

Empirical study: Provisional measures in investor-state arbitration (2023)

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Introduction

BIICL and White & Case are delighted to present our 2023 comprehensive empirical study on provisional measures in investment treaty arbitration. It builds on the success of the 2019 report on provisional measures (“**the 2019 Report**”), which has now been extensively cited in academic literature, and decisions of arbitral tribunals and parties’ submissions on provisional measures.

The study consists of three parts, summarising key new developments that have occurred since the 2019 Report, exploring procedural efficiency in the resolution of requests for provisional measures, and updating the 2019 Report’s findings in accordance with the newly available cases.

New decisions and ICSID reform: The past three years have seen not only the most significant revision of the ICSID and ICSID Additional Facility (**ICSID AF**) arbitration rules in their history, but also a significant increase in the number of publicly available decisions on provisional measures. This study conducts a detailed examination of 160 decisions on provisional measures and how these decisions affect and change the trends and practices identified in the 2019 Report.

These new decisions provide more clarity on the criteria used by tribunals to grant provisional measures and their understanding of such criteria, success rate by applicable arbitration rules and measures requested, as well as the cases most frequently relied upon by international tribunals. They also deal with some of the most crucial issues facing investment arbitration at the moment, including the future of the intra-EU investor-state disputes, and the sanctions against Russia.

Procedural efficiency: For the first time, this study explores the procedural efficiency of decisions on provisional measures, including the average number of days it takes for the tribunals to issue their decisions. It also shows how the choice of arbitration rules, the party making a request, and various other procedural factors affect the length of proceedings. It further investigates tribunals’ decisions on costs, and some of the most recent trends, including the increasing use of the “most provisional” decisions on provisional measures by ICSID tribunals, and recent amendments to the ICSID and ICSID Additional Facility Rules.

For example, tribunals are more likely to grant provisional measures in cases with a hearing compared to cases without a hearing. On average, tribunals take 112 days to resolve the request for provisional measures, and UNCITRAL and ICSID Additional Facility tribunals are much more likely to do this within 100 days. In comparison, tribunals under the ICSID Rules typically take approximately 124 days to resolve such a request. This timing varies significantly depending on the type of the requested measure, the party making the request, and various procedural factors, such as the use of virtual or in-person hearings, and party-appointed witnesses and experts.

Updating findings of the 2019 Report: Compared to the findings of the 2019 Report, respondent states have become increasingly willing to file requests for provisional measures, and much more likely to obtain a positive decision from tribunals. The study found no drastic changes in the types of the provisional measures requested by the parties, or the criteria applied by tribunals, except for an increase in the number of requests for the security for costs, and an increase in importance of the criterion of proportionality.

We hope that this study, to be updated on a bi-annual basis, will become a regular and anticipated development in the field of investor-state arbitration.



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Executive summary

Reform of the ICSID arbitration system

On 1 July 2022, both 2006 editions of the ICSID and ICSID AF arbitration rules were replaced by the new 2022 versions. The most important changes include introduction of an indicative list of types of the provisional measures, criteria for granting them, time limits for tribunals to issue their decisions, and an entirely new provision on the security for costs. This report demonstrates that, rather than formulating entirely new approaches to provisional measures, the newly revised rules largely codify the existing practice of investor-state tribunals.

Average length of the proceedings

On average, it took tribunals 112 days since the receipt of the request for the provisional measures to resolve provisional measures requests, with ICSID tribunals typically taking approximately 124 days to resolve such a request, UNCITRAL, 96 days, and ICSID AF, 78 days. This timing, however, varies greatly—from one day to 897 days depending on the parties' agreement and urgency of the provisional measures request.

The timing of the tribunal's decision also ranges depending on the type of the provisional measures—from 81 days for the requests related to the safety of the investor to 185 days for the requests related to the preservation of evidence. It further differs depending on the requesting party, with tribunals, on average, taking 100 days to resolve requests submitted by claimants, 115 days—by respondent states, and 189 days where tribunals needed to rule on the requests submitted by both parties.

Procedural factors that affect the length of the proceedings

Tribunals held hearings on provisional measures in slightly less than half of cases involving the requests for the provisional measures. Two-thirds of such cases involved an in-person hearing. Most interestingly, statistics show that the tribunals are slightly more likely to grant or partially grant the provisional measures when they hold a hearing. At the same time, hearings significantly increase the length of the

tribunals' decisions: from 71 to 175 days in cases that involve an in-person hearing.

Use of witnesses and experts

Tribunals used witness testimony in each seventh case involving the provisional measures, and experts, in each twentieth case, often in conjunction with each other. Most cases included only the submission of written witness statements or expert reports. The study shows that while use of witness or expert evidence had no effect on the likelihood of the tribunal granting the provisional measures request, it more than doubled the time it took for the tribunals to issue the decisions on provisional measures.

Decision on costs

While both the new 2022 ICSID Rules and 2010 UNCITRAL Rules support the "costs follow the event" approach to the allocation of costs, the majority of the tribunals remain reluctant to issue any costs awards before the end of the proceedings, with only 3 per cent of the tribunals expressly ruling on this issue.

Emergency arbitration and the "most provisional" measures

While the ICSID Secretariat has rejected proposals for the inclusion of emergency arbitration in 2022 ICSID and ICSID Additional Facility Rules, it was extensively used in practice under the SCC rules, resulting in at least 12 known decisions on provisional measures. At the same time, ICSID tribunals have further extensively used "medidas provisionales" or the "most provisional measures" to ensure that the subject of the provisional measures request survives long enough for the tribunal to have time to rule on the requested provisional measure. The latter type of decisions is very similar to temporary restraining orders or TROs in the US litigation system.

Parties making requests

While investors remained more likely to submit provisional measures requests, the number of respondent states to have done so significantly increased. The past three years, furthermore, saw an increase in the number of decisions in intra-regional disputes, in which both claimants and respondent states came from the same region.

While investors remain almost two times more likely to obtain a positive decision from the tribunal than respondent states, this gap has now significantly narrowed. The geographical location of respondents continues to correlate with the success of applications for provisional measures, as tribunals remained to be more likely to grant or partially grant requests against the Eastern European, Central Asian and Latin American states.

Types of provisional measures

Non-aggravation of the dispute, the preservation of the status quo and the stay of parallel proceedings in the respondent's courts again emerge as the most requested types of provisional measures. At the same time, the number of applications for security for costs has noticeably risen, making it the fourth most requested type of the provisional measures.

Recent tribunal practice provided much-desired clarity on some of the most controversial issues in investor-state arbitration, including on the circumstances that can justify granting security for costs, with a record number of tribunals granting such requests. The new decisions also shed more light on tribunals' attitudes to third-party funding, with multiple tribunals deciding that it does not, on its own, warrant granting security for costs.

Criteria for granting provisional measures

Unlike when we published our 2019 Report, most of the applicable arbitration rules now contain provisions on the criteria for granting provisional measures. These criteria correspond to tribunals' past practice, which shows the importance of the criteria of urgency, necessity and proportionality of the requested measures. At the same time, tribunals increasingly relied on the criterion of proportionality. Another notable trend was the reduction in the number of granted requests in cases where tribunals applied this criterion. The recent practice also allows to better understand the criterion of the existence of "extreme circumstances," which the vast majority of cases involving the security for costs involved.

Trends in new decisions on provisional measures

Since the 2019 Report, the number of publicly available decisions has risen from 114 to 160. The vast majority of these new decisions were issued under the ICSID Arbitration Rules (70 per cent), followed by the UNCITRAL, ICSID Additional Facility, SCC and ICC Rules.

These new decisions provide the much-desired clarity on some of the most controversial issues in investor-state arbitration, including on the circumstances that can justify granting of the security for costs.¹

The new decisions also shed more light on the tribunals' attitude to third-party funding, with multiple tribunals deciding that it does not, on its own, warrant granting the security for costs.² Many of these decisions further addressed the tribunals' authority to interfere with the states' sovereign rights to conduct criminal investigations or court proceedings.

These decisions, furthermore, could not escape the most pressing issues facing investment arbitration at the moment, including the future of intra-EU BITs and intra-EU disputes under the Energy Charter Treaty. Usually, these arose in the form of indirect challenges to the tribunals' jurisdiction through proceedings in EU Member States' domestic courts on points of the EU law.³ In one of these cases, *Uniper v. Netherlands*, these efforts succeeded, with the parties suspending the arbitration as a part of a state bailout package within weeks of the tribunal's decision on provisional measures.⁴

Western countries' sanctions on Russia and their influence on Russian companies' ability to pay the costs of arbitration became another interesting trend in recent years, with the *Nord Stream 2 v. EU* tribunal needing to address this issue in its decision on security for costs.⁵

The diverse range of issues addressed by these decisions, as well as their far-reaching effects, highlights the progress made in arbitral practice since the first known decision on provisional measures in *Holiday Inns v. Morocco*. In that 1972 decision, the tribunal had to assert its authority over the state and the already initiated provisional measures proceedings in its state courts, contrary to the established arbitration practice at the time. It referred to the parties' agreement to "abstain from all measures likely to prevent definitely the execution of their obligations" in their investment contract and on Article 47 of the ICSID Convention.⁶

Chart 1: Number of publicly available decisions on provisional measures (1972 to 2022)

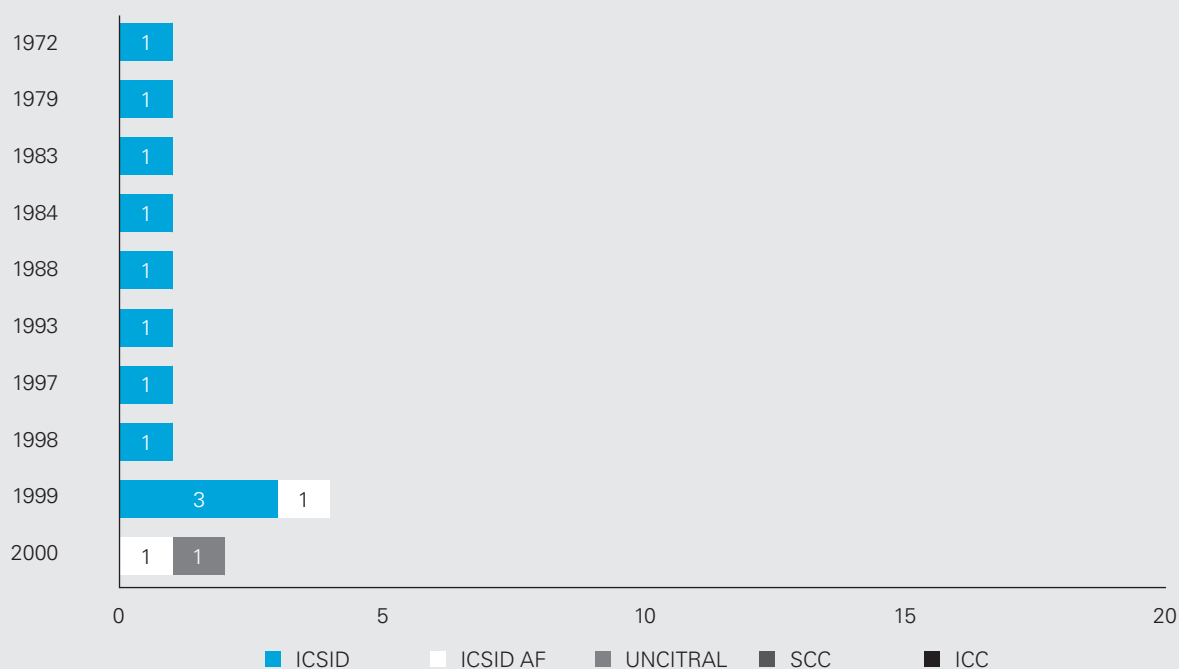
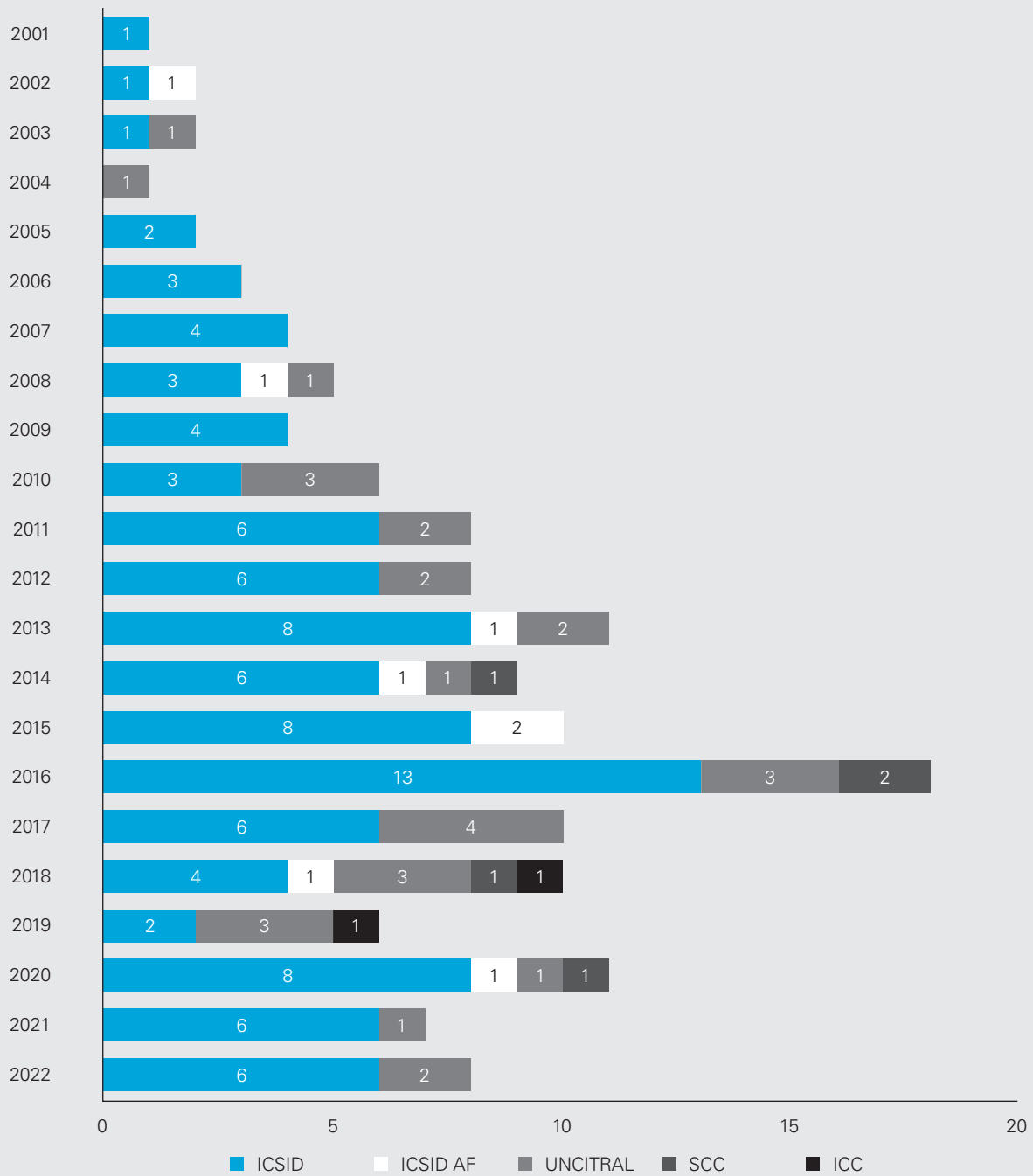


Chart 1: Number of publicly available decisions on provisional measures (1972 to 2022) (continued)

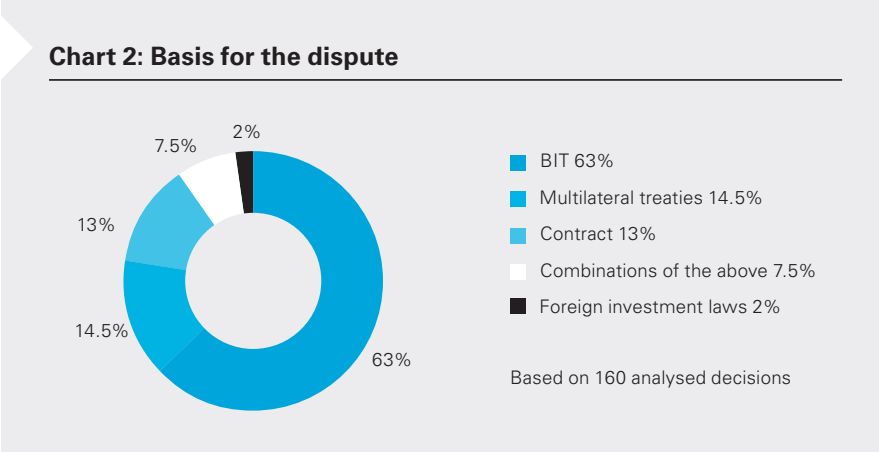


Based on 160 analysed decisions

New ICSID and ICSID AF Rules on provisional measures

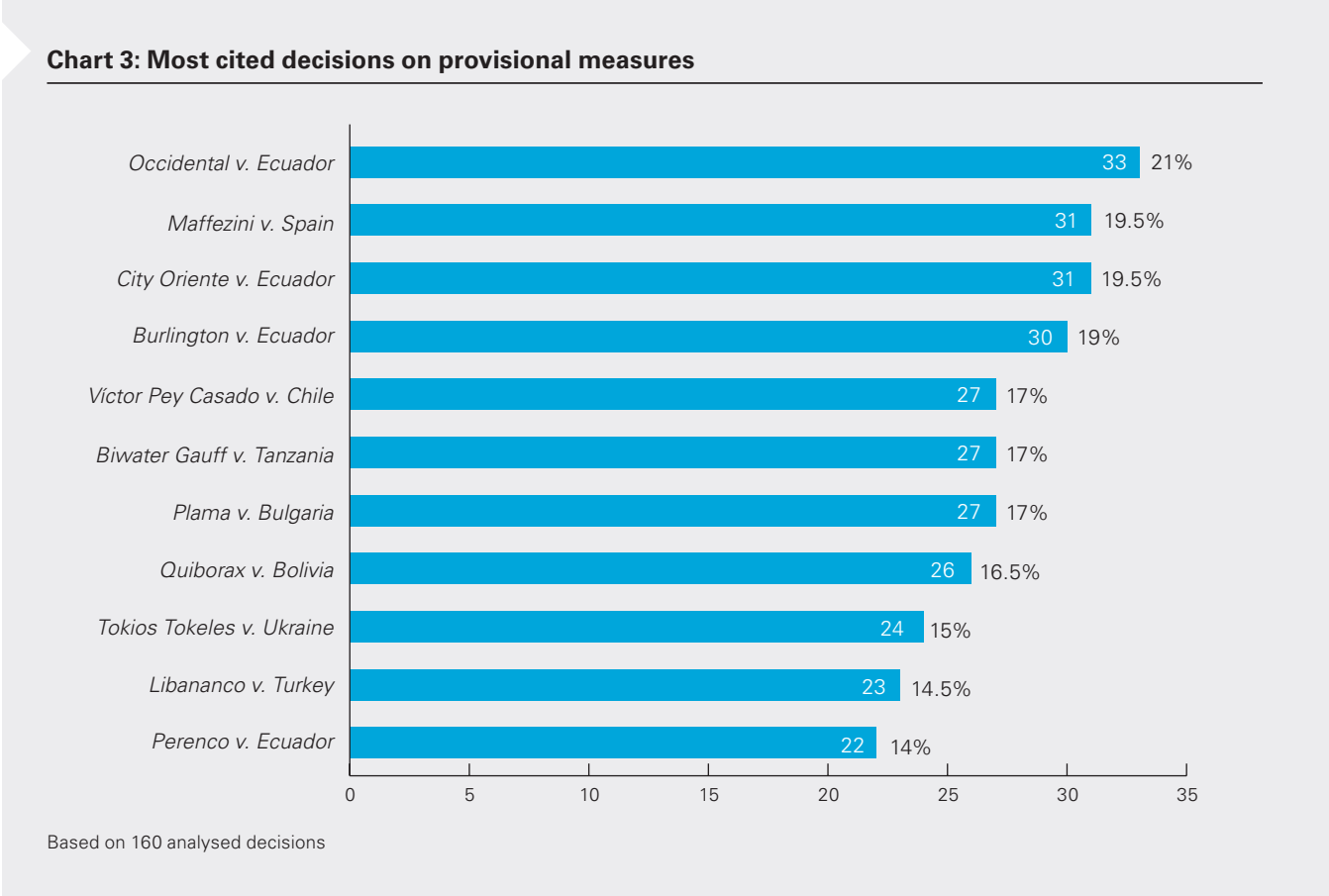
The recent reform of the ICSID and ICSID AF Arbitration Rules reflected the only substantial changes in the legal framework within which such tribunals grant provisional measures since our 2019 Report. We also observed a slight increase in the number of provisional measures requests in disputes under multilateral treaties, including ECT, DR-CAFTA and the Treaty on the Eurasian Economic Union. Tribunals, furthermore, continued to refer to the earlier decisions of other investor-state arbitration tribunals for guidance on the determination of which criteria to use to make decisions on the provisional measures.

The ICSID tribunals' decisions in *Occidental (2007)* and *Maffezini (1999)* again became the most cited cases, with the decision of the tribunal in *City Oriente* joining them as the third most cited case (replacing



Burlington in the 2019 Report). Our study also showed that tribunals do not consider themselves bound by the most cited cases

because the overall number of citations of these decisions has fallen, and tribunals were citing a much wider range of decisions.



Reform of the ICSID system

The release of 2022 versions of the ICSID and ICSID AF Rules and Regulations, which replaced the previous 2006 editions of these rules and came into effect on 1 July 2022,⁷ has become the most significant change of the applicable rules since the 2019 Report.

The table below summarises key changes between Rule 39 of 2006 and Rule 47 of the 2022 ICSID Arbitration Rules. These changes include the creation of indicative lists of provisional measures and criteria for granting them. Most interestingly, the new rules oblige tribunals to issue their decisions within 30 days after the later of their constitution or the last submission on the request.⁸ This should, hopefully, facilitate quicker resolution of requests for provisional measures under the ICSID Rules, which, as we show in the next section, takes significantly longer compared to other arbitration rules.

Most importantly, Rule 53 of the 2022 ICSID Arbitration Rules includes an entirely new provision on security for costs. It specifies indicative criteria for granting such security for claim or counterclaim, which largely reflect current arbitration practice. It also expressly enables the tribunals to suspend or discontinue the proceedings where a party fails to comply with an order to provide security for costs. Additionally, Rule 14 requires parties to disclose the existence of third-party funding throughout the life of a case to avoid conflicts of interest related to such financing arrangements.

Nearly identical changes to the ICSID AF Rules accompanied changes to the ICSID Rules. The new 2022 ICSID AF Rules 57 and 63 largely mirror the corresponding 2022 ICSID Arbitration Rules 47 and 53, with several important exceptions. These include giving the tribunals authority to

“order” provisional measures (as opposed to “recommend” under the ICSID Rules), and expressly permitting the parties to request provisional measures from judicial and other authorities. This distinction can be potentially important as, in theory, a recommendation cannot be enforced in the same way as an order or an award (although, in practice, tribunals decided that this distinction is not significant).

In addition to this, parties can now choose to apply the ICSID AF Arbitration Rules in arbitration proceedings where none of the disputing parties are an ICSID Convention Member State or a national of one. This puts them in direct competition with the UNCITRAL Arbitration Rules in such disputes.

Table 1: Key provisions of the 2006 and 2022 ICSID Arbitration Rules on provisional measures

	Rule 39 of the 2006 ICSID Arbitration Rules	Rules 47 and 53 of the 2022 ICSID Arbitration Rules	Rules 57 and 63 of the 2022 ICSID Additional Facility Rules
Who can request provisional measures?		<ul style="list-style-type: none"> <input type="checkbox"/> A party <input type="checkbox"/> The tribunal at its own initiative 	
What are the requirements for the request?		The request shall specify: <ul style="list-style-type: none"> <input type="checkbox"/> The rights to be preserved <input type="checkbox"/> The measures requested <input type="checkbox"/> The circumstances that require such measures 	
Do the rules prescribe indicative types of provisional measures?	<ul style="list-style-type: none"> <input type="checkbox"/> Not specified 	Includes (but is not limited to) measures to: <ul style="list-style-type: none"> <input type="checkbox"/> Prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process <input type="checkbox"/> Maintain or restore the status quo pending determination of the dispute <input type="checkbox"/> Preserve evidence that may be relevant to the resolution of the dispute 	
Can the tribunal recommend measures that are different from the ones requested by the party?		<ul style="list-style-type: none"> <input type="checkbox"/> The tribunal may also recommend provisional measures different from those requested by a party 	
Is there a deadline for the tribunal to reach its decision?	<ul style="list-style-type: none"> <input type="checkbox"/> Not specified 	30 days from either: <ul style="list-style-type: none"> <input type="checkbox"/> Constitution of the tribunal <input type="checkbox"/> Last submission on the request 	
Whether a party is obliged to disclose change in circumstances related to the ordered measures?	<ul style="list-style-type: none"> <input type="checkbox"/> Not specified 	<ul style="list-style-type: none"> <input type="checkbox"/> A party shall promptly disclose any material change in the circumstances upon which the tribunal recommended provisional measures 	
What if request is made before the constitution of the tribunal?		<ul style="list-style-type: none"> <input type="checkbox"/> ICSID Secretary-General fixes time limits for the parties to present observations on the request for prompt consideration after constitution of the tribunal 	
Are the tribunal’s decisions binding?	<ul style="list-style-type: none"> <input type="checkbox"/> Use softer word “recommend” <input type="checkbox"/> In practice, the tribunals decided that they are no less binding than final decision⁹ 	<ul style="list-style-type: none"> <input type="checkbox"/> Use softer word “recommend” 	<ul style="list-style-type: none"> <input type="checkbox"/> Use stronger word “order”

Table 1: Key provisions of the 2006 and 2022 ICSID Arbitration Rules on provisional measures (continued)

	Rule 39 of the 2006 ICSID Arbitration Rules	Rules 47 and 53 of the 2022 ICSID Arbitration Rules	Rules 57 and 63 of the 2022 ICSID Additional Facility Rules
Can parties request measures from courts/ other authorities?	<input type="checkbox"/> Permitted only where expressly allowed by the arbitration agreement		<input type="checkbox"/> Permitted
In which form can the tribunal issue its decision?	<input type="checkbox"/> Not specified		
Do the rules prescribe the criteria for granting measures?	<input type="checkbox"/> Not specified	<input type="checkbox"/> Urgency <input type="checkbox"/> Necessity <input type="checkbox"/> Proportionality	
Do the rules have provisions on security for costs?	<input type="checkbox"/> Not specified	<input type="checkbox"/> Yes, Rule 53	<input type="checkbox"/> Yes, Rule 63
If yes, what are the criteria for granting security for costs?	<input type="checkbox"/> Not specified	<input type="checkbox"/> Ability to comply with an adverse decision on costs <input type="checkbox"/> Willingness to comply with an adverse decision on costs <input type="checkbox"/> Effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim <input type="checkbox"/> Conduct of the parties <input type="checkbox"/> All other evidence, including the existence of third-party funding	
Sanctions for non-compliance with the order to provide security for costs	<input type="checkbox"/> Not specified	<input type="checkbox"/> Suspension (immediately after non-compliance) <input type="checkbox"/> Discontinuance (if case suspended for more than 90 days)	

In the absence of publicly available practice under the new ICSID Rules, they have already started to exert influence on arbitration practice. For instance, in *Ipek v. Turkey*, the tribunal cited the ICSID Secretariat's proposed amendments to include a dedicated provision on security for costs in support of its conclusion that it had jurisdiction to order such measure in favour of the respondent.¹⁰

In *Dirk Herzig v. Turkmenistan*, the tribunal dismissed the claimant's argument that the inclusion of a dedicated provision in the amendments to the rules meant that their earlier edition did not allow the tribunal to order security for costs. It concluded that, instead of casting doubt on its authority to grant security for costs, the proposed amendments actually reinforced such authority.¹¹

States' proposals

An unprecedented number of proposals accompanied the consultation process for the amendment of the ICSID Rules.

More than 40 ICSID Member States, the EU, as well as various law firms, academics and third-party funders submitted their proposals, which ICSID subsequently published.

This process provides unique insights into states' thinking about various aspects of provisional measures. Some of the states' proposals led to meaningful changes to the Rules, including proposals in relation to:

- Criteria for granting measures:** that the rules should provide increased clarity on the criteria for granting provisional measures, including the criteria of urgency, necessity to avoid irreparable harm and proportionality (Algeria, Argentina, Armenia, France, Indonesia, Morocco, Turkey)¹²
- Deadlines for issuing decisions on provisional measures:** that the rules should include time limits for tribunals to issue decisions on requests for provisional measures (Argentina)¹³

- Non-binding nature of provisional measures:** that ICSID tribunals can only "recommend" and not "order" provisional measures, highlighting the non-binding and extraordinary nature of the tribunals' decisions on provisional measures (Turkey)¹⁴
- Security for costs:** that a dedicated provision on security for costs should be included in the Arbitration Rules (25 states and the EU)
- Third-party funding:** that the existence of third-party funding should play a role in the tribunals' decisions on security for costs (15 states and the EU). At the same time, most of the same states (and the EU) acknowledged that the existence of such funding should not, on its own, warrant granting security for costs,¹⁵ with Costa Rica even suggesting that the tribunal should not be required to consider the existence of third-party funding unless it views it necessary in the circumstances

Other interesting proposals which ICSID did not include in the Rules included:

- **Criteria for granting measures:** specifying that tribunals should first check their prima facie jurisdiction to review the case (Italy),¹⁶ and that an especially high standard is required for granting the provisional measures related to criminal proceedings (Uruguay)¹⁷
- **Types of measures that can be granted:** limiting the types of provisional measures by excluding measures that are necessary to maintain the status quo (Argentina)¹⁸ or limiting the types of granted provisional measures to those that fall under the subject matter of the dispute (Turkey)¹⁹
- **Transparency of tribunals' decision-making:** obliging ICSID to publish all decisions on provisional measures (Argentina)²⁰
- **Entry requirements for requesting provisional measures:** prohibiting investors that are subject to prosecution for criminal offences, including money laundering and corruption, from requesting provisional measures (Algeria)²¹
- **Limitation on measures affecting states' sovereign powers:** that any order for provisional measures should respect the sovereignty of the state and its right to regulate in certain areas while the investment dispute is ongoing (Canada, Colombia)²²
- **Claimants' ability to request provisional measures from state courts:** allowing investors to request provisional measures from state courts in both ICSID and ICISD AF proceedings as the tribunals would still be able to overrule any decision on provisional measures in its final award (Georgia)²³

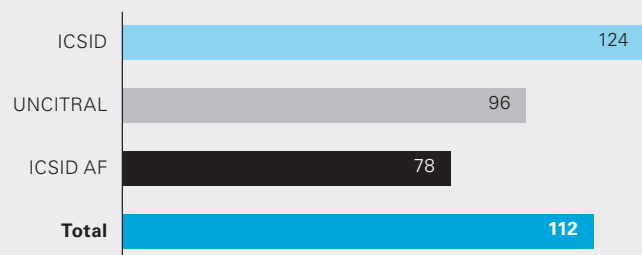
- **Security for costs:** that the application of security for costs should be only limited to claimants, and not respondent states (Armenia, Indonesia, Panama and Ukraine). Some, furthermore, argued for inclusion of the exhaustive list of criteria for granting the security for costs rather than an indicative one (Israel)²⁴
- **Third-party funding:** that the tribunals must consider existence of third-party funding as a mandatory criterion for granting the security for costs (Turkey),²⁵ with China further arguing that the existence of such funding should, on its own, oblige the tribunal to automatically order the security for costs²⁶

Procedural efficiency of provisional measures

Average length of the proceedings

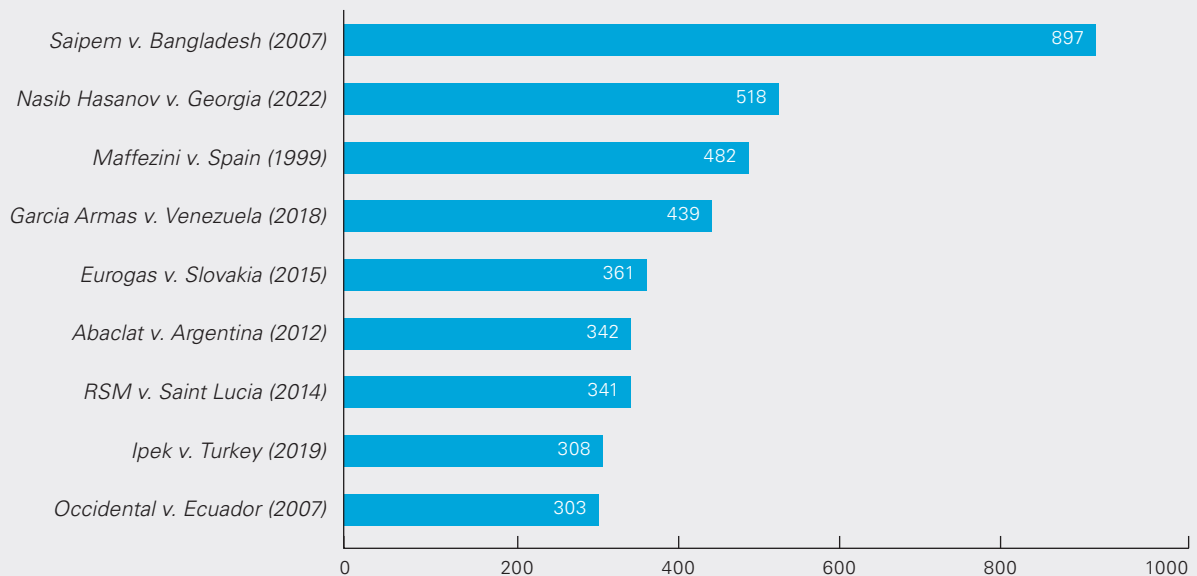
Time and cost remain two of the biggest concerns for arbitration users.²⁷ The 2018 White & Case and Queen Mary International Arbitration Survey highlighted the importance of the procedural aspects of arbitration, with many respondents having widespread concerns about the efficiency of arbitrations, with 67 per cent of them seeing “cost” and 34 per cent the “lack of speed” as the worst characteristics of international arbitration.²⁸ Many of the interviewees have, furthermore, expressed concerns about frivolous motions (undoubtedly, including requests for provisional measures) filed by parties and the necessity for the tribunal to take control over them.²⁹

Chart 4: Average number of days it takes for the tribunal to issue a decision



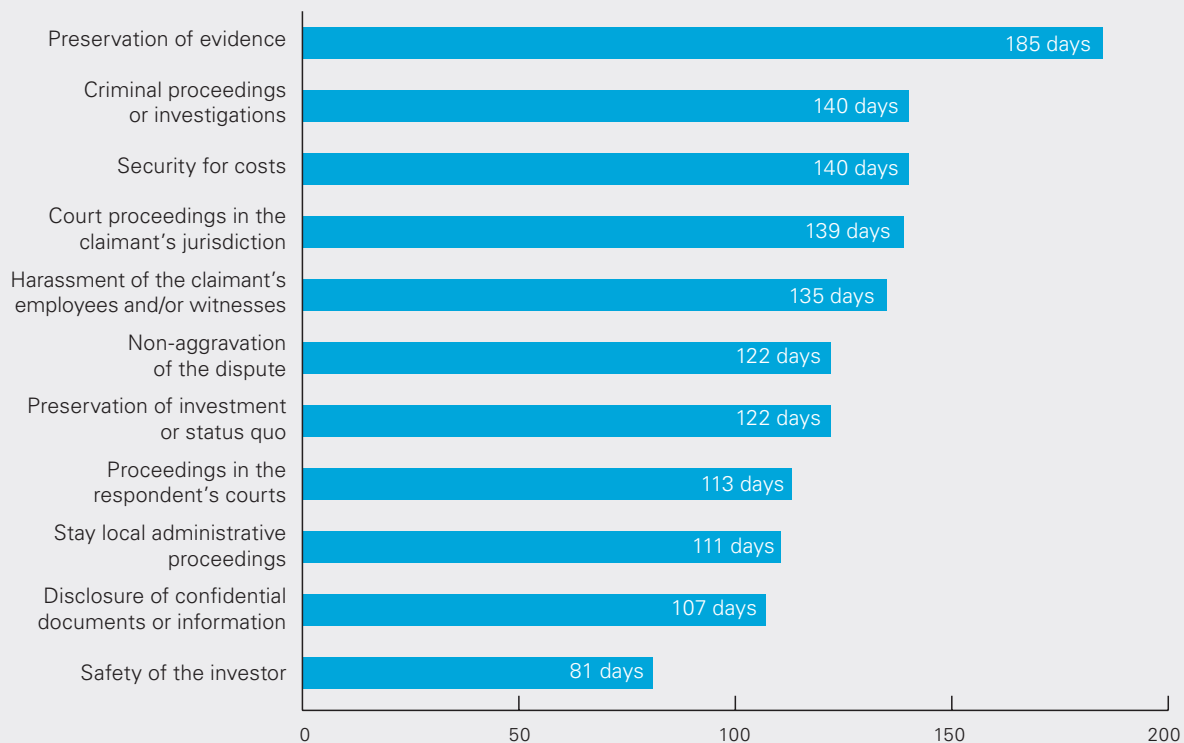
Based on 160 analysed decisions

Chart 5: Slowest resolution of requests for provisional measures



Based on 160 analysed decisions

Chart 6: Average number of days it takes to issue a decision based on the types of provisional measures



Based on 160 analysed decisions

This study aims to identify the average speed with which tribunals decide on requests for provisional measures, how different factors may cause delays in the resolution of such requests, as well as the tribunal's approach to costs for frivolous provisional measures applications.

Overall, on average, it took tribunals 112 days to resolve provisional measures requests, with ICSID tribunals typically taking approximately 124 days to resolve such requests, ICSID AF, 78 days and UNCITRAL, 96 days. This roughly corresponds to the overall average length of proceedings, which show that proceedings under the ICSID Rules are, on average, slightly longer than under the UNCITRAL Rules (4.6 years in comparison to 4.2 years).³⁰

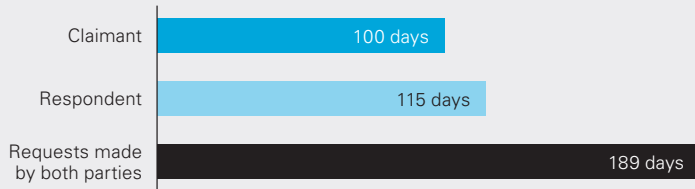
Saipem v. Bangladesh is the longest known decision involving provisional measures, where an ICSID tribunal took 897 days to resolve a claimant's request for provisional measures related to the enforcement of a bond by the respondent. An agreement between the parties and the tribunal that the request should be addressed at the hearing on jurisdiction largely caused this delay.³¹

This length would depend on the type of request, with tribunals prioritising requests that are related to the safety of the investor and publication of confidential information. For instance, in *Pezold v. Zimbabwe*, it took the tribunal only one day to rule on the claimant's request related to the government raid of its premises in an attempt to force the claimant to agree

to the disclosure regime proposed by the respondent.³² Similarly, in *Boyko v. Ukraine*, the tribunal had to issue the decision on the request concerning the claimant's safety and access to healthcare within one day after receiving the request.³³

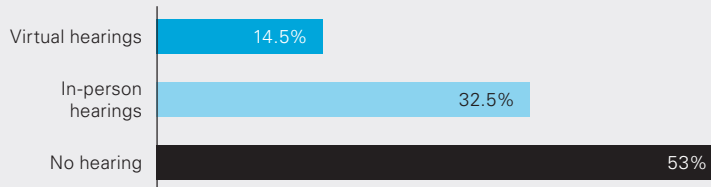
At the same time, it takes longer to rule on requests related to the preservation of the evidence, requests for security for costs or states' sovereign rights to conduct criminal investigations and proceedings, and proceedings in the respondents' courts.

Chart 7: Average number of days it takes for the tribunal to issue a decision based on the requesting party



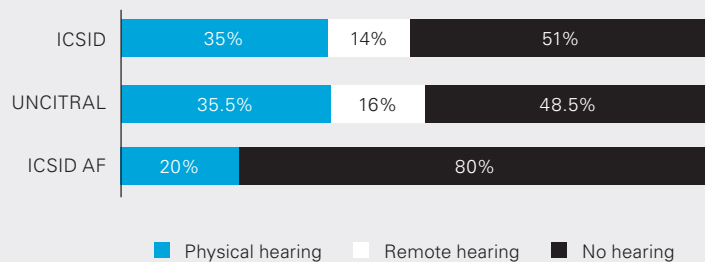
Based on 160 analysed decisions

Chart 8: Use of virtual and in-person hearings



Based on 160 analysed decisions

Chart 9: Use of hearings by arbitration rules



Based on 160 analysed decisions

This timing also differs based on the requesting party: tribunals, on average, took 100 days to resolve requests submitted by claimants, 115 days by respondents and 189 days where tribunals needed to rule on requests submitted by both parties. This is logical as the respondents' requests would typically involve requests for the security for costs, and the claimants' requests would typically include more urgent issues such as harassment of the claimant's employees, the preservation of the investment, or safety of the investor.

Use of virtual and in-person hearings

The White & Case and Queen Mary 2021 survey has shown the parties' willingness to sacrifice oral hearings on procedural issues, including hearings on provisional measures (38 per cent of interviewees) or use of the party-appointed experts (13 per cent) to make arbitration cheaper and faster.³⁴ In particular, many survey respondents confirmed that parties and tribunals should prudently seek to avoid the additional expense and time commitment that oral hearings on procedural issues entail.³⁵ The survey had, furthermore, shown the readiness of 25 per cent of the respondents to consider not having in-person hearings altogether, and 56 per cent preferring to have virtual or mixed hearings instead of only in-person ones.³⁶

The current study showed that tribunals held hearings on provisional measures in slightly less than half of cases involving such requests. In two-thirds of such cases, it included an in-person hearing, and in one-third, a virtual one.

While the COVID-19 pandemic has obviously accelerated the use of virtual hearings, with almost 40 per cent of all virtual hearings occurring after March 2020, the study shows that the tribunals have used telephone hearings as early as August 2003, in *Thunderbird v. Mexico*,³⁷ and January 2004, in *EnCana v. Ecuador*.³⁸

The arbitration rules do not seem to have any significant impact on the tribunals' decision to hold a hearing, with ICSID

and UNCITRAL tribunals (which together account for almost 90 per cent of total decisions) holding hearings in half of cases.

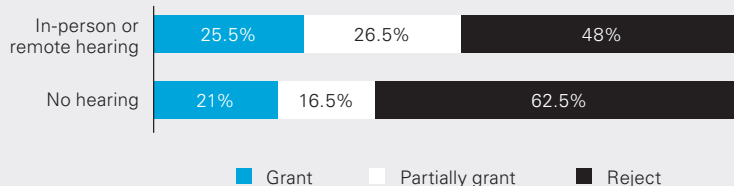
Most interestingly, the statistics further show that tribunals are slightly more likely to grant or partially grant provisional measures when they hold a hearing. The possible reluctance of tribunals to hold hearings on obviously frivolous requests may explain this.

At the same time, regardless of whether a hearing takes place in-person or remotely, it will likely significantly increase the length of time for resolving the request for provisional measures (and the associated costs). The cases involving an in-person hearing were, on average, resolved within 175 days, a remote hearing within 116 days, and no hearing within 71 days from the receipt of the request for provisional measures.

Tribunals, furthermore, would ordinarily issue their decision within 57 to 58 days after the hearing, regardless of whether it was held remotely or in-person. This is much longer than the new 30-day deadline, running from the parties' last oral or written submission on the request, established in the new ICSID and ICSID AF Arbitration Rules.

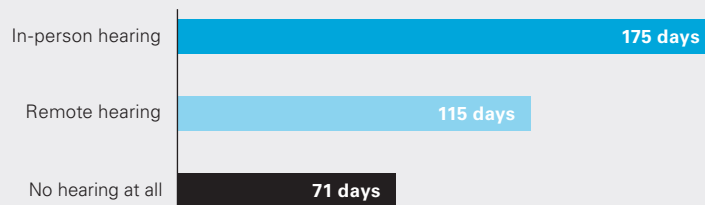
Finally, the statistics show that, where tribunals held an in-person hearing, they preferred to have it in Paris, London, Washington, DC or The Hague.

Chart 10: Whether holding a hearing affects the tribunal's decision



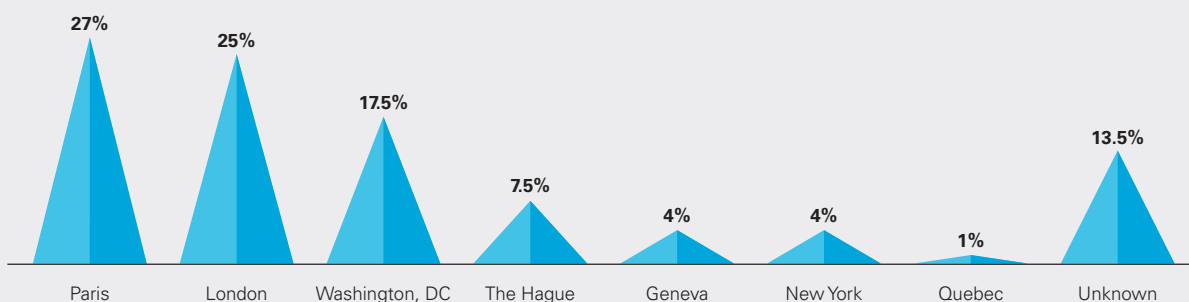
Based on 160 analysed decisions

Chart 11: Whether holding a hearing affects the length of time for rendering the tribunal's decision



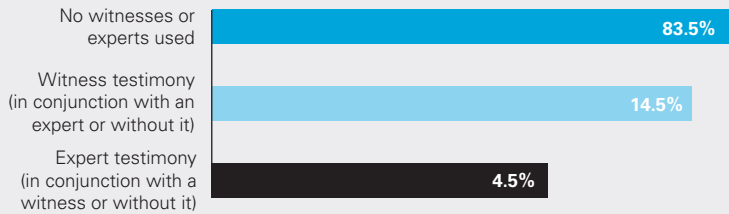
Based on 160 analysed decisions

Chart 12: Places of in-person hearings



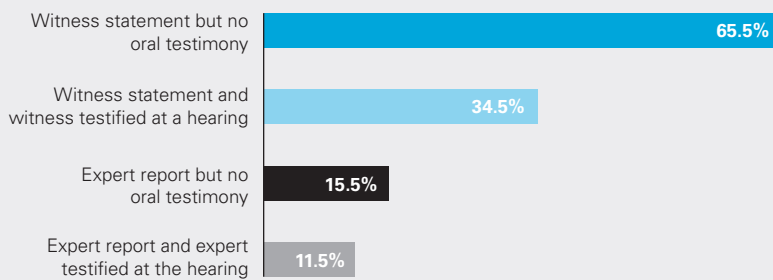
Based on 52 analysed decisions

Chart 13: The use of witnesses and experts



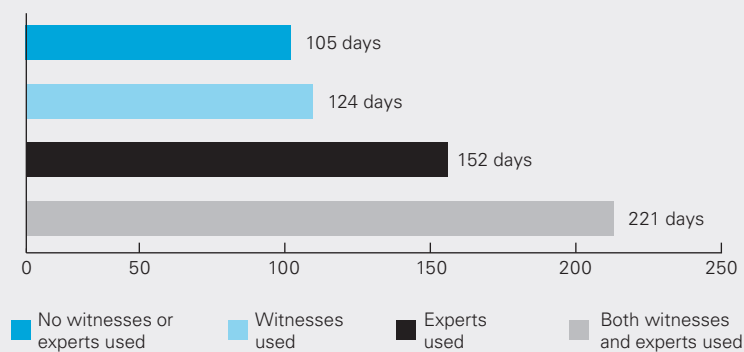
Based on 160 analysed decisions

Chart 14: Extent of witnesses' and experts' participation in the proceedings



Based on 26 analysed decisions

Chart 15: Effect of witnesses' and experts' testimony on the length of the proceedings



Based on 160 analysed decisions

Use of witnesses and experts in dealing with the provisional measures requests

The 2021 White & Case and Queen Mary survey has shown that a small but notable number of respondents view the necessity to cross-examine witnesses and experts (15 per cent), and to have party-appointed experts (13 per cent) as factors that significantly contribute to the length and costs of the proceedings, and are ready to forgo them in some cases.³⁹

The current study shows that tribunals used witness testimony in every seventh case involving the provisional measures, and experts in every twentieth case, often in conjunction with each other.

In most cases that involved witnesses and experts, their participation only included submission of written witness statements or expert reports, with only a few disputes involving oral witness or expert testimony.

In practice, both claimants and respondent states use witness and expert testimony. For instance, in an emergency arbitration under the ICC Rules, the claimant submitted a witness statement of its ultimate beneficiary, and the respondent submitted witness statements of its mining officials, with two of these individuals (one for the claimant and one for the respondent) giving witness testimony at a telephone hearing.⁴⁰

The *Ipek v. Turkey* decision provides further insight into the use of expert evidence in similar proceedings, with the claimant submitting an expert report on extradition law, prepared by a barrister, in support of its request in relation to the respondent's attempts to extradite one of the claimant's beneficiaries, with this expert giving oral testimony at an in-person hearing in London.⁴¹ Statistics further show that tribunals are usually requiring more time to issue the decisions in cases that involve expert and witness testimony.

At the same time, the participation of witnesses and experts does not seem to affect the overall outcome of the proceedings, with only a marginal difference in the percentage of granted and partially granted requests in comparison to cases that do not involve such testimony.

Language of the arbitration

Although some of the more recent decisions use languages other than English, the English language continues to dominate in the field, with the vast majority of the decisions on provisional measures being issued in English, followed by a few decisions in Spanish and French. In case of Spanish-language decisions, this would usually be in cases involving BITs, concluded between Spanish-speaking countries.⁴² In case of the French language decisions, these arise from investment contracts or mining codes, which provide for investor-state arbitration.⁴³

While the number of decisions in French and Spanish remains too small (13) to make any definitive conclusions, statistics show that, on average, tribunals take more time to issue the decisions in these languages (148 days), in comparison to 108 days for the decisions that are made in English.

Decision on costs

The White & Case and Queen Mary surveys show that interviewees are increasingly anxious about frivolous procedural applications, submitted by the other party, as well as the associated costs.⁴⁴ The UNCITRAL Working Group III on the reform of investor-state dispute resolution also shares these concerns and issued a working paper on how to address them.⁴⁵

This makes the issue of the immediate allocation of costs increasingly important to the parties, with the vast majority of requests for provisional measures requesting tribunals to award the costs of the application to the applicant.

While both the new 2022 ICSID Rules and 2010 UNCITRAL Rules support the “costs follow the event” approach to the allocation of costs,⁴⁶ they do not expressly specify whether this applies to decisions on provisional measures, and whether such costs should be only awarded in the final award or in provisional decisions.

The data shows that the majority of tribunals remain reluctant to issue any costs awards before the end of the proceedings, with more than half of the tribunals postponing the decision on costs to a later stage of arbitration and more than 40 per cent of the decisions not addressing this issue altogether.

Chart 16: Effect of witnesses’ and experts’ testimony on the decision of the tribunal

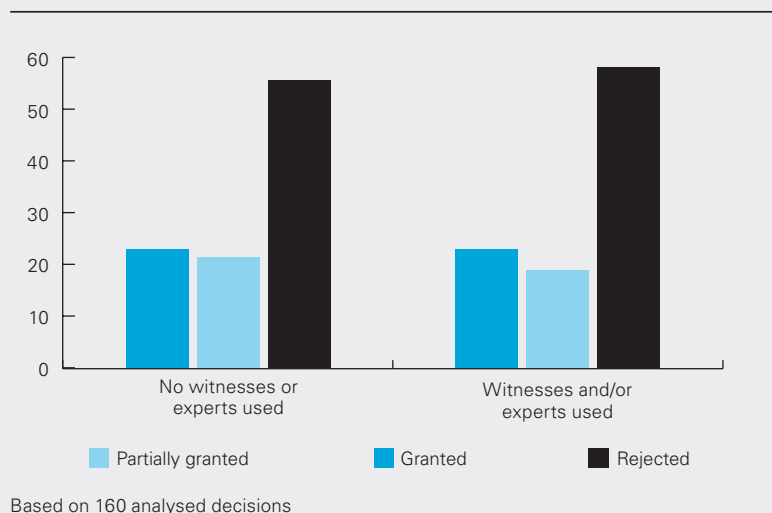
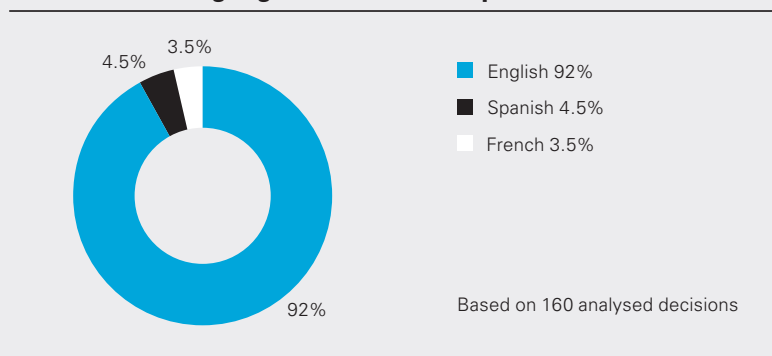


Chart 17: The language of decisions on provisional measures

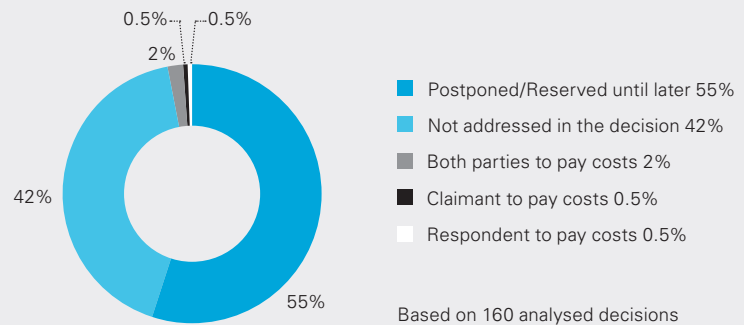


In fact, only five cases involved an award of costs. These cases include *Rizzani v. Kuwait*, where the tribunal decided that the most appropriate costs order was to order each party to bear their own costs, and one half of the costs of the arbitration incurred in connection with the provisional measures phase.⁴⁷ The tribunal in *Dirk Herzig v. Turkmenistan*⁴⁸ and the emergency arbitrator in *Komaksavia v. Moldova*⁴⁹ followed a similar approach.

The few exceptions to this rule, where tribunals decided to award all costs incurred in connection with the provisional measures phase to the winning party, include *SL Mining v. Sierra Leone*, where an ICC emergency arbitrator ordered the respondent to bear all of the arbitrator's fees, as well as all of the claimant's legal costs and expenses because the claimant's request was granted in full.⁵⁰ Similarly, when the respondent prevailed in its request for security for costs in *Kazmin v. Latvia*, the tribunal ordered the claimant to bear all costs of the application.⁵¹

Accordingly, while an award of costs in a decision on provisional measures is increasingly rare, it is not unprecedented, especially where a party's request is granted in full, or a party fails to show that the requested order for provisional measures is justified in the circumstances.

Chart 18: Tribunals' decisions on costs



Emergency arbitration and the “most provisional” measures

Emergency arbitration in the disputes involving states

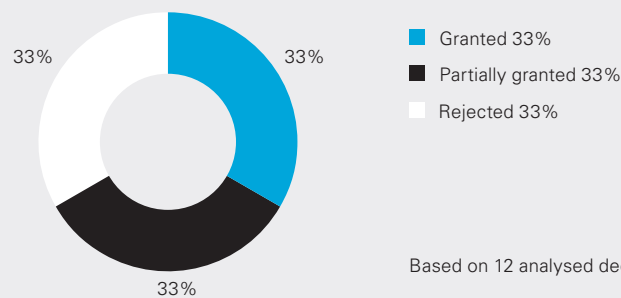
While some stakeholders (primarily law firms) had argued for inclusion of the provisions on the appointment of the emergency arbitrators in the ICSID Rules,⁵² this proposal did not gain much traction with states, with the ICSID Secretariat rejecting it because the “tight schedule required for emergency arbitration could raise due process issues in cases involving states.”⁵³ The ICSID has further pointed to a recent trend for BITs “to allow a request for provisional measures before domestic courts prior to the constitution of the tribunal” as a potential way for parties to request provisional measures before the constitution of the tribunal.⁵⁴

Because of this, the practice under the SCC rules remains the main source of emergency decisions in investor-state cases. At the moment, there are at least 12 known SCC emergency arbitration decisions.⁵⁵ Only five of these decisions became publicly available and were included in this study. They typically included applications related to the stay of the enforcement of administrative proceedings and recently adopted local legislation, proceedings in the respondent’s courts, criminal investigations and measures related to the claimant’s safety.

Unlike ICSID and UNCITRAL tribunals, all SCC emergency arbitrators have shown enviable consistency in their application of the criteria for granting provisional measures, with all tribunals applying the criteria of urgency and proportionality and conducting a brief assessment of prima facie jurisdiction and the claimant’s reasonable chance of success on the merits.⁵⁶

According to Appendix II to 2017 SCC Arbitration Rules, the SCC board must appoint an emergency arbitrator within 24 hours of receipt of a party’s application. Such emergency arbitrator is obliged to issue a decision on interim measures no later than five days from the date when they received the application. In practice, arbitrators have often slightly overrun this deadline, with only three out of five emergency arbitrators issuing their decisions within the prescribed days limit (*TSKinvest*, *Evrobalt* and *Komposit*). In *Komaksavia*, the three-day delay was caused by the belated filing of the respondent’s response to the claimant’s application⁵⁷ and, in *Munshi*, delay in service of the claimant’s application on the respondent,⁵⁸ with both

Chart 19: Decisions of SCC emergency arbitrators



Based on 12 analysed decisions

arbitrators otherwise finalising their decisions within prescribed deadlines. Only one of these disputes, *Evrobalt*, involved a remote hearing.

Finally, while the ICC Court officially states that the provisions of the ICC Rules on “emergency arbitrator proceedings cannot apply in ICC investment treaty arbitrations,”⁵⁹ these rules have been applied in similar disputes in practice. This includes *SL Mining v. Sierra Leone*, a commercial dispute under an investment contract. In that case, the emergency arbitrator issued its decision within 19 days after the claimant made its request for provisional measures and 17 days after the appointment of the emergency arbitrator, just two days after the deadline, established by ICC Rules.⁶⁰ This minor delay was caused by the parties’ requests for an extension of time for their respective submissions.⁶¹

The “most provisional” measures in ICSID disputes

Another interesting trend that has emerged in ICSID arbitration practice is the increasing use of what the tribunal in *IBT v. Panama* called “medidas provisionálsimas” or the “most provisional measures” by ICSID tribunals. This tribunal defined them as the measures that:

*ensure that the subject of the provisional measures request is protected and survives long enough for the tribunal to have time to rule on the alleged provisional measure.*⁶²

In some cases, tribunals made such decisions before both parties had an opportunity to present their observations on the provisional measures request. For instance, this was done in *City Oriente v. Ecuador*, where the

respondent refused to participate in the hearing on provisional measures,⁶³ and in *Pezold v. Zimbabwe*, where the respondent’s actions threatened the agreed procedure for the disclosure of documents a day before such a disclosure was due to occur.⁶⁴

In other cases, tribunals made decisions pending future developments in the case, subsequently issuing a full decision based on the further submissions of the parties. In *IBT Group v. Panama*, the tribunal issued its “most provisional” decision, granting claimants’ request in relation to the enforcement of a performance bond against claimants within two months of its receipt only to reconsider and reject the request 45 days later.⁶⁵ This also happened in *Nasib Hasanov v. Georgia*.⁶⁶ In *Uniper v. Netherlands*, the tribunal, on the contrary, first rejected the claimant’s request, only to partially accept it two-and-a-half months later.⁶⁷

These decisions are very similar to the temporary restraining orders or TROs, the short-term pre-trial temporary injunctions available in US civil litigation proceedings. Similarly to the decisions on the “most provisional measures,” TROs enable judges to issue provisional measures without informing other parties or holding a hearing where a party convinces the judge that it will suffer immediate irreparable injury unless the order is issued.

At the moment, these decisions seem to be taken in a complete legal vacuum and may technically contradict the old 2006 version of the ICSID Rules, which provide that tribunals should issue provisional measures “after giving each party an opportunity of presenting its observations.”⁶⁸ The 2022 ICSID Rules provide more flexibility to the tribunals and do not have such a provision.⁶⁹

Key findings

The parties making the provisional measures requests

The requesting parties

Our 2019 Report showed that claimants made the vast majority of requests for provisional measures, accounting for almost 70 per cent of them, respondent states only one-fifth, and both parties 9.5 per cent of such requests. While recent practice has not reversed this trend, with claimants still accounting for almost two-thirds of cases, and respondent states only a quarter of them, it shows states' increasing willingness to request the provisional measures, particularly related to the security for costs.

The regions of the parties

The increase in the number of decisions in intra-regional disputes signifies another important trend. While the vast majority of the investors involved in the decisions on provisional measures still come from capital-exporting countries, an increasing number of requests come from parties originating in Eastern Europe, Latin America and Africa.

This has not been accompanied by a corresponding change in the number of respondents from developed countries, with states from capital-importing countries being respondents in the majority of cases involving decisions on provisional measures. A significant rise in the number of respondents coming from the Post-Soviet Eastern European and Central Asian states has become a noticeable trend in recent years.

Chart 20: Parties requesting decisions on provisional measures

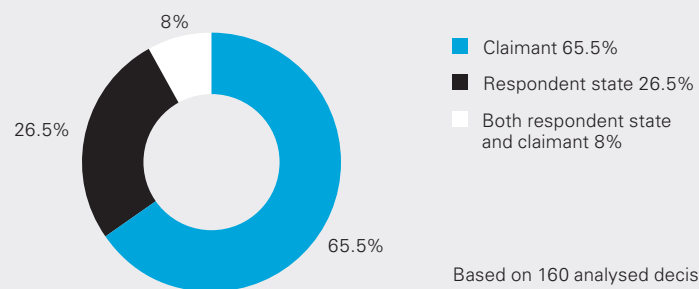


Chart 21: Regions of investors

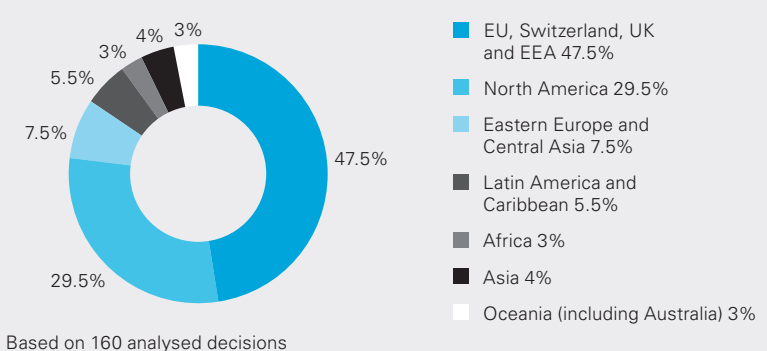
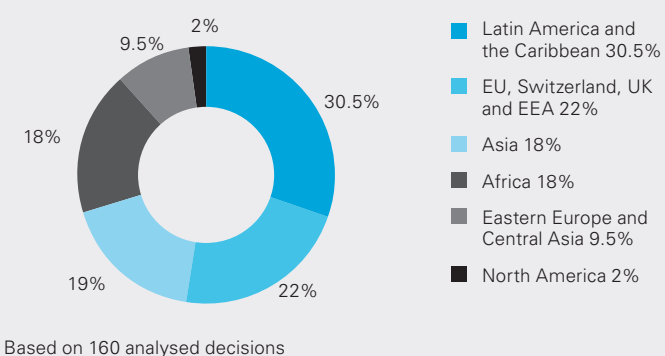


Chart 22: Regions of respondent states



The chance of success by region of the requesting party

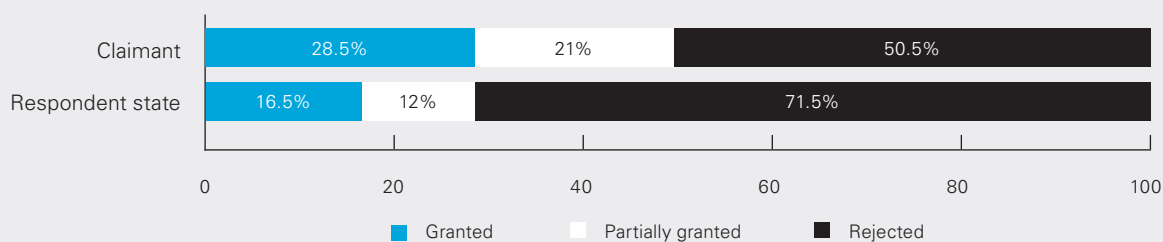
While investors remain almost two times more likely to obtain a positive decision from the tribunal than respondent states, this gap has now significantly decreased, with tribunals granting the requests of respondent states in 16.5

per cent of cases—a quarter more than in 2019. Much of this increase relates to the tribunals’ greater willingness to grant requests for security of costs.

The geographical location of respondent states continues to correlate with the success of applications for provisional measures. Similarly to our 2019 Report,

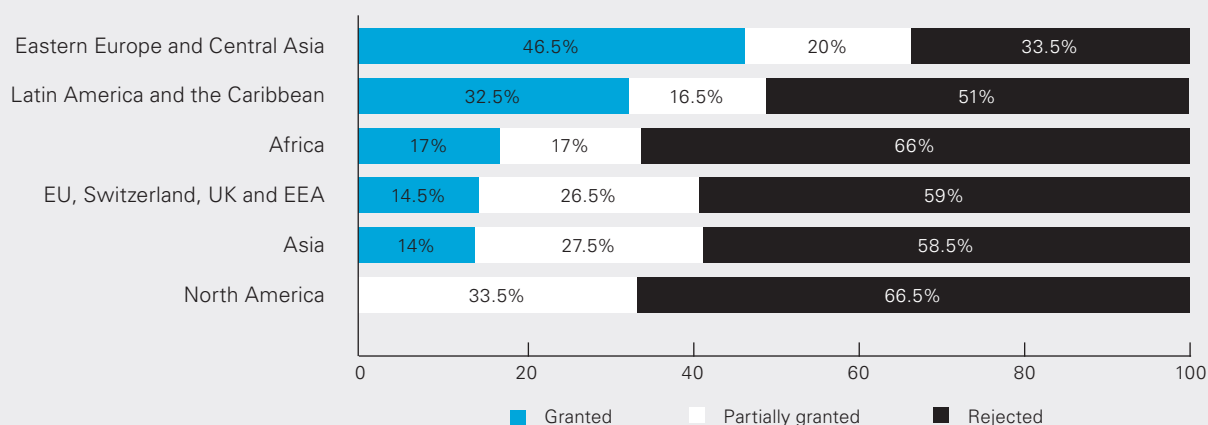
in applications involving the post-Soviet states and Latin American states as respondents, the claimants partially or fully succeeded in more than half of the cases while in applications involving Africa, Asia and the EU, Switzerland, UK and EEA, the likelihood of success was much smaller.

Chart 23: Chance of success based on the requesting party



Based on 160 analysed decisions

Chart 24: Chance of success based on the region of the respondent state



Based on 160 analysed decisions

Applicable arbitration rules

Tribunals acting under the ICSID Arbitration Rules made the vast majority of publicly available decisions on provisional measures, followed by UNCITRAL and ICSID AF tribunals. This confirms that, despite having a choice between the ICSID and UNCITRAL Rules under the majority of international investment agreements, the parties continue to be drawn by greater institutional support in the ICSID arbitration system, as well as its enforcement mechanism, which allows to avoid possible annulment and challenges in domestic courts.

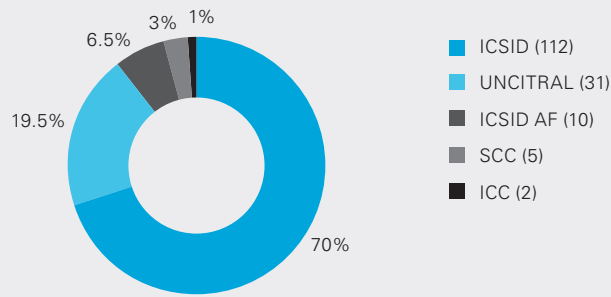
The study further shows that UNCITRAL tribunals remained more likely to grant or partially give requested provisional measures, but this gap has now significantly narrowed down, with ICSID tribunals doing this in nearly the same number of cases.

The breakout by the party shows similar differences between UNCITRAL and ICSID practices. As in our 2019 Report, claimants were more likely to succeed under UNCITRAL Rules. At the same time,

a respondent states' rate of success was much higher under the ICSID Rules, with the tribunals granting or partially granting states' requests in nearly a third of cases—twice

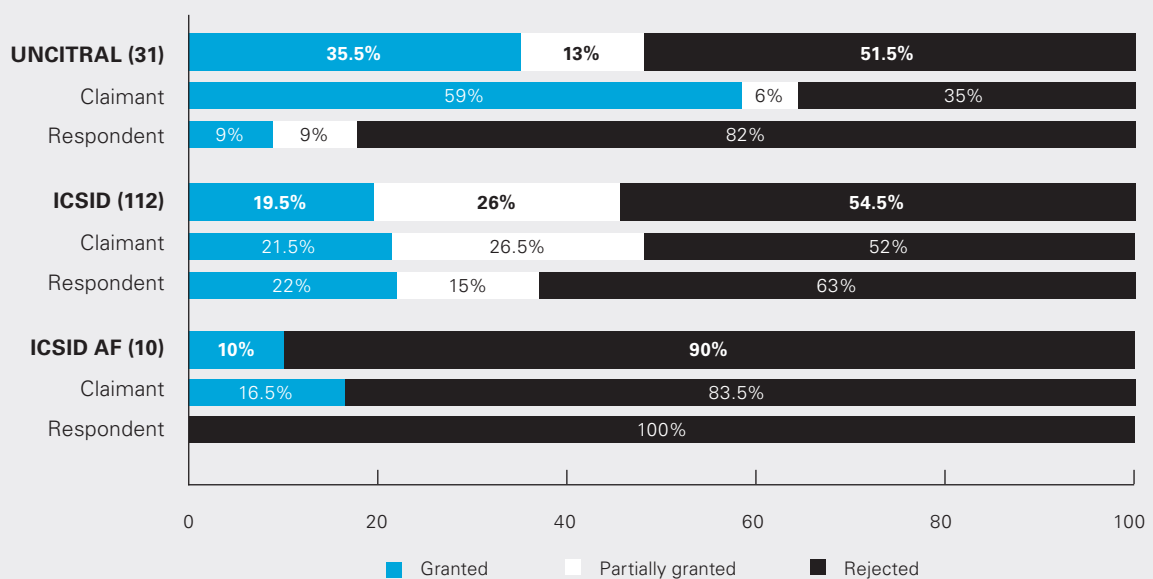
as many as under the UNCITRAL Rules. Regardless of applicable arbitration rules, investors continued to have more success with their applications compared to states.

Chart 25: Applicable arbitration rules



Based on 160 analysed decisions

Chart 26: Chance of success under different arbitration rules by party



Based on 153 analysed decisions

Types of provisional measures

There is still no universally accepted definition of “provisional measures.” The UNCITRAL Rules contain the most exhaustive indicative definition of provisional measures, describing them as measures to:

- a. Maintain or restore the status quo pending determination of the dispute
- b. Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself
- c. Provide a means of preserving assets out of which a subsequent award may be satisfied
- d. Preserve evidence that may be relevant and material to the resolution of the dispute⁷⁰

The new 2022 ICSID Rules contain a more limited (although non-exhaustive) description of “provisional measures,” describing them as measures to:

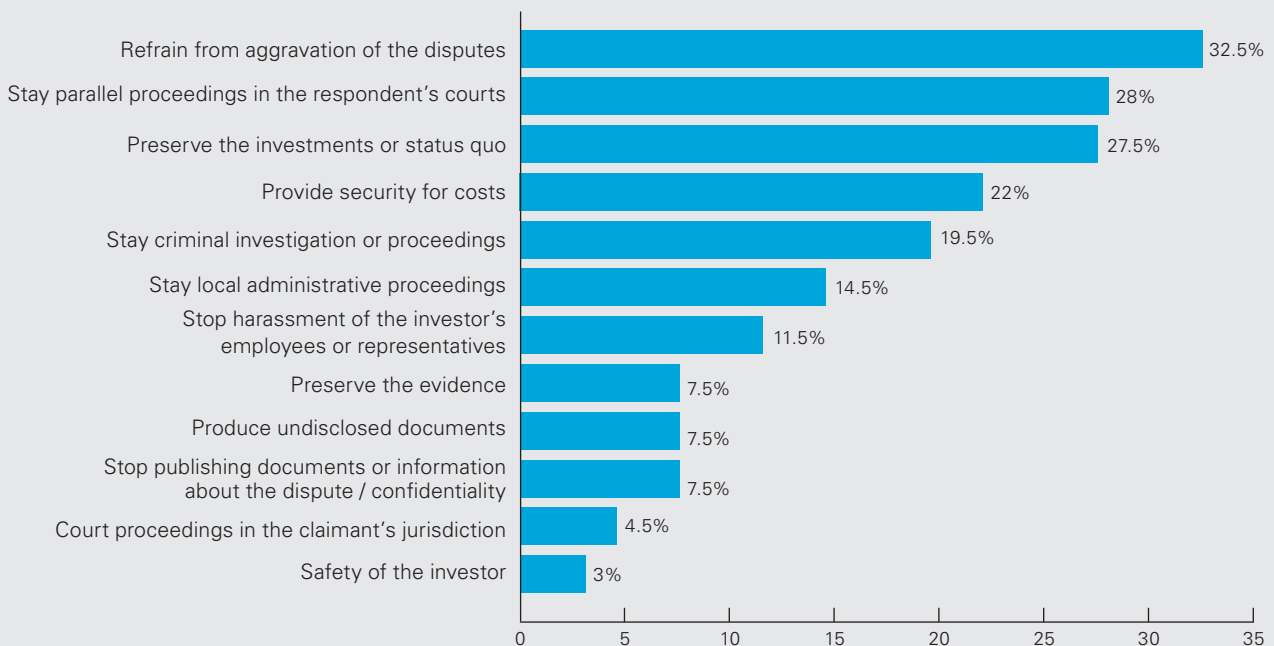
- a. Prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process
- b. Maintain or restore the status quo pending determination of the dispute
- c. Preserve evidence that may be relevant to the resolution of the dispute⁷¹

As the discussions during the ICSID Rules amendment process have shown, even this limited description of “provisional measures” is controversial, with various states proposing to limit them to only measures preventing the aggravation of

the dispute,⁷² or even requesting a de facto exclusion of measures related to criminal proceedings.⁷³

This study confirms that the amended ICSID Rules cover most of the requested types of measures. Such measures also included those related to parallel court proceedings in the respondent’s courts, and criminal investigations and proceedings. Some of the most interesting changes since 2019 include the noticeable rise in the number of the applications for security for costs, which have now become the fourth most requested type of provisional measures.

Chart 27: Most requested types of the provisional measures



Based on 160 analysed decisions

Preservation of investments and non-aggravation of the dispute

Requests to refrain from aggravating the dispute, often coinciding with requests to preserve investments, continue to be the most requested provisional measure although their overall share has slightly fallen in comparison to our 2019 Report.

The aggravation of the dispute may take various forms, with claimants most recently requesting tribunals to stop respondent states from aggravating the dispute by:

- Pursuing criminal investigations against claimants, their employees witnesses and legal counsel⁷⁴
- Enforcing an administrative decision requesting claimants to pay more than US\$800 million⁷⁵

- Enforcing a performance bond against claimants⁷⁶
- Terminating the claimant's concession agreement⁷⁷

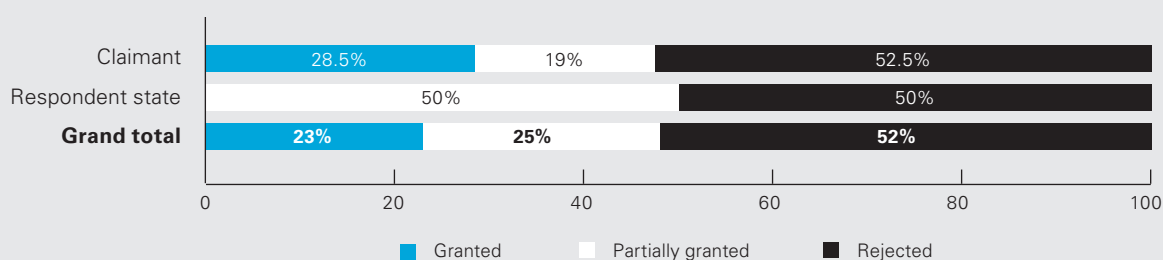
While such requests are typically made by claimants, in a small number of cases such relief was also requested by respondent states. These examples include allegations that claimants aggravated the dispute through:

- Engaging lobbyists and public relations firms to pressure the respondent's authorities⁷⁸
- Publishing confidential excerpts from the arbitration file⁷⁹
- Publishing information discouraging foreign investors from making investments in the respondent state⁸⁰

Multiple tribunals have recognised the importance of such requests, with the tribunal in *Alicia Grace v. Mexico* highlighting "the paramount need to protect the integrity of the arbitration process and the equally important need to avoid any aggravation of the dispute."⁸¹ At the same time, tribunals have repeatedly recognised that the required burden of proof for such requests should be "particularly high"⁸² and that even the most extreme circumstances, such as the institution of criminal investigations related to investment during the pendency of the dispute, "do not automatically aggravate such dispute."⁸³

Overall, tribunals granted or partially granted such requests in slightly less than half of cases. Claimants were more likely to reach an outright success, while respondent's requests more often were only partially granted.

Chart 28: Decisions on requests for non-aggravation of dispute



Based on 52 analysed decisions

Stay of parallel proceedings

The same disputes or issues may simultaneously arise in domestic courts and international arbitration, often forming the subject of the arbitration proceedings. This can undermine the exclusivity of proceedings and put tribunals in the cross-hairs, forcing them to choose between resolving the dispute and prejudging the merits of claimants' claims. This could potentially explain the relatively low rate of the decisions granting such requests—only slightly more

than 40 per cent of all decisions on this issue—much lower than in our 2019 Report, in which, the tribunals granted such requests in nearly two-thirds of cases.

The recent practice highlights the increasingly cautious attitude, adopted by tribunals, with tribunals being ready to grant provisional measures only where they have the same subject matter as arbitration. For instance, the *Ipek v. Turkey* tribunal separated claimants' request in two parts and decided to suspend only the proceedings

that dealt with an issue that was central to the arbitration.⁸⁴ In *Uniper v. Netherlands*, the tribunal adopted a similarly cautious approach, highlighting the importance of state sovereignty and refusing to outright order the state to suspend the proceedings in the investor's home courts. The tribunal also noted that it was given comfort by the respondent state's express and binding representation that these court proceedings were not aimed at contesting the tribunal's power to rule on its own jurisdiction.⁸⁵

At the same time, tribunals adopted a far harsher approach in cases where respondents attempted to outright challenge their jurisdiction. In *Maintstream Renewable Power v. Germany*, the tribunal rejected the respondent's request to stay arbitration proceedings pending the German court's decision on whether the arbitration agreement was invalid under the EU law.⁸⁶ In *Patel Engineering v. Mozambique*, the tribunal similarly rejected the respondent's request for the suspension

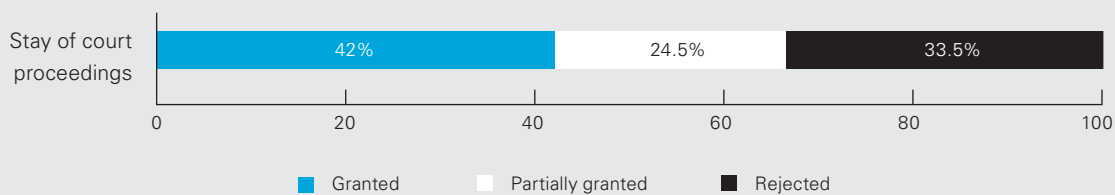
of the arbitration proceedings pending resolution of a parallel ICC arbitration.⁸⁷

Finally, a notable development involved the respondent's application for the tribunal to order claimants to suspend an application to obtain discovery in a third-party state's court in *Fund for Protection v. Lithuania*. The tribunal dismissed the respondent's application because the respondent state had failed to show that the foreign court's decision on disclosure could itself prejudice the state's rights in arbitration or cause the respondent any procedural harm.⁸⁸

Security for costs

Investment arbitration proceedings typically involve significant costs for both parties, with parties' costs often reaching millions or even tens of millions of US dollars, and the respondent state mean costs reaching up to US\$4.7 million.⁸⁹ Investors in investor-state proceedings are frequently holding companies operating through local subsidiaries with few assets of their own, which raises concerns about respondent states' ability to recover their costs.

Chart 29: Decisions on requests for stay of court proceedings



Based on 45 analysed decisions

As this study explains above, these concerns have led to states' overwhelming support of the inclusion of a dedicated provision on security for costs in the new 2022 ICSID and the ICSID AF Arbitration Rules.⁹⁰

The UNCITRAL Rules 2010 do not have an equivalent provision, but this does not prevent tribunals from ordering security for costs or relying on similar criterion. In *Tennat v. Canada*, the tribunal confirmed this by ruling that "Article 26 of the UNCITRAL Rules does not set forth a limit on the types of provisional measures that this Tribunal may take," which authorises the tribunals to grant security for costs.⁹¹

The most recent arbitration practice follows the same approach. As the 2019 Report explained, until recently, such

measures had been increasingly rare, with tribunals granting them in only three out of more than 20 cases involving such requests.⁹² In all of these cases, tribunals required the respondent states to show the extreme circumstances that warranted granting security for costs.

Tribunals have followed a similar approach in new disputes, awarding security for costs where:

- The claimant was bankrupt, represented by its insolvency administrator and funding all of its costs through a third-party funding agreement that did not have any provision on funders' liability in case of claimant's loss⁹³

- The claimant failed to pay its own legal counsel in previous disputes, was subject to criminal and money laundering investigations, and had no traceable assets⁹⁴

The most recent practice has further clarified the dominant approach to the acceptability of third-party funding, with the tribunal in *Hope v. Cameroon* confirming that third-party funding "did not necessarily constitute, on its own, exceptional circumstances justifying the granting of a security for costs measure."⁹⁵ As this tribunal further explained, the exclusion of the assumption of the opposing party's costs is common for funding contracts and cannot, on its own, justify the granting of security for costs.⁹⁶

The tribunal in *Tennant v. Canada* had similarly decided that “the existence of a funding agreement alone has not been found by arbitral tribunals to be sufficient to grant security for costs.”⁹⁷ This tribunal eventually rejected the respondent’s request because the respondent state failed to prove the claimant’s impecuniosity or show any track record of its non-payment of costs awards.⁹⁸

In line with the new ICSID and ICSID AF Arbitration Rules sanctions for non-compliance with the tribunals’ decision on security for costs, tribunals have suspended the proceedings in cases where claimants had failed to comply with the tribunals’ orders on security for costs, with the tribunal in *Kazmin v. Latvia* suspending arbitration proceedings after the claimant’s failure to comply with its security for costs order until the claimant posted such a security.⁹⁹

At the same time, tribunals have demonstrated greater flexibility in cases where the circumstances of the case justified the claimant’s failure to post security for costs. In *Dirk Herzig v. Turkmenistan*, the majority of the tribunal excused the claimant, facing insurmountable obstacles in obtaining a bank guarantee or other security, for a failure to comply with the tribunal’s security for costs order.¹⁰⁰

Stay of criminal investigation or proceedings and investor’s safety

Subsequent practice also confirms our 2019 Report’s findings demonstrating increasingly intertwined connections between investment arbitration and domestic criminal proceedings, with the tribunal in *Alicia Grace v. Mexico* observing (with reference to our 2019 Report) that requests that are related to the criminal proceedings are “not so unusual in arbitration between investors and states.”¹⁰¹

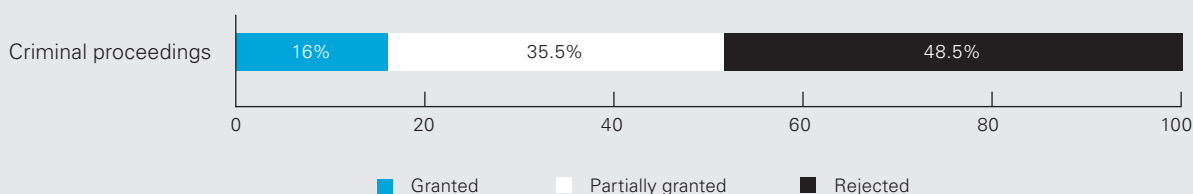
The new requests, related to these types of measures, involved:

- Criminal proceedings against the claimant’s shareholder and key witness, the members of their family, their legal counsel and other potential witnesses for the purported terrorism offences¹⁰²
- Eight sets of criminal investigations against claimants’ and their subsidiary’s directors, claimants’ employees and legal counsel based on allegations of procedural fraud and tax evasion¹⁰³
- Criminal investigations and proceedings against the claimant’s employees based on alleged incitement of the violent riots that had occurred near the claimant’s mine¹⁰⁴
- Criminal investigations against a claimant’s witness based on allegations of corruption¹⁰⁵

The overall statistics on granting requests in relation to criminal investigations and proceedings had remained roughly the same, with tribunals granting claimants’ requests for the suspension of such proceedings in 16 per cent of cases, and partially granting them in approximately one-third of the decisions.

The tribunals’ reluctance to interfere with state’s “undisputed sovereign right” to investigate alleged criminal behaviour occurring on its territory¹⁰⁶ may explain such a relatively low success rate. After our 2019 study, only one tribunal, *Ipek v. Turkey*, outright granted the claimant’s request for the suspension of criminal proceedings and investigations.¹⁰⁷ In *Alicia Grace v. Mexico* and *Gerald v. Sierra Leone*, tribunals adopted a more cautious approach by either issuing a general recommendation for the respondent “to abstain to adopt any unjustified measure that may aggravate the dispute,”¹⁰⁸ or recommending the state to change the bail conditions for the claimant’s employees to enable them to return to the claimant’s mine without the suspension of the criminal proceedings.¹⁰⁹

Chart 30: Decisions on requests for stay of criminal proceedings



Based on 31 analysed decisions

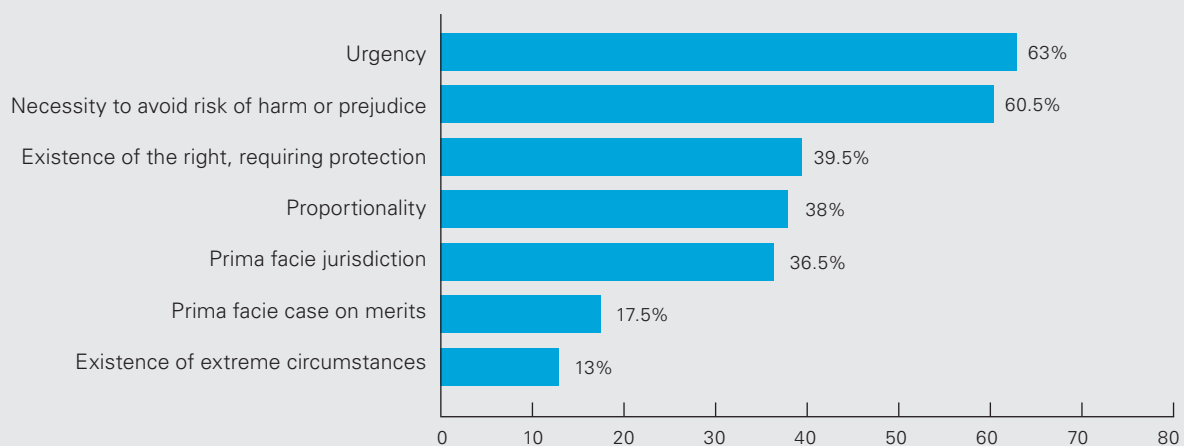
Requirements for granting provisional measures

Unlike in our 2019 Report, most applicable arbitration rules now contain provisions on the criteria for granting of provisional measures, providing long-needed clarity on this issue. In addition to Article 26(3) of the UNCITRAL Rules' requirement that the parties satisfy the criteria of necessity, proportionality and a showing of prima

facie case on merit, the new 2022 ICSID and ICSID AF Arbitration Rules 47 and 57 (respectfully) require parties to prove that the measures are urgent and necessary, and show the effect that the measures may have on each party.¹¹⁰ These criteria are in line with tribunals' practice, summarised in chart 31 below. Although the criteria have not changed

dramatically since our 2019 Report, recent decisions indicate a significant rise in the importance of the criteria of proportionality. It was now expressly considered in 38 per cent of cases, including more than one half of all of the decisions rendered after our 2019 Report.

Chart 31: Most widely used criteria for granting provisional measures



Based on 160 analysed decisions

Urgency

Urgency remained the most used criterion for granting interim measures. The tribunal in *Gerald v. Sierra Leone* providing the most detailed definition of this criterion, describing as urgent "when the party requesting the measures would otherwise suffer imminent harm or at least harm that would arise before the award is rendered," particularly where such harm can prejudice the integrity of arbitration proceedings.¹¹¹ The majority of other tribunals supported this approach.¹¹² Few other tribunals have also interlinked this criterion with the criterion of necessity, defining the

requested measures as urgent if they are necessary to prevent "irreparable" or "imminent" harm.¹¹³

The ongoing discussion of whether the criterion of urgency is relevant to applications for security for costs has become another important development. Tribunals in *Kazmin v. Latvia* and *Nord Stream v. EU* considered it relevant to their determination,¹¹⁴ but the tribunal in *Dirk Herzig v. Turkmenistan* decided that it was "not persuaded that Turkmenistan must prove an urgent need for the provisional measure of security for costs."¹¹⁵

This criterion remained difficult to satisfy, with parties managing to prove it in less than one half of cases. Tribunals found urgency where:

- The relevant criminal proceedings were reaching a key point and some of key claimants' witnesses and their relatives had to imminently submit evidence in their defense and actively participate in them¹¹⁶
- The claimant demonstrated that there was a non-speculative and genuine risk of the destruction of its investment¹¹⁷

At the same time, tribunals did not find the requested measures urgent where:

- There was no immediate risk of enforcement of the government’s eviction order against claimants in the foreseeable future due to the COVID-19 pandemic¹¹⁸
- The requested measures were purely hypothetical and there was no evidence of the existence of the criminal investigations in relation to claimants’ legal counsel¹¹⁹
- The arbitration was at an early stage and the respondent failed to show urgent need for granting the security for costs¹²⁰
- The respondent provided assurances that it had adopted measures that were required to protect and preserve documents, the preservation of which was requested by the claimant¹²¹

Overall, together with necessity (described below), the criterion of urgency remained the single most important standard for granting provisional measures, with the vast majority of applications being essentially decided based on one of these criteria.

Necessity to avoid the risk of harm or prejudice

The vast majority of the tribunals continue to define this criterion as the necessity to avoid risk of “irreparable” harm, meaning the harm that cannot be repaired by a later award of damages.¹²² Only a minority of tribunals adopted a lighter test of showing a risk of “serious,” “significant”

or “material” harm.¹²³ Some tribunals that had followed the majority approach had also taken a more flexible stance, stating that, in some circumstances:

*the availability of damages is not dispositive, particularly when an issue in the case is whether a purported investment, which the state did not eliminate in advance of the arbitration, shall remain in place.*¹²⁴

The chances of succeeding in a case in which the tribunal used this criterion remained roughly the same as in the cases involving the criterion of urgency. Tribunals granted such measures where the relevant criminal proceedings could adversely affect the claimant’s ability to present its case by enabling the respondent to obtain witness testimony and other evidence from the claimant’s witnesses.¹²⁵ At the same time, they did not find the necessity to grant provisional measures where:

- The risk of extradition of the claimant’s beneficiary and other relevant individuals was merely hypothetical¹²⁶
- There was no indication that the claimants’ witnesses would feel pressured when testifying at the hearing unless the tribunal had suspended the criminal proceedings¹²⁷
- The respondent failed to show that the purported future breaches of confidentiality were likely to occur¹²⁸

- The respondent provided express and binding representations that the proceedings in state courts could not deprive the tribunal of the right to determine its jurisdiction to hear the dispute¹²⁹

Overall, the criterion of necessity remains the most important and, at the same time, most debated criterion, with a minority of tribunals adopting a more flexible approach and continuing to challenge the majority view on its content.

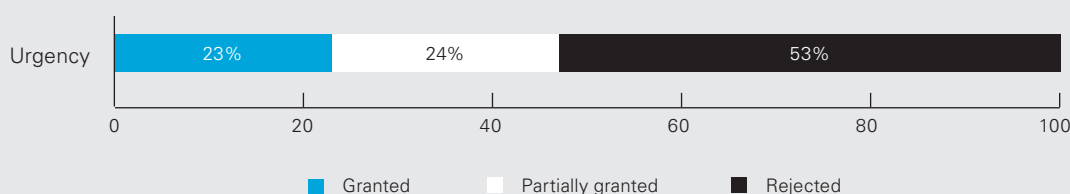
Existence of a right requiring protection

The criterion of the existence of a right requiring protection arises from the wording of Article 47 of the ICSID Convention. The ICSID and the ICSID AF Arbitration Rules require that provisional measures be taken to preserve the respective rights of either party.¹³⁰ This largely limits the application of this criterion to ICSID and ICSID AF jurisprudence. Only two out of more than 30 publicly available decisions under the UNCITRAL Arbitration Rules have considered this criterion.¹³¹

Taken together with the increase in the number of the publicly available decisions under the UNCITRAL Arbitration Rules, this can potentially explain the drastic fall in use of these criteria from nearly a half of cases in our 2019 Report to less than 40 per cent of cases today.

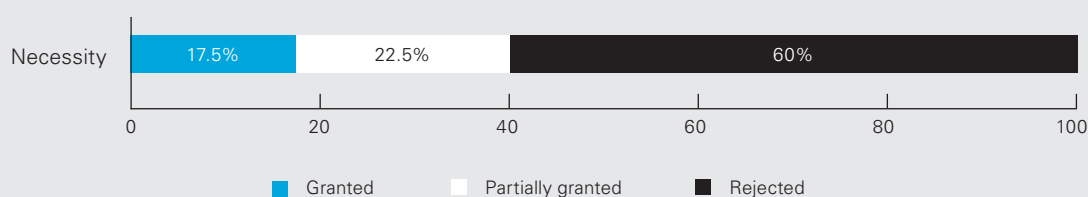
The most recent practice of tribunals demonstrates an overall fall in the number of recent decisions that expressly consider

Chart 32: Chance of success (urgency)



Based on 101 analysed decisions

Chart 33: Chance of success (necessity)



Based on 97 analysed decisions

this requirement even among ICSID tribunals. Only a few recent decisions, such as *Ipek v. Turkey*, dealt with it as a standalone criterion. That tribunal rejected the claimant’s request in relation to the potential extradition proceedings because of the absence of an “extant extradition request” and, accordingly, no risk to the claimant’s right to prosecute its claim.¹³²

While parties occasionally disputed the existence of the right requiring protection in several other recent cases, this has not played a decisive role. The tribunals remained reluctant to refuse provisional measures under this standard unless the risks arising from such measures are merely hypothetical.

Proportionality

The requirement of proportionality, now expressly included in all major arbitration rules, has become the fourth most used criterion for granting the provisional measures. 38 per cent of cases considered this criterion, including the vast majority of recent decisions on provisional measures under all types of arbitration rules (compared to only 30.5 per cent of cases in the 2019 Report).

Tribunals seemed to agree on the content of this criterion: nearly all viewed it as requiring to “balance the parties’ respective interests.”¹³³ The

tribunal in *IBT v. Panama* provided the following definition of this criterion:

*Any provisional measure must be balanced—the positive effects that it entails must outweigh the negative ones. Therefore, the Tribunal is called upon to weigh the effects that the provisional measure will have on each Party.*¹³⁴

Two recent decisions of the tribunal in *Dirk Herzig v. Turkmenistan* provide the best illustration of the application of this criterion, with the tribunal first deciding that the respondent’s request for provision of US\$3 million security for costs was proportionate as it expressly permitted the claimant to provide a bank guarantee instead of immediately depositing the full amount in an escrow account.¹³⁵ The majority of the tribunal later reversed its decision after the claimant had credibly established that it “face[d] insurmountable obstacles” to obtaining such bank guarantee.¹³⁶

The tribunal in *Dirk Herzig v. Turkmenistan*, furthermore, dismissed the claimant’s request for security for a claim of €45 million due to its “disproportionate nature and amount involved in security for one party’s costs and in security for one party’s total damages and costs,” deciding that “an order for security for claim is unprecedented, and for good reason.”¹³⁷

Tribunals more frequently referred to the criterion of proportionality. Another notable trend is the reduction in the number of granted requests in cases where tribunals considered this criterion (from nearly 40 per cent in 2019 to just 28.5 per cent). This, presumably, indicates that tribunals are becoming increasingly cautious about exercising their powers in relation to a state’s sovereign powers, particularly in cases involving criminal proceedings and investigations. In particular, tribunals have decided that requested measures were disproportionate where:

- Claimants’ request was related to state authorities’ actions (involving criminal proceedings and the request for the assistance from INTERPOL), which were based on regular procedures and did not exceed the regular framework of state powers¹³⁸
- The urgency of the claimant’s request was disproportionate due to the severity of the constraints upon the respondent resulting from governmental policies to deal with the COVID-19 pandemic¹³⁹
- The claimant’s request for the state to immediately suspend criminal proceedings was essentially a request to immunise them from the normal operation of criminal law¹⁴⁰

At the same time, the emergency arbitrator in *Komaksavia v. Moldova* considered the claimant's request for him to order the respondent to suspend the process of termination of its concession contract with the claimant as proportionate where the entirety of its investment would appear to be nullified if such termination were to proceed.¹⁴¹

Overall, recent decisions point to the increasing importance of the criterion of proportionality, although it still rarely appears as the most definitive criterion for the tribunal's decision, with the vast majority of cases decided based on criteria of urgency and necessity.

Prima facie jurisdiction and prima facie case on merits

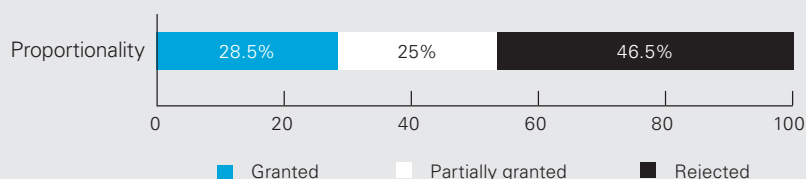
While the use of the criteria of prima facie jurisdiction and the existence of a prima facie case on merits has slightly fallen, tribunals still widely rely on it, particularly under the UNCITRAL Arbitration Rules. The tribunal in *Gerald v. Sierra Leone* provided the most detailed analysis of the criterion of proving *prima facie* jurisdiction:

*The Tribunal considers that a determination whether or not prima facie jurisdiction exists should not anticipate a thorough analysis of potentially ensuing jurisdictional challenges by either Party. Rather, the Tribunal should satisfy itself that upon an initial analysis, i.e. "at first sight"/ prima facie, it has jurisdiction. For this, it is necessary and sufficient that the facts alleged by the Claimant establish this jurisdiction without it being necessary or possible at this stage to verify them and analyse them in depth.*¹⁴²

In that case, the tribunal concluded that it had such jurisdiction where the claimant had shown that it was a company registered in its home state, which had indirectly owned an investment that allegedly suffered harm by the respondent state.¹⁴³

Often tribunals consider the criteria of the existence of a prima facie case on merits and prima facie jurisdiction together, with the tribunal in *Ipek v. Turkey* explaining that these criteria require the claimant to "establish a prima facie case that the

Chart 34: Chance of success (proportionality)



Based on 60 analysed decisions

Tribunal has jurisdiction over the substance of the claim and as to the merits of the claim." As this tribunal further clarified, it "need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants."¹⁴⁴

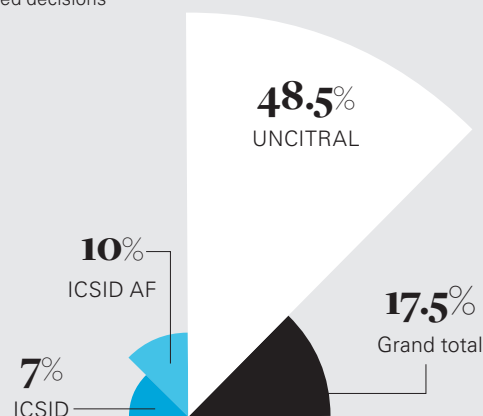
As in earlier decisions in which tribunals considered these criteria, the tribunals in recent cases were careful not to prejudge the merits of the case. Tribunals found bad faith only in cases of overwhelming evidence of it and when the other side was failing to show

any evidence to the contrary. For instance, in *Kazmin v. Latvia*, the tribunal decided that it would not prejudge the merits of the case, as the evidence of the claimant's fraud supplied by the respondent sufficed to establish existence of fraud behind the insolvency of one of the claimant's companies, which warranted granting of security for costs.¹⁴⁵

Overall, tribunals remained reluctant to prejudge the jurisdiction or merits of the case and rarely considered them in detail or determined the outcome of requests for provisional measures solely based on these criteria.

Chart 35: Use of criterion of a prima facie case on merits by the tribunals

Based on 19 analysed decisions



Extreme circumstances (security for costs)

While technically the criterion of the existence of “extreme circumstances” appeared only in 13.5 per cent of decisions on provisional measures, this number accounts for the majority of the decisions on security for costs.

Arbitration rules recently for the first time codified this criterion albeit without expressly mentioning it by name. Rule 53 of the 2022 ICSID and Rule 63 of the ICSID AF Rules state that, when dealing with a request to order a party to provide security for costs, tribunals should consider:

- a. That party’s ability to comply with an adverse decision on costs
- b. That party’s willingness to comply with an adverse decision on costs
- c. The effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim
- d. The conduct of the parties¹⁴⁶

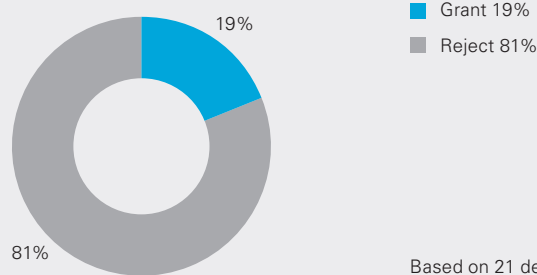
New rules further suggest that the tribunal should also consider other evidence adduced by the requesting party, including evidence related to the existence of third-party funding.¹⁴⁷

While, at the moment, the UNCITRAL Rules do not prescribe a similar set of criteria, UNCITRAL tribunals, such as the tribunal in *Tennant v. Canada*, apply a similar “extreme” or “exceptional” circumstances standard.¹⁴⁸

This is roughly in line with arbitration practice on security for costs, with tribunals finding “extreme” circumstances (often cumulatively) due to:

- The claimant’s insolvency or inability to comply with an adverse court order¹⁴⁹
- The claimant’s failure to pay its former legal counsel¹⁵⁰

Chart 36: Chance of success (existence of extreme circumstance)



- Existence of justified and serious concerns about the claimant’s business practices and eventual willingness to comply with a costs order if one were to be made¹⁵¹
- Evidence of the claimant’s documented practice of moving assets to reduce its exposure to creditors’ claims¹⁵²
- Evidence of the claimant making suspicious financial transactions with allegedly related companies¹⁵³

At the same time, multiple tribunals have decided that many of these factors, on their own, do not suffice to justify an order for security for costs.¹⁵⁴ For example, the tribunal in *Ipek v. Turkey* concluded that the fact that the claimant does not itself have the funds to meet an adverse costs order “in itself is insufficient to justify an order of security for costs” without other factors, such as “a prior proven record of non-payment of costs, including the advances on costs.”¹⁵⁵

Recent decisions further seem to confirm the relevance of third-party funding to decisions on security for costs, although such funding cannot, on its own, justify granting of such measure.¹⁵⁶ The tribunal in *Tennant v. Canada* concluded that the “existence of a funding agreement alone has not been found by arbitral tribunals to be sufficient to grant security for costs.” It also noted that, if this was a determinative factor, respondents could request and obtain security on a systematic basis, increasing the risk of blocking potentially legitimate claims.¹⁵⁷

Overall, tribunals usually refrained from ordering the security for costs even where the claimant was insolvent or otherwise unable to pay an adverse costs award without the existence of extreme circumstances such as serious evidence of fraudulent activities by the claimant, or previous procedural misbehaviour by the claimant.

The effect and form of the provisional measures decisions

In their recent decisions, tribunals seem to follow the earlier pattern of issuing their rulings on provisional measures primarily in the form of decisions or orders. In fact, all but one recent ruling on provisional measures took such form, with only the emergency arbitrator in *Komaksavia v. Moldova* issuing its judgment in the form of an award.¹⁵⁸

This trend stays true for tribunals under all arbitration rules, with the UNCITRAL Rules and the emergency arbitrators under the SCC Rules remaining the only rules under which decisions were rendered in the form of awards or interim awards.

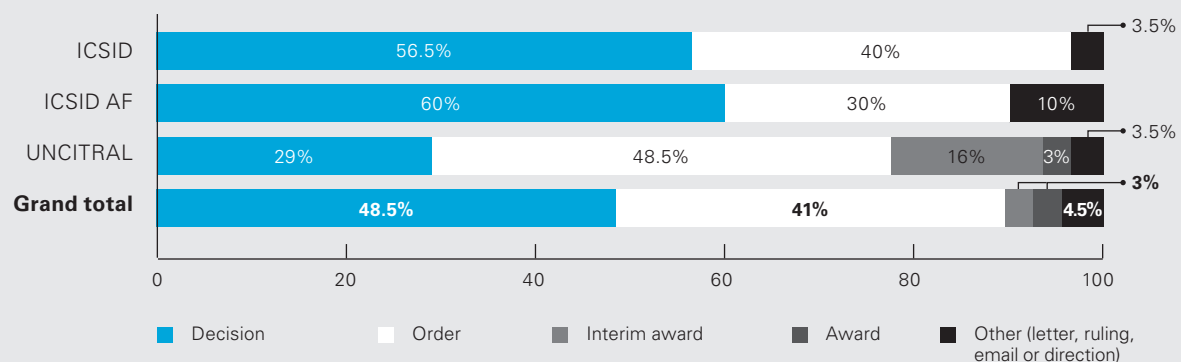
The new ICSID Arbitration Rules still provide that tribunals can “recommend provisional measures” and not “order” them to the parties.¹⁵⁹ Most interestingly the new ICSID AF Arbitration Rules retained the words “order provisional measures” in them.¹⁶⁰

In practice, however, tribunals do not attribute much importance to this difference. As the ad hoc committee in *RSM v. Saint Lucia* explained, while there was no doubt that the choice to use the word “recommend” and not “order” in the ICSID Rules was deliberate, the drafting history suggested that “it was understood that consequences could attach to non-compliance with a recommendation for provisional measures.” It further clarified that, even though a recommendation for provisional measures could not be enforced in the way that an award can be enforced, this “does not mean that it is not binding in the sense that consequences can flow from non-compliance with a provisional measure.”¹⁶¹ The ICSID tribunal in *IBT v. Panama* similarly confirmed “the binding nature of provisional decisions regardless of the terminology used.”¹⁶²

The working paper related to the amendment of the ICSID Rules further supported this understanding, confirming that regardless of the use of the word “recommend,” “[t]ribunals remain free to draw inferences from the failure of a party to follow a recommendation for provisional measures.”¹⁶³

Overall, recent decisions provide further clarity on the binding nature of ICSID, ICSID AF or UNCITRAL tribunals’ decisions on provisional measures, confirming that tribunals’ decisions on provisional measures are binding regardless of the choice of wording in particular arbitration rules or treaties.

Chart 37: Form of tribunals’ decisions by arbitration rules



Based on 160 analysed decisions

Endnotes

- 1 See, e.g., *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020; *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 (Decision on the Respondent's Application for Security for Costs), 13 April 2020; *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 7 (Decision on the Respondent's Request for Suspension of the Proceedings), 6 May 2020.
- 2 See *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, paragraphs 53-56; *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4 (Interim Measures), 27 February 2020, paragraphs 104-111; *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision and Procedural Order No. 5 on Claimant's Request for Reconsideration and Respondent's Request for Termination of the Proceedings, 9 June 2020, paragraphs 22-33; *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 4 (Decision on Respondent's Request for Security for Costs), 12 May 2021, paragraphs 64-79.
- 3 See *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Decision on the Claimants' Request for Provisional Measures, 17 February 2022; *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Procedural Order No. 2 (Decision on the Claimants' Request for Provisional Measures), 9 May 2022; *Mainstream Renewable Power, Ltd., International Mainstream Renewable Power, Ltd., Mainstream Renewable Power Group Finance, Ltd., Horizont I Development, GmbH, Horizont II Renewable, GmbH and Horizont III Power GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 2 (Respondent's Request for a Stay of the Proceeding), 1 June 2022.
- 4 "Uniper is required to withdraw its Intra-EU ECT claim against the Netherlands as part of German bailout package," IAREporter, 22 July 2022, available at <https://www.iareporter.com/articles/uniper-is-required-to-withdraw-its-intra-eu-ect-claim-against-the-netherlands-as-part-of-german-bailout-package/>.
- 5 *Nord Stream 2 AG v. The European Union*, PCA Case No. 2020-07, Procedural Order No. 9, 2 September 2022.
- 6 *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision, 2 July 1972, described in Pierre Lalive, "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) - Some Legal Problems," British Yearbook of International Law, Volume 51, Issue 1, pp. 132-137 (1980).
- 7 ICSID Releases 2022 Versions of its Rules and Regulations, 22 June 2022, available at <https://icsid.worldbank.org/news-and-events/communiqués/icsid-releases-2022-versions-its-rules-and-regulations>.
- 8 This, presumably, includes both written and oral submissions of the parties as this rule replaced earlier wording saying "(ii) the last written submission on the request; or (iii) the last oral submission on the request." See ICSID Working Paper No. 5, June 2021, page 301, available at <https://icsid.worldbank.org/sites/default/files/publications/WP%205-Volume1-ENG-FINAL.pdf>.
- 9 See, e.g., *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, paragraph 9; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003, paragraph 4; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent's Application for Provisional Measures, 12 May 2016, paragraph 109.
- 10 *Ipek Investment Limited v. Republic of Turkey*, ICSID Case No. ARB/18/18, Procedural Order No. 7 (Respondent's Application for Security for Costs), 14 October 2019, footnote 2 ("The Tribunal notes that the ICSID Secretariat currently proposes to deal with security for costs by way of a separate provision (Rule 52): ICSID, Proposals for Amendment of the ICSID Rules (Working Paper No 3, August 2019), 333-5").
- 11 *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, paragraph 49 ("The Tribunal considers that, contrary to the Claimant's assertion, the pending Proposals for Amendment of the ICSID Rules reinforce rather than cast doubt on the existing authority of ICSID tribunals to order security for costs. We do not agree that the inclusion of Proposed ICSID Arbitration Rule 52, which expressly addresses security for costs, in any way suggests that tribunals currently lack the authority to order security for costs.").
- 12 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 13 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, pp. 325-327, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 14 Rule Amendment Project – Member State & Public Comments on Working Paper # 3, page 33, available at https://icsid.worldbank.org/sites/default/files/amendments/WP_3_Comment_Compendium.pdf; Rule Amendment Project – Compendium of Comments for Working Paper # 4, page 34, available at <https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20-WP%20%23%204%20-%20As%20of%202021.03.23.pdf>.
- 15 See, e.g., Rule Amendment Project – Member State & Public Comments on Working Paper # 2 of March 15, 2019, page 134, available at https://icsid.worldbank.org/sites/default/files/amendments/State_Public_Comments_WP2.pdf.
- 16 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, pp. 328-329, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 17 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, page 329, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 18 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, pp. 325-327, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf; Rule Amendment Project – Member State & Public Comments on Working Paper # 3, page 33, available at https://icsid.worldbank.org/sites/default/files/amendments/WP_3_Comment_Compendium.pdf.
- 19 Rule Amendment Project – Compendium of Comments for Working Paper # 4, page 34, available at <https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20-WP%20%23%204%20-%20As%20of%202021.03.23.pdf>.
- 20 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, page 303, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 21 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, page 325, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 22 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, pages 327-329, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 23 Rule Amendment Project – Member State & Public Comments on Working Paper # 2 of March 15, 2019, page 124, available at https://icsid.worldbank.org/sites/default/files/amendments/State_Public_Comments_WP2.pdf.
- 24 Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, page 338, available at https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf.
- 25 Rule Amendment Project – Member State & Public Comments on Working Paper # 3, page 38, available at https://icsid.worldbank.org/sites/default/files/amendments/WP_3_Comment_Compendium.pdf.
- 26 Rule Amendment Project – Compendium of Comments for Working Paper # 4, page 40, available at <https://icsid.worldbank.org/sites/default/files/amendments/Compendium%20of%20State%20Comments%20on%20Proposed%20Amendments%20to%20the%20ICSID%20Rules%20-WP%20%23%204%20-%20As%20of%202021.03.23.pdf>.

Endnotes

- 27 See, e.g., UNCITRAL Working Group III, A/CN.9/WG.III/WP.153- Possible reform of ISDS- Cost and duration, available at <https://undocs.org/en/A/CN.9/WG.III/WP.153>.
- 28 2018 White & Case and Queen Mary International Arbitration Survey: The Evolution of International Arbitration, page 8, Chart 4, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.
- 29 2018 White & Case and Queen Mary International Arbitration Survey: The Evolution of International Arbitration, page 35, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.
- 30 BIICL and Allen & Overy 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration, page 33, Figure 44, available at https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.
- 31 See *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.
- 32 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Directions Concerning Claimants' Application for Provisional Measures, 13 June 2012.
- 33 *Igor Boyko v. Ukraine*, PCA Case No. 2017-23, Procedural Order No. 3 on Claimant's Application for Emergency Relief, 3 December 2017.
- 34 White & Case and Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world, page 13, Chart 9, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
- 35 White & Case and Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world, page 13, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
- 36 White & Case and Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world, page 25, Chart 17, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
- 37 *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Decision of the Tribunal on the Request for Interim measures, 26 November 2003, paragraph 1.
- 38 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Interim Award, Request for Interim Measures of Protection, 31 January 2004, paragraph 4.
- 39 White & Case and Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world, page 13, Chart 9, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
- 40 *SL Mining Limited v. Republic of Sierra Leone*, ICC Case No. 24708/TO, Order of the Emergency Arbitrator, 8 September 2019, paragraphs 31-49.
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- 50 *SL Mining Limited v. Republic of Sierra Leone*, ICC Case No. 24708/TO, Order of the Emergency Arbitrator, 8 September 2019, paragraphs 124-125.
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- 61 *SL Mining Limited v. The Government of Sierra Leone*, ICC Case No. 24708/TO (EA), Order, 8 September 2019.
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Methodology

The research was conducted in three phases:

- **Phase 1:** locating the publicly available decisions on provisional measures by the tribunals in investor-state disputes in the ICSID, itlaw, ISLG, UNCTAD and other major databases, resulting in locating of 160 publicly available decisions on provisional measures.

The search included only the decisions published in their original form or in an academic article, which quoted significant parts of the decisions.

- **Phase 2:** setting the research questions, legal research, and analysing and summarising the relevant parts of the decisions on provisional measures.
- **Phase 3:** producing the statistical data presented in this report. For convenience, all of the statistics were rounded up to the nearest number (e.g., 24.04 per cent is shown as 24 per cent, 59.52 per cent as 59.5 per cent and 4.76 per cent as 5 per cent). The qualitative information was used to supplement the legal research data, to nuance and further explain the findings on particular issues covered in the report.

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