prejudice for the requesting party.” The Tribunal shares that view and considers that the “irreparable harm” in international law has a flexible meaning. It is noteworthy in that respect that the UNCITRAL Model Law in its Article 17A does not require the requesting party to demonstrate irreparable harm but merely that “(h)arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.”⁷²

The above decision reflects again the lower standard relative to national courts that tribunals use in determining whether to issue interim measures. The tribunal does not require that a party suffer irreparable harm for the tribunal to issue an interim measure. Rather, the tribunal requires that a party would suffer merely “substantial” harm or “irreparable prejudice,” and the non-monetary harm can be as simple as reputational damage.

The tribunal’s decision here, like the previous cases studied, is problematic in the context of international commercial arbitration. One of the advantages of arbitration is the ability to settle contractual disputes in a more expedited process compared to normal litigation.⁷³ Given

71. *Id.* ¶ 64.

72. *Id.* ¶ 68.

73. See generally, Robert L. Bonn, *Arbitration: An Alternative System for Handling Contract Related Disputes*, ADMINISTRATIVE SCIENCE Q., June 1972, at 254-64.

the commercial nature of these disputes, there should be few cases in which a party could not be compensated financially for any damages it suffered. By holding that interim measures can be issued by a showing that the moving party would suffer “substantial harm,” the tribunal in *Paushok* seems to ignore that if the claimant is granted the final award, then Mongolia can return any excessive tax that it has collected from the company.⁷⁴ The overall point here is that international arbitral tribunals are issuing powerful interim measures before fully adjudicating the case based on the lower standard of “irreparable prejudice” or “substantial harm” even though a monetary award could compensate the eventual victorious party. Interestingly enough, the *Paushok* tribunal eventually reversed course and dismissed most of the Claimants’ claims in the final award.⁷⁵ Nonetheless, the imposition of interim measures on the Respondents potentially prevented Mongolia from collecting some of its windfall tax, resulting in substantial harm to the Respondent.⁷⁶

This lower standard differs remarkably from the standard used by national courts when thinking about whether to issue interim measures such as injunctions. Consider, for example, the United States Court of Appeals for the Second Circuit case *Faiveley Transport Malmo AB v. Wabtec Corp.*⁷⁷ In *Faiveley*, the plaintiff corporation developed a special braking system for subway cars which it shared with the defendant corporation pursuant to a contractual agreement.⁷⁸ After the contract between the two parties ended, the defendant corporation “reverse engineered” its own version of the braking system and began using the braking system to fulfill its contract with New York City subway cars.⁷⁹ Plaintiff, Faiveley, alleged that defendant, Wabtec, had stolen its trade secrets after their contract ended, and was now using the braking

74. See *Paushok v. Mongolia*, Final Order, Ad Hoc UNCITRAL Arbitration (Apr. 28, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf>.

75. *Id.*

76. In fairness to the tribunal in *Paushok*, the tribunal did recognize that the imposition of interim measures would have a potential burden on Mongolia by not allowing it to collect the Windfall tax or issue liens against the Claimant’s property in Mongolia. It further recognized that this might give the claimants an opportunity to liquidate its assets in Mongolia. To account for this, the tribunal required that the claimants provide security in the form of a deposit into an escrow account in a third country that was not Russia or Mongolia. In the event that the claimants were held to be eventually liable, Mongolia could seek execution against estate. The claimants in *Paushok* however did not post such security despite the orders from the tribunal, and thus, the tribunal rescinded its order for interim measures. *See id.*

77. *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F. 3d 110 (2d Cir. 2009).

78. *Id.* at 114.

79. *Id.* at 114-15.

system to its own advantage.⁸⁰ Thus, Faiveley moved for an injunction to prevent Wabtec from using the braking system in the subway cars.⁸¹ Although the court in *Faiveley* found that there was merit to Faiveley's claim of stolen trade secrets, the court declined to issue the injunction because there was not irreparable harm.⁸² The court noted that the rule for irreparable harm was that "[p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm."⁸³ Under the court's analysis, Faiveley failed to meet this threshold because it could not prove that Wabtec would disseminate its trade secrets.⁸⁴ This decision, however, reflects the general pattern of national courts in the United States to hesitate to issue interim measures unless there is a strong showing of irreparable harm.⁸⁵ But some of the arbitral case law discussed *supra* suggests that the arbitral panels are more bullish in their issuance of interim measures. This Note suggests in the last section that this aggressive posture of tribunals should be curtailed because the standards by which an interim measure are issued should be similar to the more stringent standards applied in national courts when an application for interim relief is made.

80. *Id.* at 115.

81. *Id.*

82. *Id.* at 116-20.

83. *Id.* at 118.

84. *Id.* at 119.

85. In the seminal case, *Winter v. Natural Defense Resource Council, Inc.*, 555 U.S. 7 (2008), the Supreme Court rejected the sliding scale approach used previously by some circuits, and held that an injunction could only be issued on a finding of a likelihood to succeed on the merits **and** a showing of irreparable harm. According to the Court, the moving party must have a strong case on both of these criteria, and could not make up for a deficiency in one of the criteria by a stronger showing in another criteria. Similar criteria are used in other national court systems too. For example, according to the §917 of the German Code of Civil Procedure, a German court can seize a party's assets "wherever there is the concern that without a writ of pre-judgment seizure being issued, the enforcement of the judgment would be frustrated or be significantly more difficult." Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 917, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.). Furthermore, §940 of the German Code of Civil Procedure allows for injunctions for the purpose of providing for a temporary status concerning a legal relationship that is in dispute, to the extent this provision is deemed to be necessary in order to avert significant disadvantages, to prevent impending force, or for other reasons, in particular in the case of legal relationships of a long-term nature existing." *Id.* § 940. In Spain, the Spanish Code of Civil Procedure calls for courts to consider the likelihood to succeed on the merits and the danger in delay. See Carlos Esplugues, *Provisional Measures in Spanish Civil Procedure*, COMPARATIVE STUDIES ON ENFORCEMENT AND PROVISIONAL MEASURES 207, 211 (2011).

It should be noted that there are tribunals which have issued interim measures using a fairly high standard similar to the standard used in national courts.⁸⁶ Although these cases show a tribunal applying a higher standard, the cases show at the very least that there is little uniformity in how tribunals apply the standards. Perhaps the best demonstration of this lack of uniformity are two recent arbitrations that both involved the Republic of Moldova. In *Kompozit LLC v. Republic of Moldova*, SCC Arbitration EA (2016/095), the claimant moved for an emergency award of interim measures to halt the cancellation of its shares in one of the largest commercial banks, Moldova Agroindbank.⁸⁷ Pursuant to its institutional rules, the Stockholm Chamber of Commerce appointed an emergency arbitrator.⁸⁸ The emergency arbitrator determined that the lower irreparable harm standard announced in *Paushok* should apply and that the claimants would suffer irreparable harm should Moldova proceed with the cancellation of the claimant's shares in the bank.⁸⁹ Thus, the emergency arbitrator issued an order enjoining Moldova from cancelling the shares, reasoning that it was very likely that Kompozit would suffer irrevocable harm if Moldova was not prevented from cancelling its shares.⁹⁰ Contrast that result with the decision of a different emergency arbitrator two weeks earlier in another arbitration against Moldova on substantially similar facts. In *Evrobalt v. Republic of Moldova*, the claimants (also Russian investors) made a similar claim for protection of its shareholder rights in the same Moldovan Agroindbank.⁹¹ In that case, the emergency arbitrator denied the request for interim measures, arguing that “[a]ll of the harm, actual and imminent, associated with the claimant’s investment can be made good by an award of damages.”⁹² The contrasting results, despite the near identical facts, suggest an unpredictability and lack of uniformity in how and when interim measures

86. See *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Provisional Measures (Sep. 6, 2005) (“provisional measures are extraordinary measures which should not be recommended lightly”); *Occidental Petroleum Corp. and Occidental Expl. and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (Aug. 17, 2007) (“Any prejudice suffered as a result of the termination of the Block 15 contracts, if subsequently found illegal by the Tribunal, can readily be compensated by a monetary award.”).

87. *Kompozit LLC v. Republic of Moldova*, Emergency Award on Interim Measures, SCC Arbitration EA 2016/095 (June 14, 2016).

88. *Id.* ¶ 7.

89. *Id.* ¶ 88.

90. *Id.* ¶ 92.

91. *Evrobalt LLC v. The Republic of Moldova*, Award on Emergency Measures, SCC Arbitration EA 2016/082 (May 30, 2016).

92. *Id.* ¶ 52.

are granted by tribunals. Such unpredictability would increase uncertainty for businesses, which consequently makes doing business more expensive. Consequently, this Note pushes for greater uniformity and higher standards when applying the criteria necessary for interim measures to provide more certainty to the business environment and commercial disputes.

D. *Factor 4: Proportionality of the Interim Measure*

Article 2 additionally notes that arbitral tribunals should weigh whether the interim measure being sought is proportional.⁹³ Article 2 defines proportionality as a balancing test in which “[a]rbitrators need also to consider any harm likely to be caused to the opposing party if they grant the interim measure. Any harm caused by granting the measure should be weighed against the likely harm to the applicant if the measure is not granted.”⁹⁴ The article further notes that in performing this cost-benefit analysis, “[a]rbitrators may need to consider the relative financial position of the parties to ensure that a party will not be substantially disadvantaged if the interim measure is granted such that the arbitration is abandoned. In this situation, the likely financial hardship to be caused to both parties should be carefully weighed and considered.”⁹⁵

The *Paushok* case exemplifies how arbitral tribunals apply the doctrine of proportionality. In that decision, the tribunal had to weigh the damage incurred by the gold mining company versus the right of the Mongolian government to tax.⁹⁶ The tribunal stated that it did “not question in any way the sovereign right of a State to enact whatever tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation.”⁹⁷ The tribunal further noted that sovereigns are generally entitled to collect taxes, and it would be dangerous for a tribunal to circumvent the taxation.⁹⁸ But the tribunal found that Mongolia had made extensive efforts to repeal its own tax because it realized how excessive the tax was.⁹⁹ The tribunal further argued that continuing the

93. CHARTERED INSTITUTE OF ARBITRATORS, *supra* note 40, at art. 2.

94. *Id.*

95. *Id.*

96. *Paushok*, *supra* note 67, ¶ 79.

97. *Id.* ¶ 81.

98. *Id.*

99. *Id.* ¶ 82.

tax would have a negative consequence on the mining industry in Mongolia.¹⁰⁰ Consequently, the tribunal concluded that “there is considerable advantage for both parties in the issuance of interim measures of protection.”¹⁰¹

The criterion of proportionality is not inherently troublesome and is most often beneficial. On its face, it appears entirely logical that a tribunal should balance the costs weighed to both parties in making the decision. But the *Paushok* decision shows that this approach leaves open the door for tribunals to be excessively paternalistic. The *Paushok* tribunal essentially determined that it was better public policy for Mongolia to not collect such a usurious tax. But if this were the case, then why would Mongolia be contesting the interim measures? Here it seems that the *Paushok* tribunal contradicts itself by essentially arguing that Mongolia has sovereignty to determine its own tax rate, but its own tax rate is bad policy that hurts Mongolia, so therefore, that tax should be stopped provisionally. Thus, the doctrine of proportionality is susceptible to its own problems.

E. *Factor 5: Urgency as Shown in Railroad Development Corp v. Guatemala*

The Chartered Institute of Arbitrators does not list urgency as one of its criterion for interim measures, but many scholars¹⁰² have pointed out that it clearly is part of the calculus that tribunals consider when deciding whether to issue interim measures. Indeed, the pre-hearing nature of interim measures suggest that they should only be addressed if there is an immediate need to resolve a problem.

In *Railroad Development Corp. v. Guatemala*, an ICSID tribunal considered a dispute between a railroad company and Guatemala.¹⁰³ The claimant, Railroad Development Corp. (RDC), motioned the tribunal to compel Guatemala to preserve certain documents which RDC believed were vital to its position.¹⁰⁴ RDC contended that preservation of the documents was necessary because of new reports in Guatemala that suggested that several governmental documents had been stolen, destroyed, or misplaced under the new presidency in Guatemala.¹⁰⁵ Guatemala responded that ICSID arbitrations were generally not

100. *Id.* ¶ 83.

101. *Id.* ¶ 85.

102. See BORN, *supra* note 6, at 2511-12.

103. R.R. Dev. Corp. v. Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Provisional Measures (Oct. 15, 2008).

104. *Id.* ¶ 1.

105. *Id.* ¶ 7.

susceptible to U.S.-style discovery and that the request for preservation of the documents was not urgent.¹⁰⁶ The ICSID tribunal denied the request for interim measures because it found it did not meet the criterion of urgency.¹⁰⁷ The tribunal concluded that “the Request would place an unfair burden on the Government because of its excessive breadth and that no need or urgency has been proven to justify the recommendation.”¹⁰⁸

Of all criteria that tribunals have posited as necessary for the issuance of interim measures, the urgency criterion is the least problematic. As the above ICSID case demonstrates, the criterion serves an appropriate role of limiting interim measures to only those cases where it is truly judicious to apply the measures. The criterion recognizes that the issuance of an interim measure is fundamentally an exercise of power, and therefore should only be exercised when needed.

F. *A Proposal for Reform: The Need to Raise the Standards*

The above cases illuminate the low threshold that tribunals employ in issuing interim measures relative to national courts. In one sense, this lower threshold is surprising because one would expect that the more powerful national courts would be more likely to exercise their power in issuing interim measures, whereas weaker tribunals would be more circumspect in their use of power. But given their limited power, tribunals may require less of a showing of need in order to issue interim measures as a way of magnifying their authority, whereas national courts may recognize the magnitude of their power, and thus seek restraint in its exercise.

Whatever the cause of the lower threshold needed to issue interim measures in private international tribunals, this Note makes three proposals for increasing the standard necessary for a tribunal to issue interim measures. First, tribunals should undertake a more thorough analysis of their jurisdiction before issuing interim measures. Jurisdiction is a fundamental question that any judicial body must consider seriously at the very onset of any controversy. The current *prima facie* threshold inadequately leads to circularly weak reasoning and allows the tribunal to exert authority over parties who may be objecting to their jurisdiction. Thus, tribunals should first make a detailed and

106. *Id.* ¶ 12.

107. *Id.* ¶ 36.

108. *Id.*

reasoned determination of their jurisdiction before issuing any interim measures.

Second, tribunals should issue interim measures only on a showing of truly irreparable harm, not on merely a showing of “substantial” harm. Interim measures should be enforced only in the event that the winning party will not suffer some sort of harm beyond monetary damages. If the harm is purely financial, then the party will be able to be compensated in the final award if they are successful.¹⁰⁹ This, of course, should not preclude tribunals from issuing protective interim measures, such as ordering the non-moving party to deposit the disputed amount into an escrow account. Such measures are appropriate for ensuring that parties do not hide assets in the event that an award unfavorable to them is issued because those measures seek to ensure that a monetary award could be given. But when the interim measures require the non-moving party to perform some other concrete actions, such as transfer some asset to the moving party or to refrain from engaging in some activity, tribunals should exercise restraint and evaluate such request under an irreparable harm analysis, where the tribunal should determine if the damage alleged could be compensated monetarily.

Finally, tribunals should guard against paternalism in analyzing whether an interim measure is proportional to the offense. While the doctrine of proportionality admirably invites tribunal members to balance the benefit of issuing the interim measure versus the harm likely to result, the tribunal should not determine what is in the best interest of the party, particularly in investor-state arbitrations involving foreign governments. As the discussion of the *Paushok* case demonstrated, it can be easy for tribunals—often composed of learned experts—to substitute their own public policy preferences for the policy preferences of a country. Consequently, tribunals should guard against issuing their opinions based on paternalistic assessments of what they believe to be in a party’s interests.

109. See, e.g., *Occidental Petroleum*, *supra* note 87 (“Provisional measures should only be granted in situations of necessity and urgency in order to protect legal rights that could, absent such measures, be definitely lost . . . The harm in this case is only ‘more damages’, and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm.”); *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (May 13, 2008) (“A possible aggravation of a debt does not generally warrant the ordering of provisional measures.”).

IV. THE LACK OF HARMONIZATION IN ENFORCING INTERIM MEASURES

The United Nations Convention on the Recognition of Foreign Arbitral Awards, (“the New York Convention”) has been lauded for giving force to the final awards of arbitration tribunals.¹¹⁰ However, it is unclear whether interim measures are within the purview of the New York Convention.¹¹¹ Consequently, interim measures issued by an arbitral tribunal do not necessarily have the same legal force as court orders of a national court. This is problematic because a party may choose to not comply with an interim order issued by a tribunal. Such a situation may force the party moving for interim measures to appeal to the appropriate national court system to enforce the interim measure.¹¹² However, national courts have treated the enforcement of interim measures in different ways. The disparate degrees to which different national courts support interim measures can lead to unpredictability in the arbitral system.

This section highlights the broad spectrum of approaches among national court systems by comparing and contrasting how three different national courts—Germany, the United States, and Great Britain—differ in their enforcement of interim orders by a tribunal. The section concludes by noting that the lack of harmonization could be cured through an international convention which gives more effect and power to interim measures issued by a tribunal. But any such convention should be contingent on arbitral tribunals raising the standard for issuing interim measures, ostensibly through the articulation of clearer standards for the issuance of interim measures in the proposed convention. Otherwise, a convention giving weight to the interim measures issued by a tribunal would have the odd effect of making private international tribunals more powerful than national courts because the tribunals would be able to issue interim measures that would be enforced by a national court at lower standards than the standards national courts normally use.

110. See Linda Silberman, *The New York Convention after Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT’L & COMP. L. 25 (2009).

111. See Charles Brower, *What I Tell You Three Times Is True: US Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT’L L. 971 (1994) (arguing that the *travaux préparatoires* of the New York Convention does suggest that interim measures were intended to be enforced, but American courts have been split on this issue).

112. See BORN, *supra* note 6, at 2511-12.

A. *The Approach to Enforcing Interim Measures in German National Courts*

In order to make arbitration more attractive, Germany became the first major European power to adopt almost all measures of the UNICTRAL Model.¹¹³ Consequently, the German approach to the enforcement of interim measures is quite progressive and reflects a preference for free choice among the parties.¹¹⁴ Parties can make requests for interim measures to either a tribunal or directly to German national courts.¹¹⁵ In the event of a tribunal-issued interim measure, German courts are obligated to enforce the interim measure—even if the arbitration seat is outside of Germany.¹¹⁶ The German courts' authority to enforce interim measures is governed by section 1041 of the German Code of Civil Procedure. That statute states:

(1) Unless the parties to the dispute have agreed otherwise, the arbitral tribunal may direct, upon a party having filed a corresponding petition, provisional measures or measures serving to provide security as it deems fit with a view to the subject matter of the litigation. The arbitral tribunal may demand, in connection with such measure, that each of the parties provide reasonable security.

(2) Upon a party having filed a corresponding petition, the court may permit the enforcement of a measure pursuant to subsection (1), unless a corresponding measure of temporary relief has already been petitioned with a court. It may issue a differently worded order if this is required for the enforcement of the measure.

(3) Upon corresponding application being made, the court may reverse or modify the order pursuant to subsection (2).

(4) Should the order of a measure pursuant to subsection (1) prove to have been unfounded from the start, the party that has obtained its enforcement is under obligation to compensate the opponent for the damage it has suffered as a result of the measure being enforced, or as a result of his having provided security in order to avert the enforcement. The claim may be asserted in the pending arbitration proceedings.¹¹⁷

113. Schaefer, *supra* note 10.

114. *Id.*

115. Zivilprozessordnung [ZPO], §1041(2) (Ger.).

116. *Id.*

117. Zivilprozessordnung [ZPO], §1041 (Ger.).

Generally speaking, section 1041 reflects the spirit of the UNCITRAL Model Laws, with a small German twist.¹¹⁸ While subsection 1 recognizes the enforcement of interim measures issued by a tribunal, subsection 2 recognizes the reality that the interim measure might not conform with the German national court approach to issuing interim measures. Thus, subsection 2 and 3 grant German courts the ability to modify tribunal-issued interim measures so that they can accord more with traditional German interim measures.

B. The Approach to Enforcing Interim Measures in British Courts

The British system to enforcing interim measures granted by a tribunal has been described as “a policy of subsidiary court jurisdiction.”¹¹⁹ Under the British system, parties should look to British courts for assistance as a last resort only after they have exhausted their means through the tribunal.¹²⁰

The British system is codified in the Arbitration Act 1996, which was passed to simplify the previous system that was based on unique British legal precedents that applied poorly to the realities of international arbitration.¹²¹ Pertinent to the issue of interim measures are section 42 and 44 of the Act. Section 42, on the enforcement of preemptory measures, states:

- (1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a preemptory order made by the tribunal.
- (2) An application for an order under this section may be made—
 - (a) by the tribunal (upon notice to the parties),
 - (b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
 - (c) where the parties have agreed that the powers of the court under this section shall be available.

118. Schaefer, *supra* note 10.

119. *Id.*

120. *Id.*

121. Thomas Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. LJ 131, 131 (1998) (“The 1996 Act represents a substantial improvement over prior English arbitration statutes, including the 1979 Act.”).

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The leave of the court is required for any appeal from a decision of the court under this section.¹²²

As section 42 notes, the British system takes a hands-off approach, relative to the German system, calling for court intervention in the enforcement of interim measures only as a last resort. Section 44 of the Act, concerning the powers of the court in support of arbitration, likewise reflects this hands-off approach. The Section states:

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

- (a) the taking of the evidence of witnesses;
- (b) the preservation of evidence;
- (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose, authorizing any person to enter any premises in the possession or control of a party to the arbitration;
- (d) the sale of any goods the subject of the proceedings;
- (e) the granting of an interim injunction or the appointment of a receiver.

122. Arbitration Act 1996, c. 23, § 42 (U.K.).

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.¹²³

Section 44 of the Act preserves the right of the national court to issue injunctions or orders of production related to court. However, in subsections 3 and 4, the Act distinguishes between interim measures of urgency, which will allow court intervention, and non-urgent interim measures, which can only be considered by a national court with approval from the tribunal or the parties. Furthermore, subsection 5 emphasizes that the tribunal should intervene only when the tribunal lacks power to act effectively. Subsection 5 thus serves to limit the degree of intervention that a court may undertake. Finally, subsection 6 give tribunals the radical power to overrule a national court's granting of an interim measure. Such a provision inevitably encourages parties to apply for interim measures to the tribunal first. Subsection 6, therefore, serves to limit the role of the British court system by allowing the court system only to buttress decisions of the tribunal, and not undermine the decisions of the tribunal.¹²⁴

123. *Id.*

124. Although the British system supports arbitration less than the German system, the British system is far more hospitable than other systems. For example, Greece and Italy refuse to enforce interim measures issued by an arbitration tribunal, holding that such power is the exclusive domain of its national courts.

C. *The American Approach to Interim Measures*

The American approach to enforcing interim measures granted by a private international tribunal is fragmented. First, the Federal Arbitration Act, which codifies the New York Convention, addresses the issue of enforcement of interim measures in only three case-specific scenarios.¹²⁵ Indeed, the closest statutory provision that addresses the judicial assistance of foreign tribunals in the United States is 28 U.S.C. § 1782, which was drafted for the purpose of assisting discovery in foreign courts. But federal circuits are split on whether section 1782 applies to proceedings conducted by foreign tribunals.¹²⁶

Due to the lack of federal guidelines governing the enforcement of interim measures, the New York state legislature has tried to make arbitration in New York state more attractive with a 2005 amendment to §7502(c) of the New York Civil Practice Law and Rules that grants New York courts the authority to enforce interim measures.

That provision reads:

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the

125. See Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 THE AM. J. OF INT'L LAW, 24 (1986) (identifying three situations in which the pre-judgment measures are enforced under the FAA).

126. For example, compare *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, WL 2407189, (5th Cir. 2009), (considering whether 28 U.S.C. § 1782 allows district courts to compel parties to disclose documents for use in foreign or international arbitration tribunals. The court concluded that a Swiss arbitral panel was not within the scope of §1782 because it was a private arbitration tribunal and not a public court. The court further concluded that it would be wrong to compel disclosure because the Swiss arbitral panel had not yet approved the request for disclosure, so it was possible that the disclosure could potentially not even be part of the arbitration proceedings.) with *In re: Application of Babcock Borsig AG for Assistance Before a Foreign Tribunal*, 583 F.Supp.2d 233 (D. Mass. 2008), (holding that 28 U.S.C. §1782 did apply to foreign private tribunals). The circuit split is invariably due to ambiguous language in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in which Supreme Court decided that §1782 applied to foreign national courts, but was unclear about whether private international tribunals fell under §1782. The opinion did quote favorably from a Hans Smit article which included private tribunals within the scope of §1782, and courts have subsequently attempted to interpret what that citation means.

ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief . . .¹²⁷

The above statute reflects the state of New York's policy to be friendlier towards arbitration and reflects an approach akin to Germany's.¹²⁸ Outside of New York, however, it appears that other states have not passed statutes concerning the enforcement of interim measures issued by private tribunals. In the absence of a federal statutory framework, American courts outside of New York have deliberated whether the New York Convention gives sufficient grounds for the enforcement of interim measures issued by a tribunal. Predictably, courts have interpreted the New York Convention differently.

For example, in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, the Third Circuit declined to enforce interim measures in a case before an arbitration panel, reasoning that judicial intervention in an arbitration by issuing interim measures would violate the spirit of the New York Convention.¹²⁹ The court summarized its reasoning by stating that “[t]he contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable [. . .]” under the New York Convention.¹³⁰ In contrast, in *Carolina Power & Light Company v. Uranex*, the court determined that the New York Convention did not preclude American courts from enforcing orders of interim measures, reasoning that “[t]here is no indication in either the text or the apparent policies of the [New York] Convention that resort to prejudgment attachment was to be precluded [. . .].”¹³¹ The

127. N.Y. C.P.L.R. § 7502(c) (2012).

128. New York State Courts have likewise read CPLR 7502(c) liberally. See *Drexel Burnham Lambert Inc. v. Ruebsamen*, 139 A.D.2d 323, 328 (N.Y. App. Div. 1988) (“the possibility that an arbitration award may be rendered ineffectual in the absence of an order of attachment is sufficient under the statute to support provisional relief.”); *County Natwest Sec. Corp. USA v. Jesup, Josephthal & Co., Inc.*, 180 A.D.2d 468, 469 (N.Y. App. Div. 1992) (“This Court has held that the standard that governs in a case involving arbitration is whether the award ‘may be rendered ineffectual without such provisional relief’. And the standards generally applicable to the attachments pursuant to CPLR 6201(3), such as sinister maneuvers or fraudulent conduct, are not required to be shown in an application pursuant to CPLR 7502(c).”).

129. *McCreary Tire & Rubber Company v. CEAT S.P.A.*, 501 F.2d 1032 (3d Cir. 1974).

130. *Id.* at 1038.

131. *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977). Due in part to scholarly criticism of *McCreary Tire*, the majority of subsequent cases have tended to side with *Carolina Power & Light's* logic. See *China Nat. Metal Products Import/Export Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174 (C. D. California, 2001) (rejecting *McCreary's* argument that the New York Convention prevents courts from enforcing interim measures issued by the court.); *Bahr*.

split among the courts, however, appears to remain unresolved until the Supreme Court intervenes.

Thus, the American system is fragmented in how it enforces interim measures granted by a private international tribunal. On the one hand, American federal law has failed to address how and whether national courts should enforce interim measures granted by private international tribunals. As a result of that federal vacuum, New York has passed its own state laws with the hope of maintaining New York state law as an attractive *lex arbitri*. Outside of New York, however, it has been up to federal courts to determine whether to enforce interim measures in support of private international law, leading to an almost inevitable split among circuits.

D. *Comparing and contrasting the different approaches to enforcement*

The American, German and British systems represent three different archetypes about how a national court may approach the enforcement of interim measures. On the one hand, there is the German approach, which provides nearly unconditional support for interim measures issued by a tribunal.¹³² In contrast, the American system only lends judicial support to interim measures in some circuits, while other circuits following *McCreary Tire* are likely to provide no support to interim measures issued by a tribunal.¹³³ The British system represents a middle-ground position between the two extremes by offering judicial support but only as a last resort.¹³⁴ The major problem with the British and American approaches, however, is that both create greater uncertainty in the arbitral system, which will invariably raise the cost of doing business by increasing litigation risk. Under the American and British systems, it is unclear whether and when a court might buttress a tribunal order.¹³⁵ The German system, in contrast, provides clear notice to parties that interim measures issued by a tribunal will be supported by the force of the German national courts.¹³⁶ The German approach,

Telcoms. Co. v. Discovery Tel, Inc., 476 F. Supp. 2d 176, 180-81 (D. Conn. 2007) (“[the opinion] that the Convention . . . somehow prohibits provisional remedies in international arbitration—has long been harshly criticized by courts and commentators . . . this Court can discern nothing in the Convention that divests federal courts of jurisdiction to issue provisional remedies or other *pendente lite* orders, such as an attachment, when appropriate in international arbitrations, and certainly no reason to differentiate between domestic and international arbitrations in that regard”).

132. See *supra* note 116 and accompanying text.

133. See *supra* notes 129–131 and accompanying text.

134. See Schaefer, *supra* note 9.

135. See *supra* notes 129–131 and accompanying text.

136. See *supra* note 115 and accompanying text.

therefore, is more desirable as it bolsters the authority of the tribunal while at the same time providing greater predictability for the parties facing arbitration.

V. CONCLUSION: THE NEED FOR HARMONIZATION AND THE RAISING OF STANDARDS

This Note identifies two different, but interrelated, problems with interim measures. First, the Note highlights the lower standard with which arbitral tribunals issue interim measures. This Note challenges the international tribunal system to both raise and harmonize its standards for issuing interim measures. Currently, the standards used for applying interim measures by arbitration tribunals are woefully low, and the reasoning in determining the application of interim measures is far from rigorous. Furthermore, the application of the standards by tribunals is far from consistent, as some tribunals apply a high threshold to the issuance of interim measures, and other tribunals seem to maintain a lower standard in their issuance. Raising the standards will be essential to the legitimacy of international commercial arbitration and increasingly important as interim measures become more and more common in international arbitration.

The second problem this Note has examined is the lack of harmonization among different national court systems with regard to their enforcement of interim measures, as demonstrated in the approach of German courts, British courts, and American courts.¹³⁷ One could argue that harmonization may inevitably result as different countries amend their laws to be more conducive to arbitration. That is, the competition among different nations for the big business of international arbitration may, over time, lead to more hospitable statutes granting national courts the authority to enforce interim measures issued by a tribunal.

But a faster and more efficient approach than such a *laissez-faire* route would be for different countries to harmonize their treatment of interim measures through the drafting of a second international

137. To be sure, the observation that the enforcement of interim measures is not uniform is not novel. See, e.g., BORN, *supra* note 6, at 2511–12 (“Unfortunately, the law relating to the enforceability of tribunal-ordered provisional measures is unsettled.”); Wang, *supra* note 13, at 1099. This article, however, builds upon this past scholarship by updating crucial changes to the enforcement of interim measures by national courts and highlighting the five factors that arbitral panels use when examining interim measures. More importantly, this Note provides one of the first academic endeavors to analyze actual case law in order to illustrate the woefully low bar that international tribunals are using for provisional measures. Furthermore, this Note highlights the connection between that troublesome reasoning and its potential enforcement in national courts.

convention akin to the New York Convention which addresses the enforcement of interim measures.¹³⁸ Such a move would bring stability to the international commercial arbitration world and make the increasingly more complex arbitration system more predictable.

Given the lack of harmony among nations about the enforcement of interim measures, there will inevitably be disagreement about the form that such a convention would take. In order to make the arbitral system the strongest possible, however, this Note advocates that the German system offers the best promise because it would put the force of the national court systems behind the issuance of interim measures by international tribunals, even if the tribunal is not seated within the country. In contrast to the German system, the British System's preference that parties turn to national courts only as a last resort provides the bare minimal, possibly untimely, support for orders of interim measures issued by tribunals, which can effectively undermine any orders that a tribunal gives. Furthermore, the fragmented American system leads to substantial uncertainty in the arbitral system as a whole, as it is unclear to what extent interim measures will be supported by a court sitting outside of the state of New York.

Finally, it is important to note that the two problems identified in this Note are interrelated problems. As section II of this Note suggests, the standards that arbitral tribunals have used for issuing interim measures are lower than the standards used by national courts. If, however, states were to adopt the proposed convention and harmonize their national laws in order to enforce interim measures without requiring that tribunals increase the standards that they use for issuing interim measures, then the convention would have the perverse effect of giving more power to international tribunals. That is, international tribunals would be able to issue interim measures at lower standards than national courts, but with the understanding that the national courts will automatically enforce their actions.

As a result, this Note advocates that the two problems are interrelated and must be solved in conjunction with one another. If nations are to harmonize their enforcement of interim measures via a convention akin to the New York Convention, as this Note argues, then private international tribunals should also raise and harmonize the criteria they use for issuing interim measures.

138. Although some scholars have argued that the New York convention intended to include orders of interim measures as part of enforcement, it is clear that many states have not considered interim measures to be part of the convention.