

# **2019 Empirical study: Provisional measures in investor-state arbitration**

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London



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# Introduction

**B**IICL and White & Case are delighted to present the first comprehensive empirical study on provisional measures in investment treaty arbitration.<sup>1</sup> The study examines more than a hundred decisions and orders rendered by ICSID, UNCITRAL and other investor-state tribunals. It offers a unique insight into how international tribunals treat applications for provisional measures.

Over the past 20 years, we have seen a dramatic increase in the number of investor-state disputes and in the number of applications for provisional measures. The study builds on a detailed examination of the entire universe of publicly available decisions and orders on provisional measures (114 in total).<sup>2</sup> Acknowledging that many such decisions remain unpublished, it aims at providing insights for a better understanding of the evolving jurisprudence based on the published decisions of tribunals. It demonstrates the trends and practices on key issues such as 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.

The term “provisional measures” usually refers to the decisions preserving rights of the parties pending the decision of the arbitration tribunal. The importance of provisional measures is difficult to overestimate. Both investors and states want greater certainty on how tribunals approach their requests regarding non-aggravation of dispute, stay of local proceedings, preservation of investment, stay of criminal investigations, security for costs, and other provisional measures. Uncertainty in these areas undermines the rule of law and legitimate expectations of the parties. The study demonstrates a number of interesting and somewhat unexpected trends in how tribunals approach provisional measures.

For example, the likelihood of granting or partially granting provisional measures under UNCITRAL Rules is significantly higher (65%) than under ICSID Convention and Arbitration Rules (41.5%). Parties most often request tribunals to stop aggravation of the dispute, stay local court proceedings and preserve the investments. In more than half of all cases, tribunals rely on urgency and necessity, followed by the examination of the right requiring protection, the risk of substantial or irreparable harm and determining prima facie jurisdiction.

A somewhat surprising finding is that tribunals rejected nearly all requests for security for costs. On the other hand, in applications for non-harassment and aggravation of the dispute and preservation of evidence the applicants have a 50/50 chance of succeeding. The outcomes on requests for staying criminal proceedings look slightly less favourable for the applicants with less than half of requests succeeding.

Another interesting conclusion is that the geographical location of respondents appears to correlate with successful applications for provisional measures. In applications involving CIS states and South American states, the applicants were successful in about 40% of cases while in applications involving African, Asian and European countries outside the CIS region, the likelihood of success was almost four times smaller.

Tribunals have significant discretion in deciding on provisional measures. It is also within their power to award damages that instead of granting provisional measures. Investor-state tribunals also have their favourite decisions on provisional measures, which they often quote with *Occidental v Ecuador and Maffezini v. Spain* being cited in almost every fourth decision.

In the absence of detailed procedural rules governing applications for provisional measures and sensitivities related to the involvement of sovereigns, this study helps map the key legal issues and how tribunals approach them. We hope that this study, to be updated annually, will become a regular and anticipated development in the field of investor-state arbitration.



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# Executive summary

## The applicable law

Almost two-thirds of the decisions on provisional measures were made in the disputes under the bilateral investment treaties (BITs), followed by the disputes under investment contracts, multilateral treaties, national foreign investment laws or different combinations of the above.

The ICSID Convention and all the applicable arbitration rules give the tribunals broad authority to make decisions on the provisional measures.

In most of the decisions on provisional measures, the tribunals referred to earlier decisions. In almost a quarter of the cases, they cited *Occidental v. Ecuador*, *Maffezini v. Spain* and *Burlington v. Ecuador*.

## The parties making provisional measures requests

Nearly 70% of the decisions on provisional measures were made after the investors requested the provisional measures, with another 20% of the decisions being made at the request of respondent states and 10% at the request of both parties.

The vast majority of the investors involved in the decisions on provisional measures are from Europe and North America, with almost the same number of the respondent states come from Latin America and the Caribbean, Asia, Africa and the CIS region.

Investors were almost twice more likely to succeed or partially succeed with their provisional measures requests than the respondent states.

Tribunals were almost twice more likely to grant requests for provisional measures in cases involving the states from the CIS region and Latin America and the Caribbean than in cases involving respondent states from Asia and Africa.

## Applicable arbitration rules

Almost three-quarters of the publicly available decisions on provisional measures were made under the ICSID Convention and Arbitration Rules, followed by the UNCITRAL and ICSID Additional Facility Arbitration Rules.

Tribunals under the UNCITRAL Arbitration Rules were almost twice as likely to grant or partially grant requests for the provisional measures than the tribunals under the ICSID Convention and Arbitration Rules and ICSID Additional Facility Arbitration Rules.

In the decisions under the UNCITRAL Arbitration Rules, investors were far more likely to succeed with their requests than the respondent states, with their requests being granted in three-quarters of the decisions. The difference is not as stark in the decisions under the ICSID Convention and Arbitration Rules.

## The types of provisional measures

The most requested provisional measures included non-aggravation of the dispute and a stay of parallel proceedings in the respondent states (almost a third of all cases).

The investors made the vast majority of requests for non-aggravation of the dispute and preservation of investments or, the status quo, and they more often than respondent states succeeded with their requests.

Investors made all requests for a stay of parallel civil proceedings in the respondents' courts and succeeded or partially succeeded in two-thirds of all cases.

Tribunals showed mixed responses to requests to interfere in the criminal proceedings, granting or partially granting requests to stop them in half of the decisions. The success rate for requests, related to the personal safety of the investors, was the same.

Respondent states rarely succeed with their requests for security for costs. Tribunals granted such requests only in 12.5% of cases.

## The requirements for the granting of provisional measures

Facing the lack of detailed guidance on the criteria for granting provisional measures in arbitration rules, the top two criteria used by the tribunals included urgency and necessity.

When dealing with requests for security for costs, the tribunals applied the criterion of the existence of an extreme case or circumstances to justify granting such type of provisional measure.

While there was little disagreement as to the meaning of urgency, the tribunals followed different approaches to necessity, especially as to the degree of risk of harm, which justified granting the provisional measure.

The criterion of the existence of a right requiring protection almost exclusively applied in the ICSID and ICSID Additional Facility proceedings, while the criteria of prima facie case on merits being mostly applied in the UNCITRAL proceedings.

## The effect of provisional measures

Despite the differences in the wording of the applicable arbitration rules, tribunals agreed on the binding nature of the decisions on provisional measures.

Decisions on provisional measures made under the ICSID Convention and Arbitration Rules are not enforceable under the ICSID Convention. However, the tribunals can draw adverse inferences and in some cases decided that failure to comply with the decision constituted a breach of the ICSID Convention.

Because the UNCITRAL Arbitration Rules allow making decisions on provisional measures in the form of partial awards, some of these decisions can be enforced under the New York Convention.

Decisions on provisional measures other than awards under the UNCITRAL Arbitration Rules, as well as decisions under the ICSID Additional Facility Rules, can be enforced only under legislation of the place of enforcement.

# The law applicable to provisional measures

Provisional measures<sup>3</sup> are any temporary measures which the arbitral tribunal orders to a party at any time prior to the issuance of the award by which the dispute is finally decided.<sup>4</sup> They play an increasingly important role in the dispute resolution by preserving the parties' rights pending the final decision of the tribunal.

Such measures play a critical role in the investor-state disputes, where the parties often face difficulties with obtaining such measures from national courts – either

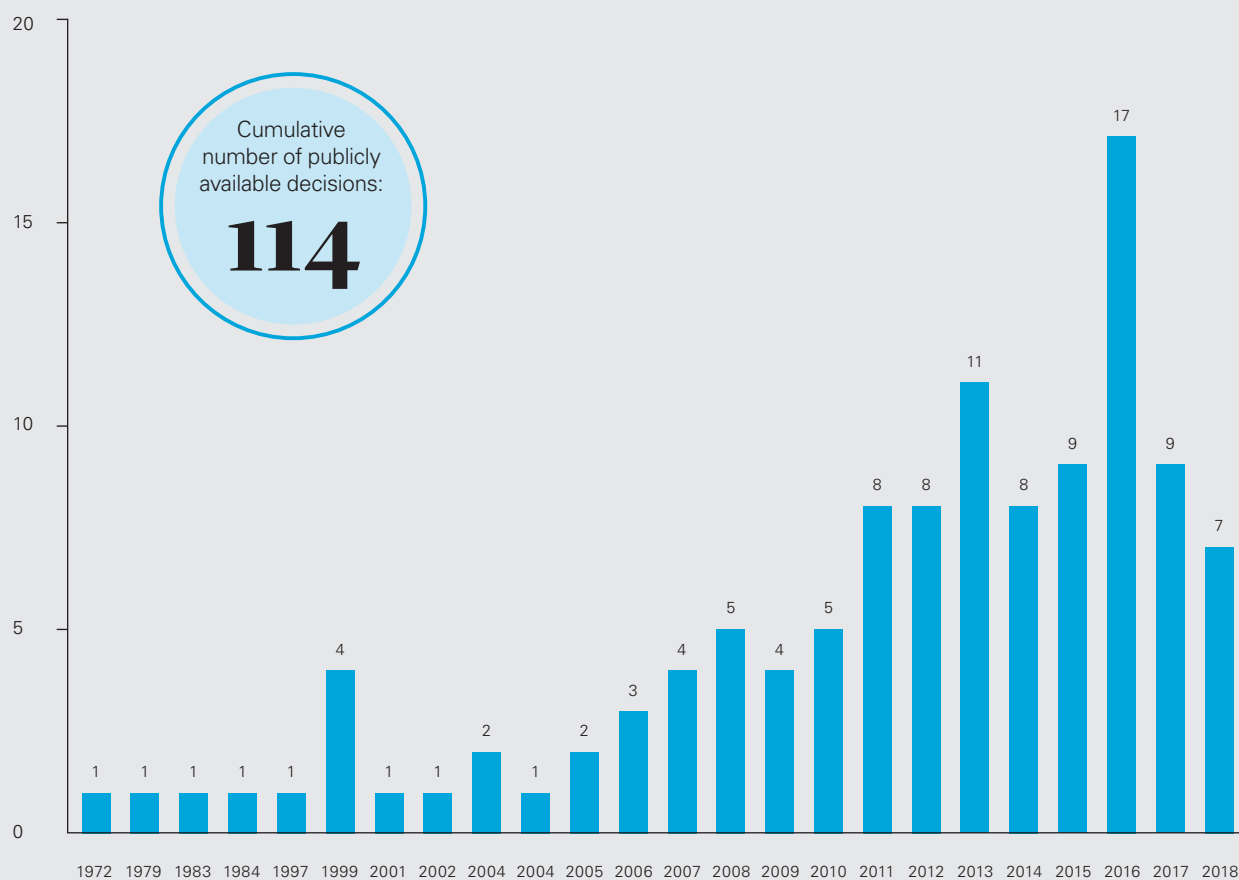
because they are restricted from doing so (as in the ICSID system) or because of sovereign immunity and an unwillingness to use the respondent state's courts.

The legal framework within which such tribunals grant provisional measures consists of the relevant instrument in which the parties consented to arbitration, rules of arbitral institutions and relevant international conventions, such as the ICSID Convention. Decisions also relied on findings of other tribunals that ruled on provisional measures in similar circumstances. Tribunals only

rarely referred to legal standards established by the law of the seat of the arbitration, preferring to rely on the international standards, such as the practice of the International Court of Justice.

The vast majority of investment arbitration cases where tribunals made publicly available decisions on provisional measures are based on the bilateral investment treaties or BITs, followed by investment contracts, multilateral treaties, national foreign investment laws or different combinations of the above (Chart 2).

**Chart 1: Number of publicly available decisions on provisional measures**



These legal instruments usually do not directly address provisional measures or provide the standards or criteria which the tribunals should apply for granting them. The tribunals find their authority to make such decisions in relevant conventions, such as the ICSID Convention or applicable arbitration rules.

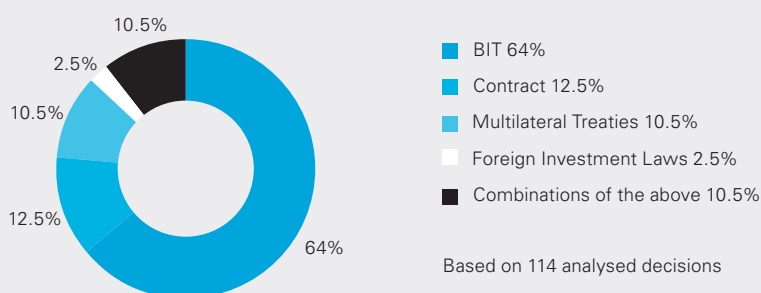
The ICSID Convention merely states that the ICSID arbitral tribunals may recommend “any provisional measures which should be taken to preserve the respective rights of either party.”<sup>45</sup> The ICSID, ICSID Additional Facility and both 1976 and 2010 versions of the UNCITRAL Arbitration Rules give the tribunals similarly broad authority to make decisions on provisional measures.

Table 1 below summarises the relevant arbitration rules, showing, where necessary, the differences between the current version and the latest revised draft of the ICSID Arbitration Rules and 1976 and 2010 versions of the UNCITRAL Rules.

This table demonstrates the trend towards including more guidance on provisional measures, with older arbitration rules tending to have broad and general provisions and their more modern versions providing a more detailed procedure. However, even new editions of rules still provide scarce detail, giving tribunals significant discretion.

In the absence of the detailed guidance, tribunals tended to refer to the earlier decisions of other arbitral tribunals in order to determine which criteria they should use to make the decisions on the provisional measures (Chart 3). The ICSID, UNCITRAL and ICSID Additional Facility tribunals also interchangeably

**Chart 2: Basis for the dispute**



**Table 1: Comparison of Arbitration Rules**

	Rule 39 of the ICSID Rules	Rules 46 and 52 of draft of revised ICSID Rules <sup>6</sup>	Art. 46 of ICSID Additional Facility Rules	Art. 26 of UNCITRAL Rules (1976)	Art. 26 of UNCITRAL Rules (2010)
<b>Who can request provisional measures?</b>	<input type="checkbox"/> A party <input type="checkbox"/> The tribunal at its own initiative		<input type="checkbox"/> A party <input type="checkbox"/> The tribunal at its own initiative	<input type="checkbox"/> Only a party	
<b>Is there a deadline for the tribunal to reach its decision?</b>	<input type="checkbox"/> Not specified	30 days from either: <input type="checkbox"/> Constitution of tribunal <input type="checkbox"/> Last written submission <input type="checkbox"/> Last oral submission	<input type="checkbox"/> Not specified	<input type="checkbox"/> Not specified	
<b>What if request is made before the constitution of the tribunal?</b>	<input type="checkbox"/> ICSID Secretary-General fixes time limits to present objections for prompt consideration after constitution of the tribunal		<input type="checkbox"/> Not specified	<input type="checkbox"/> Not specified	
<b>Are the tribunal's decisions binding?</b>	<input type="checkbox"/> Use softer word “recommend” <input type="checkbox"/> In practice, the tribunals decided that they are no less binding than final decision <sup>7</sup>		<input type="checkbox"/> Use softer word “recommend” when made at the tribunal's initiative <input type="checkbox"/> Use stronger “order” when made at the request of a party	<input type="checkbox"/> Use stronger word “order”	
<b>Can parties request measures from courts/other authorities?</b>	<input type="checkbox"/> Permitted only where expressly allowed by the arbitration agreement		<input type="checkbox"/> Permitted	<input type="checkbox"/> Permitted	
<b>In which form can the tribunal issue its decision?</b>	<input type="checkbox"/> Not specified		<input type="checkbox"/> Not specified	<input type="checkbox"/> May issue as an “interim award”	<input type="checkbox"/> Not specified; in known cases the decisions are issued as “orders” or “decisions”
<b>Do the rules prescribe the criteria for granting measures?</b>	<input type="checkbox"/> Not specified	<input type="checkbox"/> Urgency <input type="checkbox"/> Necessity <input type="checkbox"/> Proportionality	<input type="checkbox"/> Not specified	<input type="checkbox"/> Necessity	<input type="checkbox"/> Harm not adequately reparable by damages <input type="checkbox"/> Proportionality <input type="checkbox"/> Reasonable possibility of success on merits
<b>Do the rules have provisions on security for costs?</b>	<input type="checkbox"/> Not specified	<input type="checkbox"/> Yes, Rule 52	<input type="checkbox"/> Not specified	<input type="checkbox"/> Not specified	



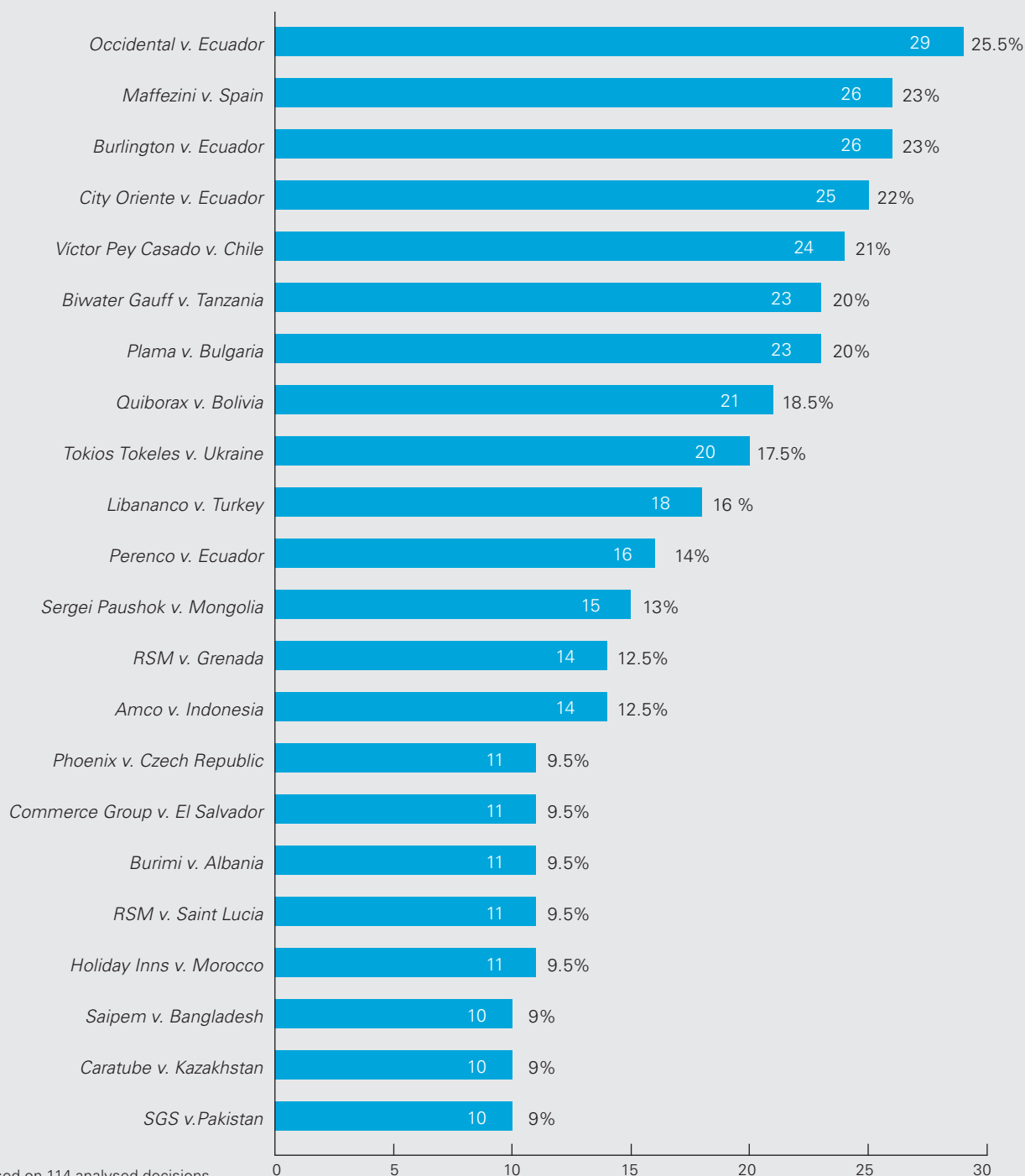
used each other's jurisprudence, without differentiating cases, made under different arbitration rules.

The majority of the cited decisions were decisions made under the ICSID,

with the tribunals most often quoting the ICSID decisions in *Occidental*,<sup>8</sup> *Maffezini*,<sup>9</sup> *Burlington*,<sup>10</sup> *City Oriente*<sup>11</sup> and *Victor Pey Casado*<sup>12</sup> in almost a quarter of all cases. The most cited cases also included decisions

of the UNCITRAL tribunals, such as the decision in *Sergei Paushok*,<sup>13</sup> quoted in more than 10% of cases.

**Chart 3: Most cited decisions on provisional measures**



Based on 114 analysed decisions

# The parties making the provisional measures requests

## The requesting parties

Investors usually initiate arbitration proceedings and they also are the parties most interested in preserving the integrity of proceedings. Because of this, investors made up the vast majority of requests for provisional measures, accounting for 69.5% of decisions on provisional measures, with a further 9.5% of the decisions involving requests submitted by both parties (Chart 4).

## The regions of the parties

Starting from the conclusion of the first modern-type BIT between Germany and Pakistan in 1959, most of more than 2,300 BITs currently in force<sup>14</sup> were concluded between capital-exporting developed countries and the developing countries expecting foreign investments.

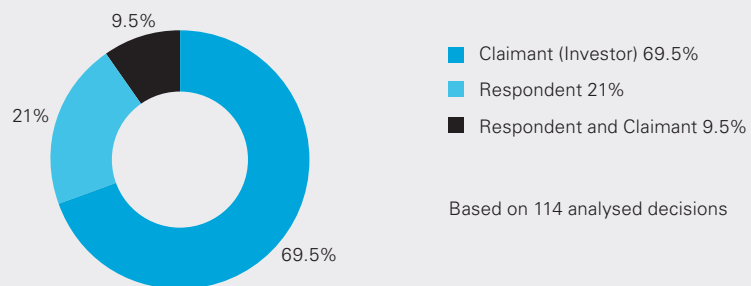
Our study clearly confirms this trend, with more than 80% of the investors involved in decisions on provisional measures coming from Europe (excluding CIS) and North America. The rest of the world accounts only for slightly less than 20% of the investors (Chart 5).

The study shows a similar correlation with respondent states, with only slightly more than 20% of respondent states involved in decisions on provisional measures coming from Europe (excluding CIS) and North America and almost 80% from other regions (Chart 6).

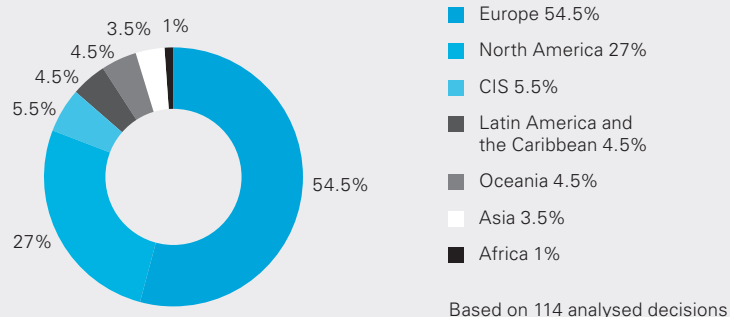
## The chance of success by region of the requesting party

Investors were more than twice as likely to obtain a positive decision from the tribunal than respondent states, which mostly requested the security for costs (which is rarely granted). The investors' requests for provisional measures received approval or partial approval in more than half of the decisions. In comparison, respondent states' requests were granted or partially granted only in one third of cases (12.5% and 16.5%, respectively) as demonstrated in Chart 7.

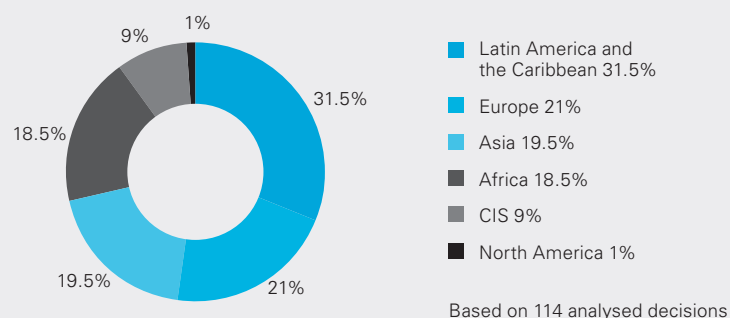
**Chart 4: Parties requesting decisions on provisional measures**



**Chart 5: Region of investors**



**Chart 6: Region of respondent states**

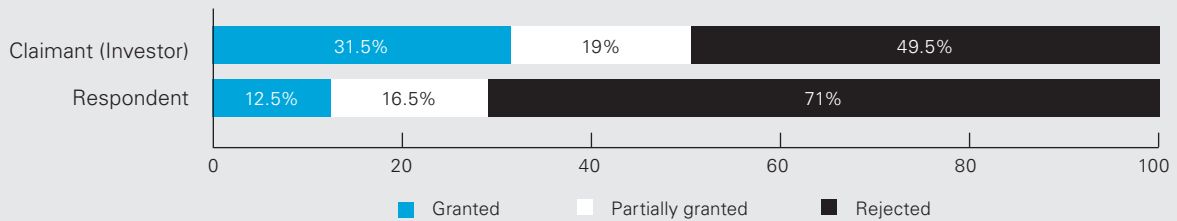


**The chance of success by region of the respondent state**

Tribunals were more likely to grant or partially grant requests for provisional measures in cases involving respondent states from two regions: the CIS (60%) and Latin America and the Caribbean (58.5%). They were far less likely to grant or partially grant them in cases involving the states from Europe (37.5%), Asia (35.5%) and Africa (33.5%) as demonstrated in Chart 8.

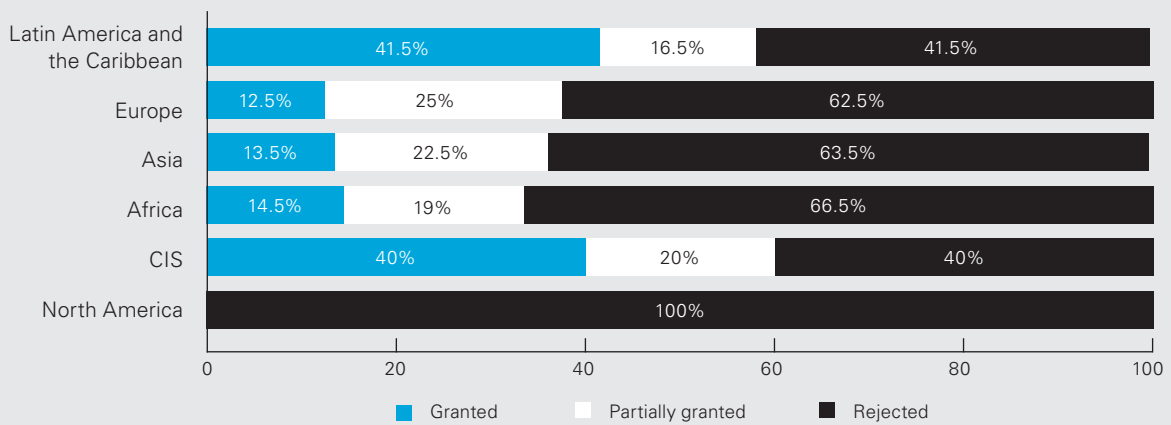
Overall, this study shows that investors were more than twice as likely to succeed in their provisional measures requests, with the tribunals being more inclined to grant them in cases involving respondent states from Latin America and the Caribbean, and the CIS region.

**Chart 7: Chance of success based on requesting party**



Based on 114 analysed decisions

**Chart 8: Chance of success based on region of respondent states**



Based on 114 analysed decisions

# Applicable arbitration rules

The choice of applicable arbitration rules has important consequences for the procedural rights of the parties and the power of investor-state tribunals. While all major modern arbitration rules have articles dealing with the tribunals' authority to make decisions on provisional measures, this study would cover primarily decisions made under the ICSID Convention and Arbitration Rules, ICSID Additional Facility and UNCITRAL Arbitration Rules.

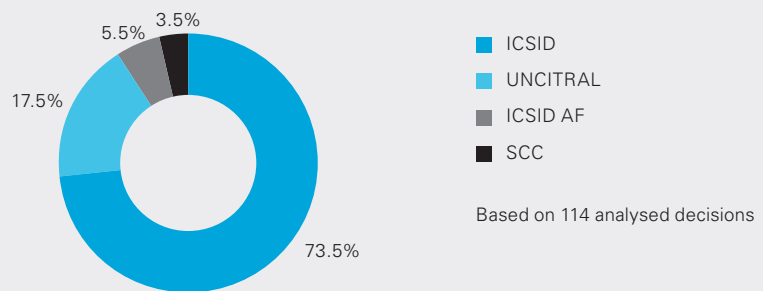
Due to their frequent use in international investment agreements, the ICSID Convention and Arbitration Rules, ICSID Additional Facility and UNCITRAL Arbitration Rules are used in the vast majority of investor-state disputes. They governed 897 out of 983 known investment arbitration disputes,<sup>15</sup> accounting for more than 90% of cases.

## The chance of success under different rules

This study confirms that these rules are similarly prevalent among provisional measures decisions, with decisions under the ICSID Convention and Arbitration Rules accounting for close to three-quarters or 84 of decisions. Tribunals under the UNCITRAL (20 in total) and the ICSID Additional Facility (6 in total) Arbitration Rules account for most of the remaining 25% of cases (Chart 9).<sup>16</sup>

Because most of the BITs pre-date 2010 and rarely include wording stating "amended

**Chart 9: Number of decisions on provisional measures under different arbitration rules**



from time to time" when providing for the use of the UNCITRAL Rules, with a few relatively recent exceptions,<sup>17</sup> the tribunals under the UNCITRAL Rules used the 1976 version of the UNCITRAL Rules.

This study shows that UNCITRAL tribunals were more likely to grant or partially grant provisional measures (65% of cases). These numbers were much lower for the tribunals appointed under the ICSID (41.5%) and ICSID Additional Facility Arbitration Rules (Chart 10).

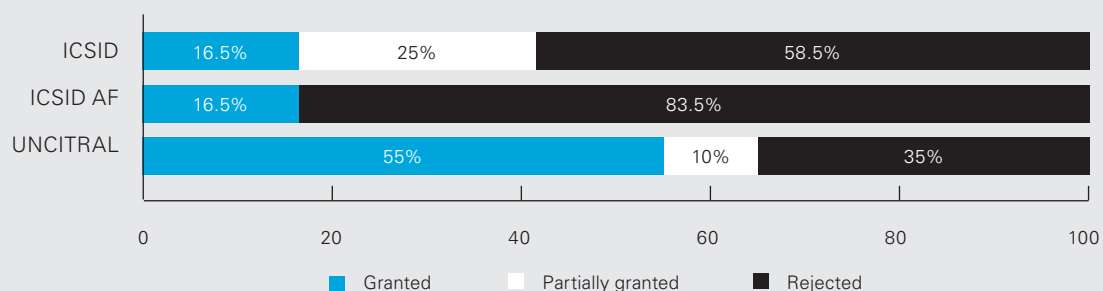
It is not clear whether this can be explained by the "stronger" wording of the UNCITRAL Arbitration Rules, allowing the tribunal to "order" rather than

"recommend" the awards or by the fact that provisional measures decisions under the UNCITRAL Arbitration Rules were rarely published, especially in comparison with decisions under the ICSID Arbitration Rules.

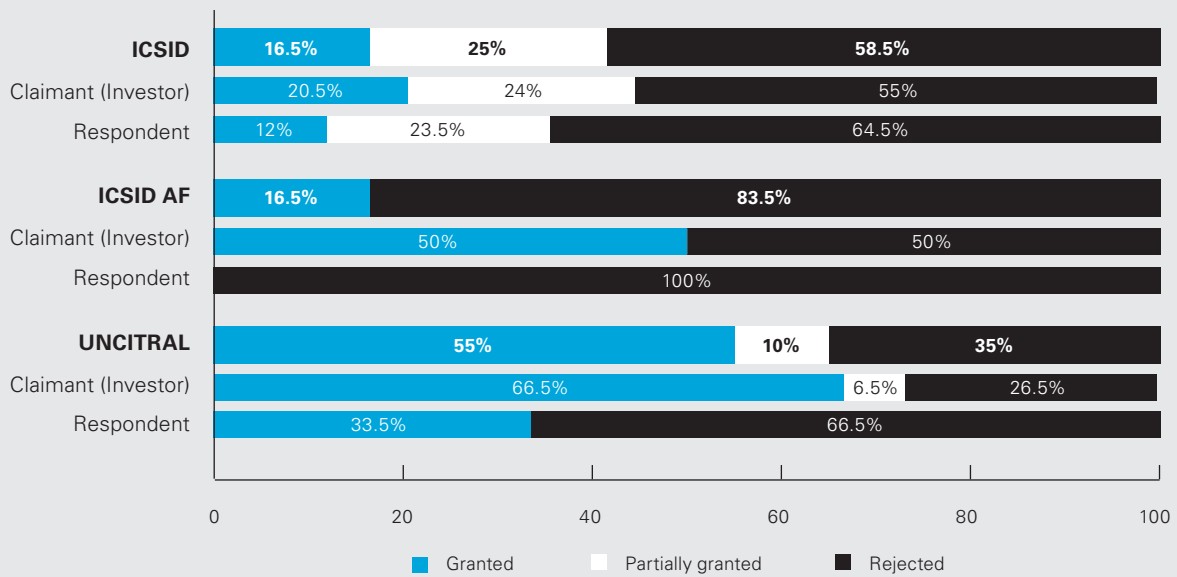
The breakout by the party also points to great differences between UNCITRAL and ICSID practices. The UNCITRAL tribunals granted or partially granted investors' requests for provisional measures in more than 70% of cases and the respondent state's requests in only a third of all cases (Chart 11).

Investors' more often succeeded with their requests in the ICSID tribunals: in 45% of cases compared to 35.5% for respondent

**Chart 10: Chance of success under different arbitration rules**



**Chart 11: Chance of success under different arbitration rules by party**



Based on 114 analysed decisions

states. The ICSID Additional Facility practice differs from both ICSID and UNCITRAL, with the tribunals under the ICSID Additional Facility Rules granting half of the investors' requests and none of the requests made by respondent states. It must be noted that the overall number of publicly-available requests under the ICSID Additional Facility rules have only been six, which makes it difficult to draw conclusions.

The study also shows that UNCITRAL tribunals were almost twice as likely to grant requests for provisional measures than ICSID tribunals. Regardless of applicable arbitration rules, investors tend to be more successful in their applications compared to states.

**Emergency arbitration in the investor-state disputes**

Starting from the *Tskinvest LLC v. Moldova* decision in 2014, emergency arbitration is increasingly used in investor-state disputes, with some of the institutions, such as SIAC, offering it in their dedicated

Investment Arbitration Rules (but requiring both parties to expressly agree to use it).<sup>18</sup> However, at the moment the publicly available investment agreements, providing for the use of SIAC Rules in investor-state disputes (such as the Singapore- Sri Lanka FTA),<sup>19</sup> do not address the issue of emergency arbitration.

Emergency arbitration may be particularly useful for investors as, without it, the claimant, needing emergency relief before the constitution of the tribunal, will often need to obtain relief from the very courts of the respondent state that it is trying to avoid by referring the dispute to arbitration.

There have been at least eight reported instances of the use of emergency arbitration in investor-state arbitration, all of them under the SCC Arbitration Rules. In six of these cases, the emergency arbitrators have granted<sup>20</sup> or partially granted<sup>21</sup> the applications. Two of the applications were dismissed, due to the failure to meet the required criteria on facts<sup>22</sup> and failure

to show the risk of harm, which is not reparable by damages.<sup>23</sup> Only four of these decisions are publicly available and were used in this study.

At the moment, it is not clear whether the increasing use of emergency arbitration proceedings in investor-state disputes is limited to SCC (and potentially SIAC) proceedings. It seems that emergency arbitration is not available in investor-state disputes under the ICC rules<sup>24</sup> or in disputes under the ICSID Convention and Arbitration Rules (including the most recently revised draft of the ICSID Arbitration Rules). This is due to Art. 29(5) of the ICC Arbitration Rules, which state that emergency arbitration provisions do not apply to non-signatories of the arbitration agreement,<sup>25</sup> and the desire of the new ICSID Rules drafters to exclude the emergency arbitration procedure to avoid due process violations in cases involving states.

# Types of provisional measures

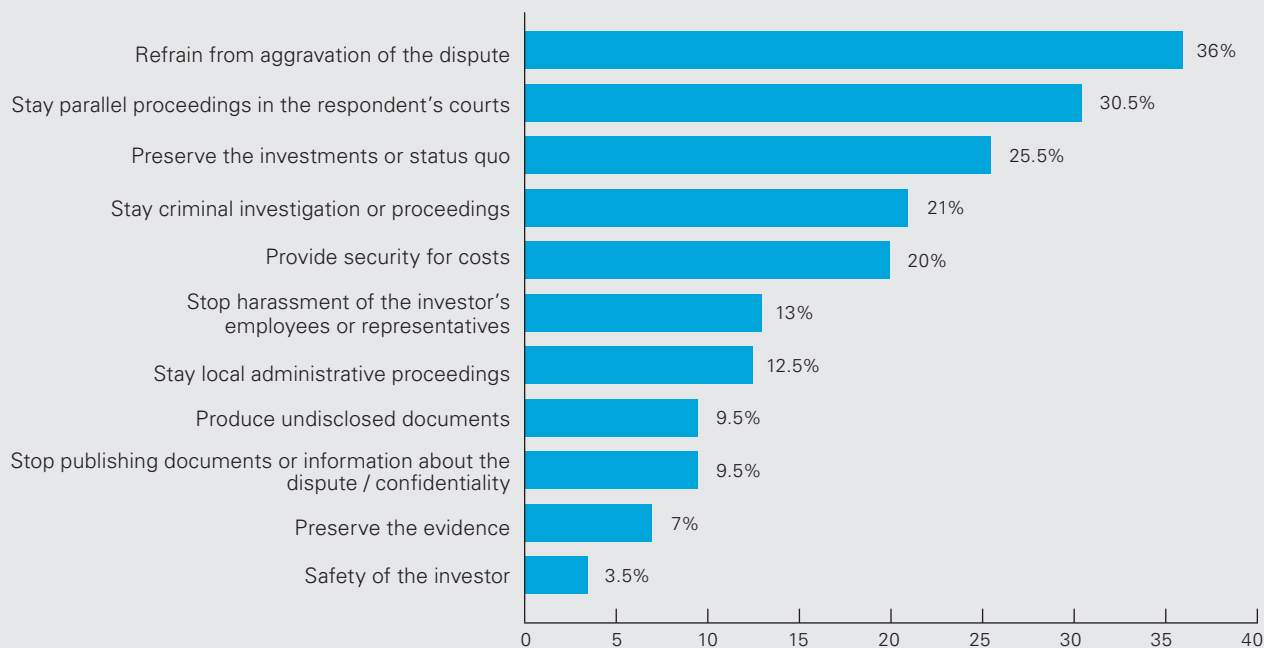
Without a universally agreed description of all types of provisional measures, approaches of tribunals vary. The UNCITRAL Model Law 2006 contains one of the most comprehensive definitions of “provisional measure”:

[A]ny temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party 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, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.<sup>26</sup>

This study shows that requested provisional measures included more types than those mentioned in the UNCITRAL Model Law including stay of parallel proceedings or criminal investigation, security for costs and protection of safety of the investor and security for costs as demonstrated in Chart 12. In rare cases, tribunals ordered stay of enforcement of certain regulations (e.g. in the area of tax or mining) in relation to a particular investor while the arbitral proceedings were pending.<sup>27</sup>

**Chart 12: Most requested types of the provisional measures**



Based on 114 analysed decisions

# Preservation of investments and non-aggravation of dispute

**R**equests to order the other party to refrain from aggravation of the dispute, often coinciding with requests to preserve investments, appeared as the most popular provisional measure. Incidentally, this was the measure that was first-ever requested in an ICSID investor-state dispute. In *Holiday Inns v. Morocco*, the investor unsuccessfully sought to stop the respondent state from aggravating the dispute by using local courts.<sup>28</sup> In another early case, *Amco v. Indonesia*, the tribunal described a provisional measure as:

...good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.<sup>29</sup>

The aggravation of the dispute may involve different types of parties' behaviour, with cases involving requests to stop aggravating the dispute by:

- Promotion of publications discouraging investments in the respondent state<sup>30</sup>
- Disparagement of the investors and their investments and unjustified refusal of permission to continue mining operations<sup>31</sup>

- Harassment of the investor's employees<sup>32</sup>
- Publication of documents relating to arbitration by the investor<sup>33</sup>
- Enforcement of the judgement of the courts of another state<sup>34</sup>

In the vast majority of cases, the requesting party merely asked for an order to refrain "from engaging in any other conduct that aggravates the dispute."<sup>35</sup> Typically, the request for non-aggravation of the dispute was submitted by the investor (86%) and only rarely by the state (16.5%). Investors tended to request the complete prohibition on aggravation of the dispute in order to preserve their investments. On the other hand, states more often made specific requests relating to particular conduct of the investor: for instance, an aggressive media campaign or publication of information about the dispute.

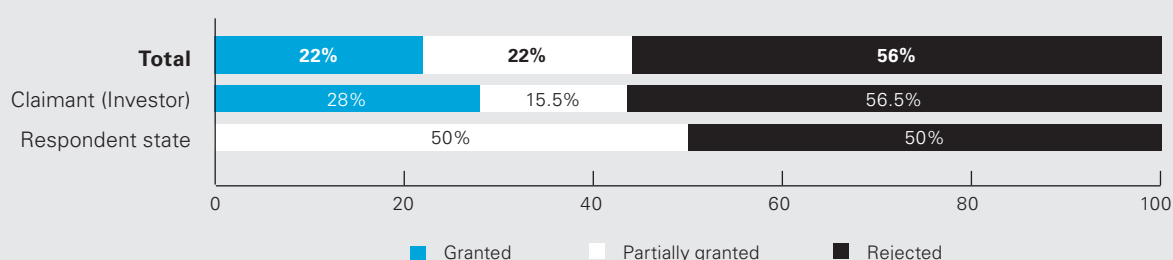
The tribunals have generally expressed caution when issuing an order to refrain from aggravation of the dispute, with the *Churchill v. Indonesia* tribunal emphasising a "high threshold" for recommending measures of this type; in that case, requiring the showing of concrete instances of intimidation or harassment.<sup>36</sup> Indeed, the analysis of the publicly available awards support this position,

showing that requests to order the other party to refrain from aggravation of the dispute were granted in 22% of cases or partially granted in the same proportion of cases. Some tribunals, like the tribunal in *CEMEX v. Venezuela*, also noted that the measures, related to non-aggravation of the dispute could only be ordered where the tribunal had already ordered more specific measures for preservation of the status quo.

The study also shows that investors succeeded more often with such requests: In 28% of cases compared to not a single success for the respondent states (Chart 13). The investors submitted the vast majority of such requests, which may explain this stark difference.

Overall, requests for the tribunal to order the other party to stop aggravating the dispute remains the most basic and widely requested provisional measure, most often requested by an investor wishing preserve its investments pending the tribunal's decision. The chance of success of such requests is low, with the investors succeeding in 28% of cases and the states never succeeding.<sup>37</sup>

**Chart 13: Decisions on requests for non-aggravation of dispute – overall and by party**



Based on 41 analysed decisions

# Stay of parallel proceedings

## Measures requesting the stay of proceedings in the respondent's courts

The same disputes or issues may arise in domestic courts and international arbitration at the same time, thus undermining the exclusivity of proceedings, which, in the case of ICSID disputes, is guaranteed by the ICSID Convention.<sup>38</sup> Therefore, a commonly requested measure is the order to stay parallel proceedings, most often submitted by investors and involving parallel proceedings against them or their assets in the respondent's courts (30.5% of decisions).

In case of ICSID Additional Facility and UNCITRAL proceedings, the parties are restricted from pursuing their case in the respondent state's courts because of the tribunal's exclusive jurisdiction under the relevant arbitration agreement, a treaty, contract or foreign investment law.

The request to order the stay of parallel proceedings in the respondent state's courts was also a part of the very first investor-state dispute – *Holiday Inns v. Morocco*.<sup>39</sup> States are normally responsible for courts; this is why all of the requests to stay court proceedings in the respondent state, were submitted by investors. Examples of parallel proceedings in the respondent state's courts included:

- Bankruptcy proceedings in the respondent's courts<sup>40</sup>
- Arrest of the investor's assets by the respondent's courts<sup>41</sup>
- Enforcement of payments under a contract pending the resolution of the dispute<sup>42</sup>
- Proceedings against the investor's parent company in the respondent's courts<sup>43</sup>
- Proceedings related to unenforceability of the court's judgment pending resolution of the dispute<sup>44</sup>
- Proceedings against the investor and his family based on the alleged organisation of a Ponzi scheme<sup>45</sup>

Due to the exclusivity of the investor-state arbitration under ICSID Convention and Arbitration Rules and other rules, the tribunals have satisfied a large number of such requests, with 76% of the requests being

fully or partially granted. As the often-cited tribunal in *Perenco v. Ecuador* observed:

[U]nless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.<sup>46</sup>

Rejections of requests to stay parallel proceedings were primarily caused by the investor's failure to:

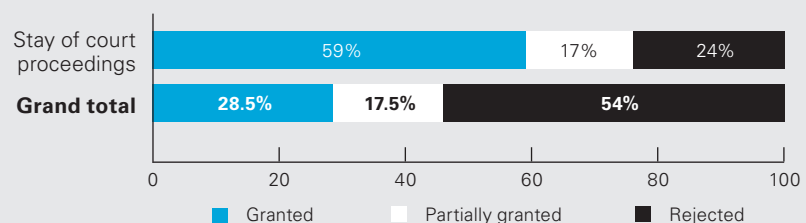
- Show that such court proceedings could affect the issues involved in this arbitration or the outcome of this arbitration<sup>47</sup> or
- Satisfy the criteria for granting the provisional measures (such as no possibility of irreparable or substantial harm to occur)<sup>48</sup>

(4.5%), parties requested the stay of proceedings in other jurisdictions, such as:

- Proceedings in the supreme court of the other jurisdiction related to the seizure of investor's vessels<sup>49</sup>
- Respondent's interference in investor's bankruptcy proceedings in another jurisdiction<sup>50</sup>
- Proceedings against the respondent and its governmental subdivisions in the investor's jurisdiction<sup>51</sup>
- Enforcement of the judgement of another jurisdiction's court against the investor's assets<sup>52</sup>

Unlike with the requests for a stay of proceedings in the respondent's courts, half of the requests relating to proceedings in other jurisdictions were submitted by the respondent. All such requests were rejected by the tribunals, in most cases because of

**Chart 14: Decisions on requests for stay of court proceedings in comparison to decisions under all types of requests**



Based on 35 analysed decisions

Overall, due to the strong presumption of exclusivity of arbitration proceedings, the requests for the tribunal to order the stay of court proceedings were likely to succeed in the vast majority of cases (Chart 14). Only a few tribunals decided not to grant this type of provisional measure.

## Measures requesting the stay of proceedings in courts of other jurisdictions and parallel arbitration proceedings

In addition to requests for the tribunal to order the stay of proceedings in the respondent state's courts in a small number of cases

the applicant's failure to satisfy the criteria for granting provisional measures, such as necessity<sup>53</sup>.

Finally, in cases such as in *SGS v. Pakistan*,<sup>54</sup> parties requested the tribunal to order the stay of parallel commercial arbitration proceedings. In *SGS*, the tribunal granted the investor's request, deciding that the local commercial arbitration proceedings should be stayed until the tribunal decided its jurisdiction.

Therefore, tribunals were so far reluctant to order the stay of proceedings in courts outside the respondent state's jurisdiction but seem to be more ready to order the stay of parallel arbitration proceedings.



# Stay of criminal investigations or proceedings and investor's safety

## Measures requesting the stay of criminal investigations and proceedings

Recently, investment disputes became more intertwined with criminal proceedings or investigations in the respondent state.<sup>55</sup> Almost 80% of requests relating to criminal proceedings and investigations were made after 2010.

Requests of these types relate to criminal proceedings against the investors, who initiated most of such requests (96%). The *Lao Holdings v. Laos* case is a noticeable exception. There, the respondent state requested the tribunal to grant permission to investigate the alleged criminal activities of the investor, accusing it of corrupting the respondent's previous prime minister.<sup>56</sup>

While in the most of the cases the requests included proceedings in the respondent states, in some instances the investors also asked the tribunal to order the respondent state to explain its involvement in criminal proceedings in the investor's state.<sup>57</sup> Another case involved threats of initiating criminal proceedings against the investor's counsel, an international law firm.<sup>58</sup>

Overall, the tribunals remained reluctant to interfere with local criminal investigations and proceedings (Chart 15). The tribunal in *Eurogas v. Slovakia* stated that such proceedings constituted "a prerogative of any sovereign State" and that the threshold for ordering such measures was "particularly high."<sup>59</sup> Because of this, tribunals have fully granted such requests only in 18.5% of cases, with the tribunal in *City Oriente v. Ecuador* justifying such a high bar as follows:

....it is the Tribunal's view that such undisputed right [to prosecute crimes] of the Republic of Ecuador should not

be used as a means to coercively secure payment of the amounts allegedly owed by City Oriente pursuant to Law No. 2006-42, since this would entail a violation of the principle that neither party may aggravate or extend the dispute or take justice into their own hands.<sup>60</sup>

In *Hydro v. Albania*, the tribunal justified its order to suspend the criminal investigation by stating that the criminal proceedings and the resulting extradition of the investor's ultimate beneficiary would prevent the investor from effectively participating in the arbitration.<sup>61</sup> In a third of cases involving such requests, the tribunals partially granted them, occasionally also ordering the respondent state not to suspend the freedom of movement of relevant individuals instead.<sup>62</sup>

Overall, tribunals seemed to be reluctant to interfere with state's rights to initiate criminal investigations and proceedings, deciding to interfere in them only where there was a strong threat of aggravation of dispute.

## Measures requesting protection of the safety of investors

In a number of cases, investors claimed that they faced serious threats to their safety, physical integrity and even life arising from the action or inaction of the respondent states. A trend of decisions shows the rise in the number of such cases in recent years involving investors requesting tribunals to order the respondent states to:

- Immediately protect the life of the investor and his family from the respondent's intelligence organisation's plans to kill the investor<sup>63</sup>

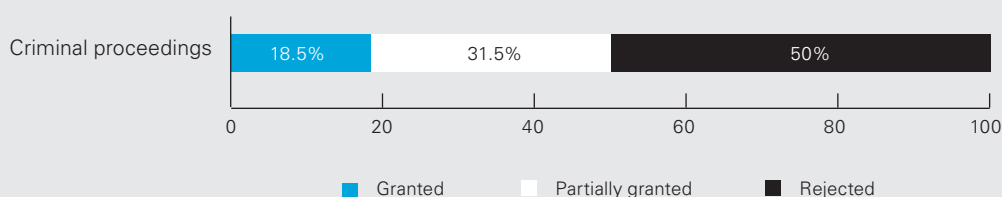
- Not threaten the investor or his family in the future, submitted as a general request<sup>64</sup>
- Refrain from endangering the investor's health and physical safety while he is under arrest and ensure that he is given proper medical treatment<sup>65</sup>
- Release the investor from detention or, alternatively, release the investor from a prison facility and allow him access to medical treatment<sup>66</sup>

The tribunals granted only two such requests, asking the respondent state to "immediately take all necessary measures to protect the life and safety of the Claimants" in *Border Timbers*.<sup>67</sup> In *Boyko*, the tribunal ordered the respondent state to provide the investor medical treatment and ensure that the investor "is not subject to or exposed to any violent or inhumane treatment or any physical or moral or psychological harassment."<sup>68</sup>

The emergency arbitrator in *Munshi* also rejected the vast majority of investors' requests, stating that even taking into the account the investor's circumstance there was no ground under international law to order the release of a person from jail so that he could make an international arbitration claim.<sup>69</sup>

All of these cases show that even when faced with extreme circumstances the tribunals were generally reluctant to interfere in the sovereign state's prerogative to initiate criminal proceedings or put suspects under arrest.

**Chart 15: Decisions on requests for stay of criminal proceedings**



Based on 24 analysed decisions

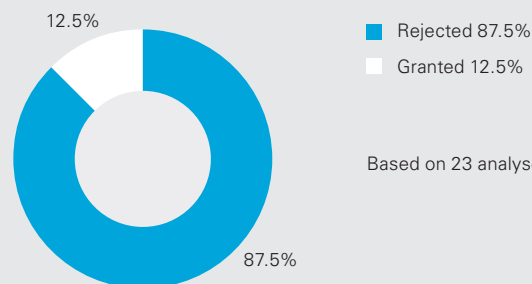
# Security for costs

Investment arbitration proceedings tend to be very costly for both parties, with costs often reaching millions or even tens of millions of US dollars. Because of this, investors, who often are holding companies operating through local subsidiaries with little assets of their own, increasingly use third-party funding to make their claims. This leads to respondent states' concerns over investors' abilities to cover the respondents' costs if the investor loses its case. To avoid this situation, the respondent states often request that the tribunal order the investor to grant them security for their potential costs. This study confirms that in the vast majority of the examined cases, it was the respondent states that requested security for costs.<sup>70</sup>

Arbitral tribunals were ready to grant security for costs only in the most extreme circumstances. Respondent states' requests for security for costs were granted only in 12.5% of cases, with the tribunal granting security for costs on its own initiative and without an express request for it from the respondent state in only one case (*Chevron v. Ecuador*) to counter-balance the provisional measures it granted to the investors.<sup>71</sup>

Until 2014, none of the investor-state tribunals had granted security for costs. For example, the tribunal in *Pey Casado*

**Chart 16: Decisions on requests for security costs**



*v. Chile* rejected the request due to the respondent's failure to show the likely risk of non-payment by the investor.<sup>72</sup> The tribunal in *Maffezini v. Spain* decided that security for costs could not be granted as it did not relate to the subject matter of the dispute.<sup>73</sup>

In fact, no tribunal had ever ordered security for costs before *RSM v. Saint Lucia* in 2014.<sup>74</sup> In that case, the tribunal decided to grant security for costs, first temporarily in its 2013 decision and then

for the duration of the case in 2014. The extreme facts of that case showed the high threshold of proving the necessity of security for costs and included the investor's failure to pay the advances on costs in two prior arbitrations in *RSM v. Grenada*.<sup>75</sup>

Overall, the tribunals remained reluctant to order security for costs and they order this type of provisional measure only in the most extreme circumstances (Chart 16).



**Arbitral tribunals were ready to grant security for costs only in the most extreme circumstances**

# Requirements for granting provisional measures

Most applicable arbitration rules remain silent on requirements for granting provisional measures. Only the UNCITRAL Arbitration Rules 2010 and the new proposed version of the ICSID Arbitration Rules provide some guidance.

Art. 26(3) of the UNCITRAL Arbitration Rules 2010 establishes the following criteria:

- Necessity to avoid irreparable harm: “harm not adequately reparable by an award of damages is likely to result if the measure is not ordered”
- Proportionality: “such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”

- Prima facie chance of success on merits: “there is a reasonable possibility that the requesting party will succeed on the merits of the claim”

Rule 46(3) of the latest draft of the new ICSID Rules provides for somewhat different criteria:

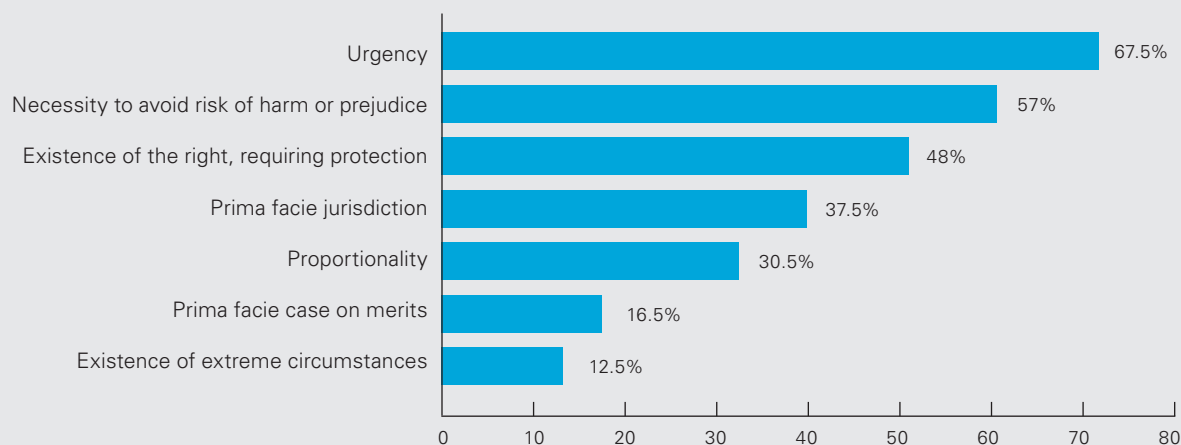
- Urgency and necessity: “whether the measures are urgent and necessary”
- Proportionality: “the effect that the measures may have on each party”

Facing the lack of prescribed standards for granting provisional measures, tribunals tended to exercise broad discretion under the arbitration rules, applying different criteria in different

scenarios. Some tribunals concluded that such measures should be regarded as “extraordinary”<sup>76</sup> and stated that they should be granted “only in exceptional circumstance”<sup>77</sup> and “must not be ordered lightly.”<sup>78</sup> Chart 17 summarised the most widely used criteria.

The following subsections will briefly describe the tribunals’ approach to the first seven most popular criteria.

**Chart 17: Most widely used criteria for granting provisional measures**



Based on 114 analysed decisions

# Urgency

When faced with a request that would require it to make a prompt decision before reviewing the case and the full submissions of the parties, tribunals wanted to ensure that such requests were genuinely urgent and could not wait for the resolution of the dispute.

Urgency appears as by far the most used criterion, which is also explicitly mentioned in the new draft of ICSID Arbitration Rules. The tribunal in *Occidental v. Ecuador* (the most quoted case) described this criterion as “well established”<sup>79</sup> and the *Pey Casado v. Chile* tribunal stated that it is “in the very nature of the institution of provisional measures that they are ... above all urgent”<sup>80</sup>.

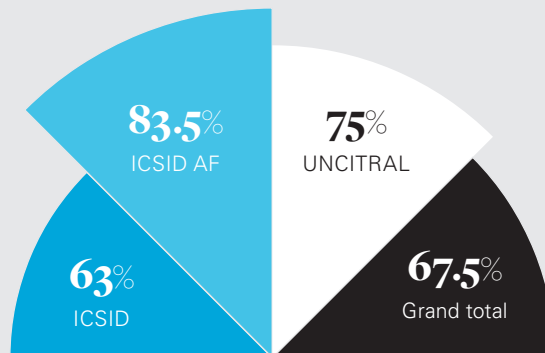
This criterion was equally applied by the tribunals under the ICSID Convention and Arbitration Rules (63%) and UNCITRAL Rules (75%), with the tribunals in ICSID Additional Facility cases using it in 83.5% of cases (Chart 18).

Most tribunals tended to use the definition of urgency in a similar manner to those used in *Burlington v. Ecuador*. In that case an ICSID tribunal decided that this criterion is satisfied where “a question cannot await the outcome of the award on the merits.”<sup>81</sup> ICSID tribunal in *Biwater Gauff v. Tanzania* pointed out the circumstantial nature of this criterion:

[I]n the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances,

**Chart 18: Use of criterion of urgency by arbitration rules**

Urgency



Based on 77 analysed decisions

including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.<sup>82</sup>

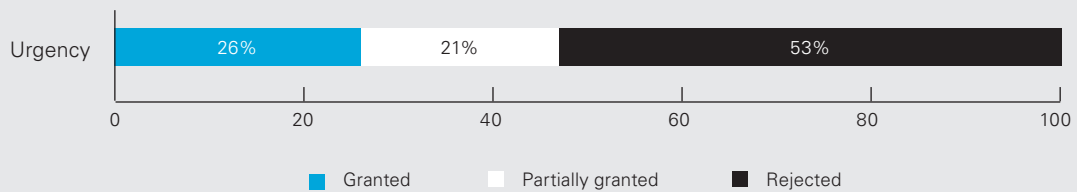
The practice under other arbitration rules did not differ from ICSID. For example, the UNCITRAL tribunal in *Dawood Rawat v. Mauritius* stated that the test for urgency was whether “action prejudicial to the rights of either party is likely to be taken before final decision is given.”<sup>83</sup> The ICSID Additional Facility in *Lao Holdings v. Laos* concluded that urgency means that “the

requested measure is needed prior to issuance of an award.”<sup>84</sup>

The criterion of urgency was, however, difficult to satisfy. The tribunals decided that the party requesting the provisional measures had failed to prove its case in 53% of cases (Chart 19). In various cases, the tribunals concluded that the party requesting the provisional measures had failed to satisfy the criterion of urgency in respect of the request for:

- Stay of criminal proceedings where the investor has failed to object to them for many months prior to making the request for provisional measures<sup>85</sup>

**Chart 19: Chance of success in decisions, in which tribunals used criterion of urgency**



Based on 77 analysed decisions

- Investor to provide an irrevocable bank guarantee (i.e., security for costs) where the respondent state has not requested it for up to six months after finding out about events that caused the request without showing any newly discovered information<sup>86</sup>
- The respondent state to pay all the advance on costs, because the state's actions had left the investor without funds, where the investor had not exhausted all other options to finance its case<sup>87</sup>
- Respondent state to suspend enforcement of court decisions and asset freezes in multiple jurisdictions where the investor had failed to request this for more than a year after filing its notice for arbitration<sup>88</sup>

On the contrary, the tribunals granted provisional measures where the requesting parties had sufficiently proven that:

- The instructions to kill the investor had been issued by the respondent state's central intelligence organisation<sup>89</sup>
- The enforced collection of the amounts disputed in the dispute were operating as a pressuring mechanism, aggravating and extending the dispute and the rights that the party sought to have protected were procedural in nature, such that they may only exist for the duration of the arbitral proceedings<sup>90</sup>
- The parallel proceedings in the respondent state's court would force the investor to argue in the respondent state's courts the same issues it would cover later in its memorial on merits<sup>91</sup>

- The decision of the respondent state's constitutional court would expose the investor to the immediate and imminent threat of losing its business<sup>92</sup>

Overall, together with necessity (described below), the criterion of urgency was the single most important standard for granting provisional measures. Tribunals granted or rejected requests based on these two criteria in the vast majority of cases. While it was not easy to satisfy, its meaning was not controversial, with most of the tribunals applying it in a similar fashion.

## Necessity to avoid the risk of harm or prejudice

Similarly to the requirement of urgency, the tribunals would generally consider the necessity to grant provisional measures before the parties have a chance to fully present their arguments.

This criterion is also absent in most of the arbitration rules, with the exception of the UNCITRAL Arbitration Rules 1976 (it is remarkably not present in the new 2010 version of the UNCITRAL Rules). This criterion was used in the majority of cases, including ICSID, UNCITRAL and ICSID Additional Facility cases (Chart 20).

Many tribunals relied on *Occidental v. Ecuador*, which understood necessity as situations “where the actions of party are capable of causing or of threatening irreparable prejudice to the rights invoked.”<sup>93</sup> The vast majority of other cases involving the criterion of necessity followed this approach. The few exceptions included the tribunals’ decision in *Eskosol v. Italy*, where the tribunal spoke only about measures being “necessary to preserve identified rights”<sup>94</sup> and *Laos Holdings v. Lao*, which stated that necessity:

is related to the preservation of the status quo as may be required to ensure that any Order made on the merits by the Tribunal in respect of the Material Breach Application is not vitiated by measures taken by the Respondent Government during the pendency of the Tribunal’s deliberations.<sup>95</sup>

The cases seemed to diverge as to the type of harm required for the measure. The majority of decisions followed the approach established in cases, such as *Occidental v. Ecuador*, in which the tribunal said that:

provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party.<sup>96</sup>



### Many tribunals relied on *Occidental v. Ecuador*, which understood necessity as situations ‘where the actions of party are capable of causing or of threatening irreparable prejudice to the rights invoked’

The vast majority of arbitration tribunals followed a similar approach.<sup>97</sup> However, in several other cases, the tribunals have opted for lower thresholds, such as:

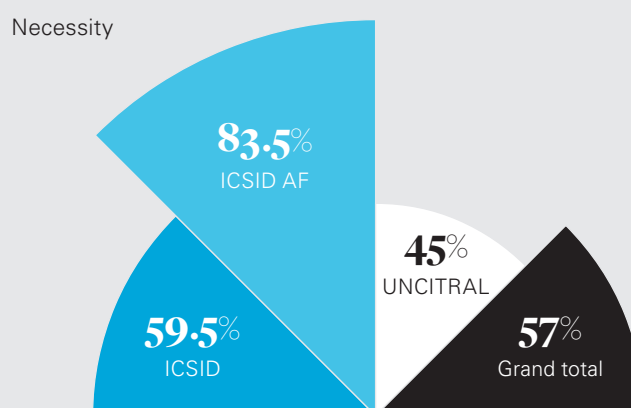
- “a risk of irreparable or substantial harm”<sup>98</sup>

- “serious or grave damage to the requesting party, and not harm that is literally ‘irreparable’”<sup>99</sup>

- “sufficient risk of harm or prejudice”<sup>100</sup>

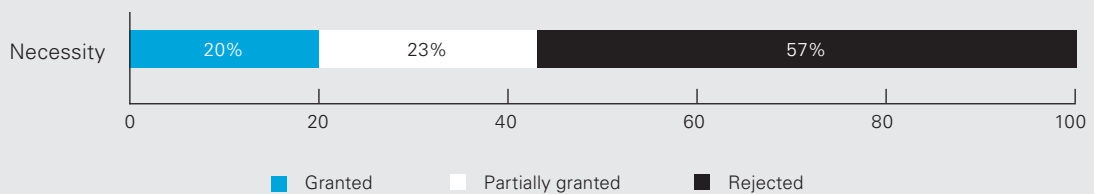
Some tribunals doubted whether the possibility of monetary compensation

**Chart 20: Use of criterion of necessity by arbitration rules**



Based on 65 analysed decisions

**Chart 21: Chance of success in decisions, in which tribunals used criterion of necessity**



Based on 65 analysed decisions

should eliminate the need for provisional measures altogether.<sup>101</sup> As the tribunal in *Micula v. Romania* explained:

protection of a business as a going concern justifies the recommendation of provisional measures, regardless of whether the destruction of such a business could formally be compensated by an award of damages.<sup>102</sup>

The chances of succeeding in a case in which the tribunal uses this criterion is roughly the same as in the cases involving the criterion of urgency (Chart 21). The tribunals refused the requests in more than half of all cases, including cases where the requested measures included:

- The stay of bankruptcy proceedings in the respondent's courts, where any losses from such proceedings could be later compensated by damages<sup>103</sup>
- A measure that related to the ownership of lands and buildings, which was equivalent to the final result sought and is not necessary to protect rights that could be irremediably forfeited<sup>104</sup>

- Stopping the alleged transfer of concession to another company, where the investor could not show the course of action that the respondent state was intending to take<sup>105</sup>
- Security for costs where the respondent state could not show persuasive evidence of the imminent danger of harm occurring from the investor's future conduct<sup>106</sup>
- Calling on the respondent state to refrain from calling any bonds issued by the investor or making the negative valuation orders against it, where the investor has shown only that the respondent state can potentially do it<sup>107</sup>

Tribunals granted such requests only in the cases where the party requesting them has shown:

- A need to preserve evidence before the proceedings progress any further to enable the parties to plead their case<sup>108</sup>
- Immediate payment of the sums allegedly owed to the respondent state would lead to the insolvency of the investments<sup>109</sup>

- A risk of destruction of ongoing investment and of its revenue-producing potential that benefits both the investor and the State<sup>110</sup>
- The respondent state's tax measures, if implemented, would have a destructive effect on the investor's business, not adequately reparable by an award of damages<sup>111</sup>

Overall, together with the urgency requirement, the standard of necessity was one of the two most important standards for granting the security measures. It was also the most controversial criterion, with different lines of cases establishing the different degrees of risk of harm, justifying the necessity to grant requests for the provisional measures.

## Existence of right requiring protection

This criterion arises from the wording of the ICSID Convention, which states that tribunals can recommend provisional measures, which should be taken to preserve the “respective rights of either party.”<sup>115</sup> ICSID and ICSID Additional Facility Arbitration Rules state that tribunals can recommend the provisional measures “for the preservation of rights.”<sup>116</sup>

Because it is only provided by the ICSID and ICSID Additional Facility Rules, this criterion exists almost exclusively in ICSID and ICSID Additional Facility jurisprudence. In total, the criterion of the existence of “rights requiring protection” applied in 48% of cases, all ICSID or ICSID Additional Facility cases.

The tribunals applied different definitions of the existence of rights requiring protection, with the tribunal in *Amco v. Indonesia* limiting such rights to “rights in dispute,”<sup>117</sup> the tribunal in *Plama v. Bulgaria* to “rights relating to the dispute”<sup>118</sup> and the tribunal in *Maffezini* stating that:

12. Rule 39(1) specifies that a party may request ‘... provisional measures for the preservation of its rights ...’

13. The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.

14. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the status quo of the property, thus preserving the rights of the party in the property.<sup>119</sup>



### **Because it is only provided by the ICSID and ICSID Additional Facility Rules, this criterion exists almost exclusively in ICSID and ICSID Additional Facility jurisprudence**

In most of the cases, the tribunals found that a party’s requests would be necessary to preserve some of its rights. Only rarely did they refuse to order provisional measures solely based on this criterion, with the few cases succeeding only if the requesting party:

- Failed to show how the rights in dispute could be endangered by the investor’s media publications<sup>120</sup>
- Failed to demonstrate how the rights intended to be preserved could be threatened by the hypothetical chance of the investor’s failure to pay for the costs of arbitration if the investor does not prevail in dispute<sup>121</sup>
- Relied on rights under a contract, which had ceased to exist due to an earlier decision of a commercial arbitration tribunal<sup>122</sup>

Overall, the standard of the rights requiring protection arises from the wording of the ICSID and ICSID Additional Facility Rules and applies exclusively in ICSID jurisprudence. In most circumstances, the tribunals were reluctant to refuse provisional measures under this standard, refusing provisional measures only where the rights ceased to exist or were merely hypothetical.



# Prima facie jurisdiction

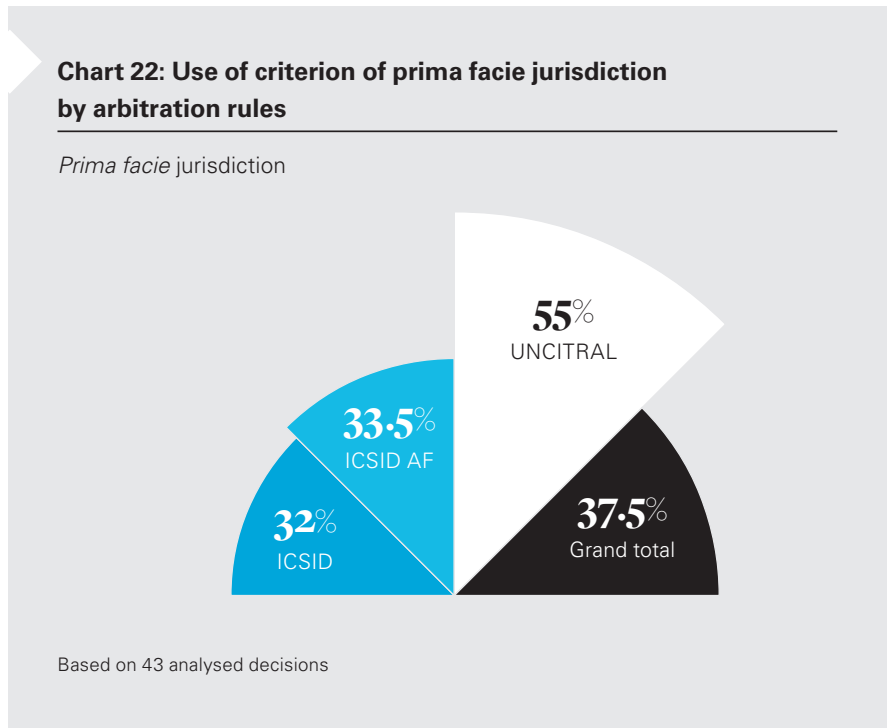
Tribunals examined the existence of the prima facie jurisdiction in 37.5% of decisions. In many cases where the tribunals received more than one request for interim measures, they considered this criterion only when looking at the first request. This explains the relatively rare use of this criterion.

As Chart 22 demonstrates this criterion was applied by tribunals acting under different arbitration rules with UNCITRAL tribunals applying it more frequently. This could partially be explained by Article 36 of the ICSID Convention, which requires the ICSID Secretary-General to conduct the preliminary determination that there is no manifest lack of jurisdiction when registering the request, although such decisions are not binding for the tribunals

Tribunals rarely refused to grant provisional measures due to a prima facie lack of jurisdiction. This is due to the fact that requests for provisional measures are considered without prejudice to the parties' objections to the tribunal's jurisdiction. The tribunal in the very first ICSID case, *Holiday Inns v. Morocco*, concluded that:

it has jurisdiction to recommend provisional measures according to the terms of Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Parties still having the right to express, in the rest of the procedure, any exception relating to the jurisdiction of the Tribunal on any other aspect of the dispute.<sup>123</sup>

The majority of other tribunals followed the *Holiday Inns* tribunal's approach.<sup>124</sup> For example, the tribunal in *Pugachev v. Russia* decided the tribunal's review should be limited to "that the requesting



party provides sufficient evidence for the tribunal to retain provisional jurisdiction".<sup>125</sup> With few exceptions, such as *Occidental v. Ecuador*,<sup>126</sup> which briefly considered the parties' arguments, the tribunals would decide on prima facie jurisdiction without much elaboration, leaving it to the later stages of the proceedings. As a member of one tribunal noted, if the respondent state makes a request for provisional measures, it does not need to demonstrate the existence of prima facie jurisdiction, as that would require it to establish the negative against its own interests.<sup>127</sup>

Overall, in the vast majority of cases, the tribunals tended to decide they have prima facie jurisdiction to hear the request for provisional measures and remained reluctant to consider jurisdictional objections in detail.

# Proportionality

In more than 30.5% of decisions, the tribunals considered whether the measure was proportional. The tribunals in *Lao Holdings v. Laos* and *Eskosol v. Italy* concluded the provisional measures should not “impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them”.<sup>128</sup> The tribunal in *Gabriel v. Romania* provided a more detailed definition:

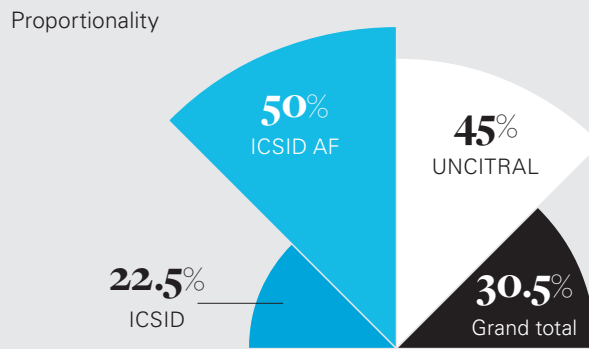
The Tribunal must balance the harm caused to the requesting party and to the other side when deciding whether or not the provisional measures should be adopted. In striking the balance, the Tribunal has to take into account the degree and nature of the harm that would be suffered by each party so that the provisional measure ordered would be proportional in all the circumstances of the case.<sup>129</sup>

The tribunals seemed to have started considering proportionality as a separate criterion in more recent cases, primarily after 2010. The analysis shows the UNCITRAL and ICSID Additional Facility tribunals tend to apply it twice as frequently as the tribunals under ICSID Arbitration Rules (Chart 23).

Tribunals rarely relied on proportionality as the main ground for refusal to issue provisional measures, with the tribunals reviewing the criterion of proportionality. They refused the requests for provisional measures in 40% of cases (Chart 24). For example, tribunals decided the requested measures were disproportionate where:

- The stay and delay of criminal proceedings in the respondent state would be detrimental to the progress of the proceedings, leading to the loss of witnesses and evidence<sup>130</sup>
- Respondent state requested a general prohibition of engagement in public discussions of the case<sup>131</sup>
- Posting security for the respondent state’s costs would potentially impinge the investor’s ability to pursue its claims or defences at ICSID<sup>132</sup>

**Chart 23: Use of criterion of proportionality by arbitration rules**



Based on 35 analysed decisions

- The stay of the extradition request against the investor would affect the respondent state’s ability to proceed with extradition, but not terminate it or affect the criminal proceedings against the investor in the respondent state<sup>133</sup>

investor) or losses (because the investor’s business would not be terminated) the case<sup>134</sup>

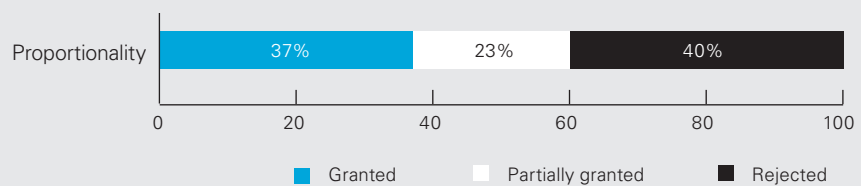
- The stay of parallel court proceedings in the respondent state’s courts for the period of arbitration would not lead to the loss of the respondent’s right to make its claims<sup>135</sup>

On the contrary, the measures were proportionate where:

- The stay of enforcement of tax legislation requested by the investor would be to the advantage of both parties, with the respondent being able to obtain the full amount of taxes both if it wins (by enforcing the security provided by the

Overall, the tribunals rarely used proportionality as a definitive criterion, rejecting the requested provisional measures only where such measures were grossly disproportionate or could affect the party’s ability to pursue its claims.

**Chart 24: Chance of success in decisions, in which tribunals used criterion of proportionality**



Based on 35 analysed decisions

## Prima facie case on merits

In a further 16.5% of decisions, the tribunals separately examined the criterion of a prima facie case on merits or a prima facie establishment of the case. For example, in *Paushok v. Mongolia* the tribunal stated that it should conduct an only limited review on merits and 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. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal.<sup>136</sup>

This criterion originates from commercial arbitration practices and tends to be applied by UNCITRAL (55%) tribunals more than by other tribunals (Chart 25). Following the International Court of Justice practice,<sup>137</sup> the ICSID and ICSID Additional Facility tribunals did not consider it in the vast majority of cases. The *Fouad v. Jordan* tribunal confirmed this practice by concluding that:

the Tribunal records certain matters that it is not required to determine for the purpose of determining the Claimants' Application...The Tribunal is not required for the purpose of this Application to determine the merits of the parties' respective positions on the legality of the tax measure underlying the dispute. That is a matter that the Tribunal will be required to determine, within the context of the guarantees provided in the applicable BIT, at the merits stage (provided that the Claimants reach the merits).<sup>138</sup>

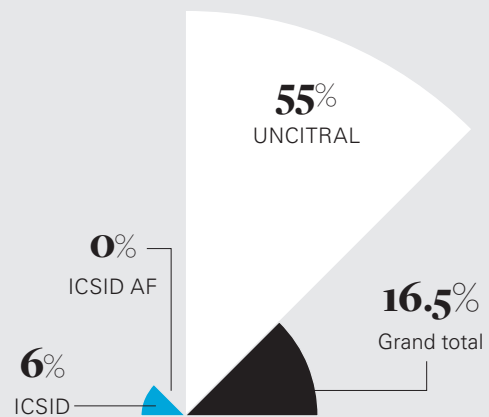
The tribunals generally remained reluctant to refuse provisional measures based on the lack of a prima facie case on the merits. They preferred not to prejudge the merits of the case before the parties were given a chance to present their arguments. The *Guaracachi v. Bolivia* tribunal explained that it was:

unwise to risk even the most minor prejudgment of the case so close to the date of the final hearings. Such determinations are therefore best avoided unless absolutely necessary to come to a decision on the request for interim measures, which is not the case here.<sup>139</sup>

Overall, as the standard of the prima facie case arose from commercial arbitration practice and is now expressly provided in Article 26 of 2010 UNCITRAL Arbitration Rules, it tended to be almost exclusively applied by UNCITRAL tribunals, with the tribunals being reluctant to prejudge the case and rarely considering the merits in detail.

**Chart 25: Use of criterion of prima facie case on merits by arbitration rules**

*Prima facie* case on merits



Based on 19 analysed decisions

## Extreme circumstances (security for costs)

The final important and also most recent criterion, quoted in only 12.5% of cases, is the requirement for the requesting party to show extreme circumstances, justifying granting security for costs. While it was only established in 2014 by the decision in *RSM v. Saint Lucia*,<sup>140</sup> it later became more widely accepted by tribunals deciding requests for security for costs, with this decision being quoted by all subsequent tribunals faced with such requests.

Even though *RSM v. Saint Lucia* was an ICSID case, it has been equally applied by ICSID (10.5% of all decisions), ICSID Additional Facility (16.5% of all decisions) and UNCITRAL (20% of all decisions) tribunals. Before 2014, none of the arbitration tribunals had ever granted the request for security for costs. For instance, in *Maffezini v. Spain* the tribunal decided that it would only protect the respondent state against the hypothetical chance of the investor's non-payment.<sup>141</sup> The tribunal in *RSM v. Grenada* decided that "more should be required than a simple showing of the likely inability of an investor to pay a possible costs award"<sup>142</sup>

While the earlier tribunals, such as *Libananco v. Turkey*, had acknowledged that some circumstance might indeed vouch granting security for costs, it was:

not aware of any established practice on the part of ICSID Tribunals in favour of granting security for costs either to a Claimant or to a Respondent. Asked during the oral hearing for its most favourable authority supporting the granting of security for costs, even by analogy, counsel for the Respondent was in some difficulty to name anything specific. In these circumstances, the Tribunal takes the view that it would only be in the most extreme case – one in which an essential interest of either Party stood in danger of irreparable damage – that the possibility of granting security for costs should be entertained at all.<sup>143</sup>



**In *RSM v. Saint Lucia*, the majority of the tribunal found that there were such circumstances. In that case these circumstances included the investor's failure in earlier arbitration cases to pay advances requested by tribunals, reimburse to the respondent state advances that it had paid instead of the investor, and satisfy the award of the tribunal**

In *RSM v. Saint Lucia*, the majority of the tribunal found that there were such circumstances. In that case these circumstances included the investor's failure in earlier arbitration cases to pay advances requested by tribunals, reimburse to the respondent state advances that it had paid instead of the investor, and satisfy the award of the tribunal. The tribunal eventually concluded that there was a material risk that the investor would not reimburse the respondent state for its incurred costs, due to the investor's unwillingness or its inability to comply with its payment obligations.<sup>144</sup>

The *RSM v. Saint Lucia* decision also addressed the issue of third-party funding. The majority decided that it further supported the tribunal's concerns about the investor's ability to comply with a costs

award, with one arbitrator delivering an assenting opinion, stating that:

unless there are particular reasons militating to the contrary, exceptional circumstances may be found to justify security of costs orders arising under BIT claims as against a third-party funder, related or unrelated, which does not proffer adequate security for adverse cost orders.<sup>145</sup>

Not all tribunals agreed with this position on third-party funding – the tribunal in *Eurogas v. Slovakia* decided that third-party funding had become common practice and did not constitute the exceptional circumstance justifying granting security for costs.<sup>146</sup>

Even after the *RSM v. Saint Lucia* decision, security for costs was granted in merely 7% of cases. Only the tribunal

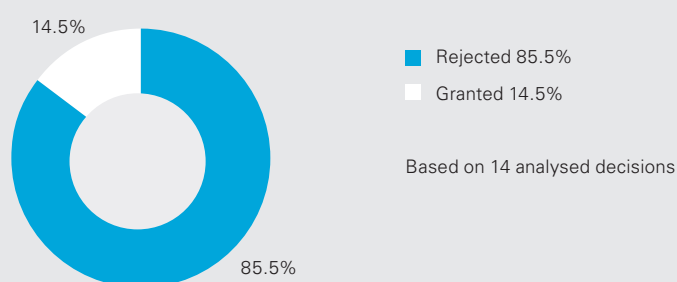
in *Garcia Armas v. Venezuela* decided that the respondent state had shown strong evidence that the investor might fail to pay any cost orders in favour of the respondent state. Noting that the third-party financing and not per se constitute a circumstance justifying granting security for costs, the tribunal said that such decision was justified in that case due to:

- Financing by third parties that, by agreement with the investor, had not assumed any obligation with respect to payment of adverse costs or granting of guarantees
- Doubts that the solvency of the investor can guarantee the Respondent the collection of a possible favourable award in costs<sup>147</sup>

In other cases, tribunals decided that there were no extreme circumstances because:

- The investor had not defaulted on their payment obligations in present or earlier arbitration proceedings, with third-party funding on its own not justifying security for costs<sup>148</sup>
- The investor's corporate structure (holding company) and lack of transparency surrounding the transfers of assets between such company and its subsidiaries were not unusual, with the financial circumstance surrounding the investor's principal beneficiary being irrelevant<sup>149</sup>
- There was no evidence that the investor had failed to comply with its obligations to third parties or breached its obligations in the current or other arbitrations and there was no evidence that it was not able to pay<sup>150</sup>
- The investor so far complied with all the cost advances and had no third-party funding<sup>151</sup>

**Chart 26: Chance of success of requests for security for costs where tribunals used criterion of existence of extreme circumstance**



**Even after the *RSM v. Saint Lucia* decision, security for costs was granted in merely 7% of cases. Only the tribunal in *Garcia Armas v. Venezuela* decided that the respondent state had shown strong evidence that the investor might fail to pay any cost orders in favour of the respondent state**

- While the investor was going through bankruptcy, it had an insurance policy protecting it from the risk of adverse cost order or order for security for costs<sup>152</sup>
- While the investor was subject to a freezing order, it alone was not sufficient to overcome the high threshold established by *RSM v. Saint Lucia*<sup>153</sup>

Overall, in the absence of the past misbehaviour by the investor, tribunals were reluctant to find the extreme circumstances, justifying security for costs (Chart 26).

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# The effect of provisional measures

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## Binding nature of the decisions on provisional measures

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**E**ven after a party receives a favourable decision on its request for provisional measures, it may still face difficulties with enforcement. With respect to the provisional measures, it is sometimes not clear as to what extent they are binding for the parties or how the parties may enforce them.

The relevant arbitration rules provide no guidance on the binding nature of decisions on provisional measures. The wording of UNCITRAL Arbitration Rules 1976 and 2010<sup>154</sup> and Additional Facility Rules (if the decision is made at the request of a party)<sup>155</sup> point to the binding nature of the tribunal's decisions on provisional measures, allowing the tribunal to "order" such measures. However, the wording of ICSID Arbitration Rules (both the current version and the proposed new draft) is different and opts for a softer "recommend".<sup>156</sup>

Nevertheless, the practice of ICSID tribunals shows that they consider their decisions as binding, with *Maffezini v. Spain* tribunal explaining it:

While there is a semantic difference between the word "recommend" as used in Rule 39 and the word "order" as used elsewhere in the Rules to describe the Tribunal's ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word "dictación". The Tribunal does not



**Overall, there does not seem to be any significant disagreement as to the binding nature of ICSID, ICSID Additional Facility or UNCITRAL tribunals' decisions on provisional measures**

believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal's authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word "recommend" to be of equivalent value as the word "order".<sup>157</sup>

The tribunal in *Victor Pey Casado v. Chile* came to the same conclusion after in-depth analyses of Article 47 of the ICSID Convention and the ICJ practice.<sup>158</sup> This position was reinforced by other tribunals,<sup>159</sup> which decided that ICSID tribunals' decisions on provisional measures were compulsory and binding for the parties.

It is worth noting that, while this position is shared by the majority of the tribunals, it is not unilaterally accepted by all arbitrators. In his Statement of Dissent to *Fouad v. Jordan*, one of the arbitrators criticised this position, stating that the travaux préparatoires and the history of the drafting of Article 47 of the ICSID Convention clearly stated that "provisional measures under the ICSID Convention were not intended to be of a binding nature."<sup>160</sup>

Overall, there does not seem to be any significant disagreement as to the binding nature of ICSID, ICSID Additional Facility or UNCITRAL tribunals' decisions on provisional measures.

# Enforceability of decisions on provisional measures

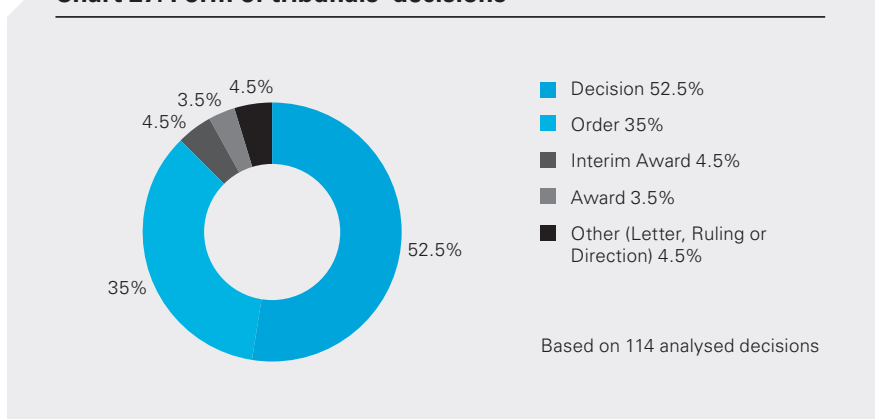
While the ICSID Convention and New York Convention create the framework for the enforcement of final awards under ICSID, ICSID Additional Facility and UNCITRAL Arbitration Rules, neither of them expressly address enforcement of decisions on provisional measures.

The ICSID Convention clearly establishes that the decisions on provisional measures are unenforceable under it as they are not a final award<sup>161</sup> and exclude other remedies,<sup>162</sup> prohibiting the parties from enforcing the decisions in other courts or tribunals. However, the parties would generally feel obliged to follow the tribunals' decisions. The tribunals also retain the capacity to draw adverse inferences from the behaviour of the parties, as shown in *Agip v. Congo*, where the tribunal stated that:

the Tribunal does not lose sight of the facts... that the Government did not comply with the decision of the Tribunal, dated 18 January 1979, as to the measures of preservation and as a consequence AGIP was unable to have access to a certain number of documents which could have assisted it in presenting its case.<sup>163</sup>

Some ICSID tribunals have expressly addressed this problem. While they have refused the argument that non-compliance with such decisions amounts to expropriation,<sup>164</sup> in other cases they have decided that "by failing to comply with those provisional measures, the Respondent has breached Article 47 of the ICSID Convention."<sup>165</sup> Article 47 of the ICSID

**Chart 27: Form of tribunals' decisions**



Convention gives a tribunal wide authority to recommend any provisional measures "if it considers that the circumstances so require."

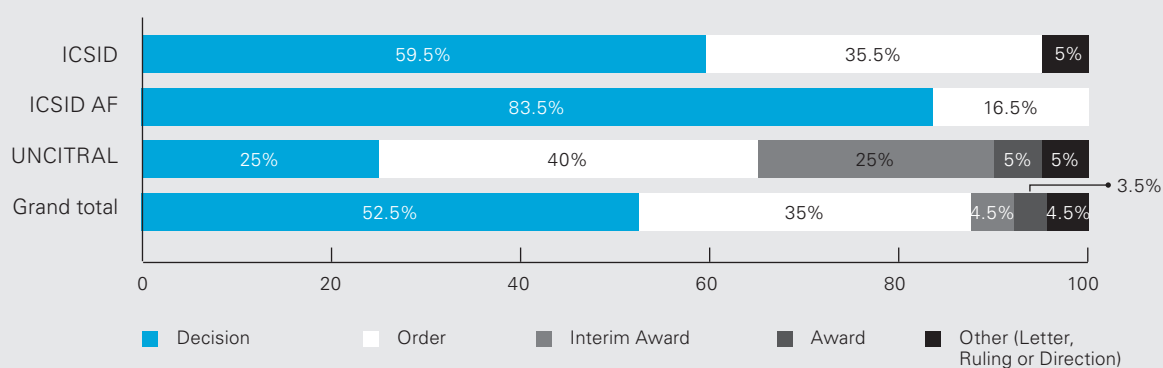
While there is not much publicly available information about enforcement of the ICSID decisions on provisional measures in state courts, in *Hydro v. Albania*, the English court decided that "the Tribunal's Order was binding on the extradition court and the extradition proceedings should be suspended."<sup>166</sup> In another case, *Nova Group v. Romania*, the tribunal, on the contrary, decided that the ICSID tribunal's provisional measures order against Romania could not oust an extradition process that had its origins in EU law.<sup>167</sup>

The situation remains far less clear with the decisions under the ICSID Additional

Facility and UNCITRAL Arbitration Rules. While it seems that they may be enforced under the New York Convention of 1958, this convention applies only to the "awards". This automatically excludes the ICSID Additional Facility Decisions, which can only be issued as orders or decisions.

In fact, this study shows (Chart 27), only a few of the decisions on provisional measures are made in the form of an award (3.5%) or interim award (4.5%). Most of the tribunals choose to respond to requests for provisional measures by rendering decisions (52.5%) or orders (35%). In *Chevron v. Ecuador*, the tribunal issued a series of decisions on provisional measures in the form of the "interim awards" with the express intention that they be used to prevent enforcement of the decision

**Chart 28: Form of tribunals' decisions by arbitration rules**



Based on 114 analysed decisions

of an Ecuadorian court.<sup>168</sup> Therefore, the possibility of enforcement of such decisions remains unclear, especially in some jurisdictions (e.g., the United Arab Emirates, the Russian Federation, Australia, Thailand and Lebanon) where courts could be reluctant to enforce a decision issued in a form other than award.<sup>169</sup>

The statistics change when separated by the arbitration rules (Chart 28): a quarter of UNCITRAL decisions on provisional measures were rendered as interim awards and 5% as awards. Additionally, three out of four publicly available decisions of SCC emergency arbitrators were made in the form of awards. However, even

when issued as awards, they may not qualify as "awards" under the New York Convention of 1958, which provides for the enforcement of the "final" awards. Therefore, national legislation primarily determines their status.

In most cases, however, the national legislation does not provide much more clarity. However, the decisions on provisional measures can be enforced under the 2006 edition of the UNCITRAL Model Law, which states that:

interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the

arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued.<sup>170</sup>

The 2006 version of the Model Law has been adopted in only slightly more than 30 out of 111 of the UNCITRAL Model Law jurisdictions. The other Model Law countries still follow the older 1985 version, which lacks such provision. The problem with enforcement of the decisions on provisional measures persists in many jurisdictions to this day, despite the recent positive changes initiated by the adoption of the 2006 version of the UNCITRAL Model Law.



## Endnotes

- 1 Although this is the first empirical study on this topic, it has already been extensively examined in such books and publications as Cameron Miles, *Provisional measures before international courts and tribunals* (2017); Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (2018); G Kaufmann-Kohler et al, "Interim Relief in Investment Treaty Arbitration", in K Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2018); Anthony Sinclair & Odysseas Repousis. "An Overview of Provisional Measures in ICSID Proceedings." *ICSID Review-Foreign Investment Law Journal* 32, no. 2 (2017): 431-446.
- 2 Including 84 ICSID, 20 UNCITRAL, 6 ICSID Additional Facility and 4 SCC decisions.
- 3 For the purposes of this study, the term "provisional measures" is used to refer to "provisional measures"; "interim measures"; "interim relief"; "interim protection" and "interim measures of protection" because different arbitration rules, tribunals and authors use different terminology.
- 4 See, for example, Article 17 of the UNCITRAL Model Law (as adopted in 2006), available at [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).
- 5 Article 47 of the ICSID Convention.
- 6 As of August 2019, available at [https://icsid.worldbank.org/en/Documents/WP\\_3\\_VOLUME\\_1\\_ENGLISH.pdf](https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf).
- 7 e.g. *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 dated 28 October 1999, paragraph 9; *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 1 dated 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 dated 12 May 2016, paragraph 109.
- 8 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures dated 17 August 2007.
- 9 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 dated 28 October 1999.
- 10 *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures dated 29 June 2009 and Decision on Liability dated 14 December 2012.
- 11 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Provisional Measures dated 19 November 2007 and Decision on Revocation of Provisional Measures and Other Procedural Matters dated 13 May 2008.
- 12 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Provisional Measures Requested by the Parties, dated 25 September 2001.
- 13 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order dated 2 September 2008.
- 14 According to UNCTAD International Investment Agreements Navigator, available at <https://investmentpolicy.unctad.org/international-investment-agreements>.
- 15 According to UNCTAD Investment Dispute Settlement Navigator (as of 30 September 2019) <https://investmentpolicy.unctad.org/investment-dispute-settlement>.
- 16 Based on 114 decisions published on [www.italaw.com](http://www.italaw.com) and <https://icsid.worldbank.org/en/Pages/process/Decisions-on-Provisional-Measures.aspx> (as of 30 September 2019).
- 17 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Procedural Order No. 14 dated 11 March 2013; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10 dated 11 January 2016; *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Decision on Claimant's Interim Measures Request dated 7 December 2018 (applying UNCITRAL Rules with new Article 1, paragraph 4, as adopted in 2013).
- 18 Art. 27 of the SIAC Investment Arbitration Rules.
- 19 Singapore-Sri Lanka Free Trade Agreement 2018.
- 20 *Tskinvest LLC v. Moldova, JKK Oil & Gas v. Ukraine* (partially revealed in the decision of a Ukrainian court) and *Puma Energy holdings v. Benin* (unpublished).
- 21 *Kompozit v. Moldova, Munshi v. Mongolia and Okuashvili v. Georgia* (unpublished).
- 22 *Griffin v. Poland* (unpublished).
- 23 *Evrobalt v. Moldova*.
- 24 ICC Arbitration Commission Report on Arbitration Involving States and State Entities under the ICC Rules of Arbitration dated November 2014, paragraphs 51 and 52, available at: <https://iccwbo.org/publication/icc-arbitration-commission-report-on-arbitration-involving-states-and-state-entities-under-the-icc-rules-of-arbitration/>.
- 25 Emergency Arbitrator Proceedings – ICC Arbitration and ADR Commission Report dated April 2019, paragraph 49, available at <https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/>.
- 26 The UNCITRAL Model Law (as adopted in 2006), at [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).
- 27 See, e.g., *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Claimant's Amended Application for Provisional Measures dated 17 September 2013; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures dated 2 September 2008.
- 28 *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1), Decision dated 2 July 1972, described in "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)- Some Legal Problems" by Pierre Lalive.
- 29 *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures dated 9 December 1983, paragraph 5.
- 30 *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Request for Provisional Measures dated 9 December 1983.
- 31 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order dated 2 September 2008.
- 32 *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision dated 31 July 2009.
- 33 *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia* (ICSID Case No. ARB/14/24), Decision dated 12 May 2016.
- 34 *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award dated 17 July 2017.
- 35 *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait* (ICSID Case No. ARB/17/8), Decision dated 23 November 2017, paragraph 49.
- 36 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Procedural Order No. 14 dated 22 December 2014, paragraph 72.
- 37 *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on the Claimants' Request for Provisional Measures dated 3 March 2010, paragraph 65.
- 38 Article 26 of the ICSID Convention ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.")
- 39 *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1), Decision dated 2 July 1972, described in "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)- Some Legal Problems" by Pierre Lalive.
- 40 *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Procedural Order No. 4 dated 11 January 1999.
- 41 *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 1 dated 1 July 2003.
- 42 *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures dated 8 May 2009.

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- 43 *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* (ICSID Case No. ARB/08/20), Decision on the Application for provisional measures submitted by the Claimants dated 9 December 2009.
- 44 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures dated 7 February 2013.
- 45 *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Order Regarding Claimant's and Respondent's Requests for Interim Measures dated 11 January 2017.
- 46 *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures dated 8 May 2009, paragraph 61.
- 47 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order dated 6 September 2005.
- 48 *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Procedural Order No. 2 dated 19 April 2015.
- 49 *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on the Claimants' Request for Provisional Measures dated 3 March 2010.
- 50 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 6 dated 5 September 2016.
- 51 *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait* (ICSID Case No. ARB/17/8), Decision on Provisional Measures dated 23 November 2017.
- 52 *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award dated 17 July 2017.
- 53 *See, e.g., Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award dated 17 July 2017, paragraph 263.
- 54 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 dated 16 October 2002.
- 55 *See, e.g., Yarik Kryvoi, 'Economic Crimes in International Investment Law', International and Comparative Law Quarterly, Volume 67, Issue 3, pp. 577-605 (2018).*
- 56 *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Ruling on Motion to Amend the Provisional Measures Order dated 30 May 2014.
- 57 *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Procedural Order No. 11 dated 27 June 2012.
- 58 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Provisional Measures dated 8 April 2016.
- 59 *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 Decision on the Parties' Requests for Provisional Measures dated 23 June 2015, paragraph 82.
- 60 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Provisional Measures dated 19 November 2007, paragraph 62.
- 61 *Hydro S.r.l. and others v. Republic of Albania* (ICSID Case No. ARB/15/28), Order on Provisional Measures dated 3 March 2016.
- 62 *See, e.g., Convia Callao S.A. and CCI- Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru* (ICSID Case No. ARB/10/2), Decision on Provisional Measures dated 22 February 2011.
- 63 *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 5 dated 3 April 2013.
- 64 *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award dated 17 July 2017.
- 65 *Igor Boyko v. Ukraine* (PCA Case No. 2017 – 23), Procedural Order No. 3 on Claimant's Application for Emergency Relief dated 3 December 2017.
- 66 *Mohammed Munshi v. Mongolia*, SCC Case No. 2018/007, Award on Emergency Measures dated 5 February 2018.
- 67 *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 5 dated 3 April 2013, paragraph 65(a).
- 68 *Igor Boyko v. Ukraine* (PCA Case No. 2017-23), Procedural Order No. 3 on Claimant's Application for Emergency Relief dated 3 December 2017, paragraph 4.3(a).
- 69 *Mohammed Munshi v. Mongolia*, SCC Case No. 2018/007, Award on Emergency Measures dated 5 February 2018, paragraph 57.
- 70 Notable exceptions include cases such as *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea* (ICSID Case No. ARB/84/1), Decision on Provisional Measures dated 18 December 1984; *Burimi SRL and Eagle Games SH.A v. Republic of Albania* (ICSID Case No. ARB/11/18) Procedural Order No. 2 dated 3 May 2012.
- 71 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Interim Award on Interim Measures dated 16 February 2012.
- 72 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Provisional Measures Requested by the Parties, dated 25 September 2001.
- 73 *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2 dated 28 October 1999.
- 74 *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Provisional Measures dated 12 December 2013 and Decision on Saint Lucia's Request for Provisional Measures dated 13 August 2014.
- 75 *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6).
- 76 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Order dated 6 September 2005, paragraph 38.
- 77 *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Claimant's Request for Provisional Measures dated 17 May 2006, paragraph 32.
- 78 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Revocation of Provisional Measures and Other Procedural Matters dated 13 May 2008, paragraph 72.
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- 133 *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award dated 17 July 2017, paragraphs 331-333.
- 134 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order dated 2 September 2008, paragraphs 84-86.
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- 138 *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38), Order on Application for the Grant of Provisional Measures dated 24 November 2014, paragraphs 51-52.
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- 169 Emergency Arbitrator Proceedings – ICC Arbitration and ADR Commission Report dated April 2019, paragraph 194, available at <https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/>.
- 170 Art. 17H of the UNCITRAL Model Law 2006.

# Methodology

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The research was conducted in three phases:

- **Phase 1:** location of 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 the location of 114 publicly available decisions on provisional measures.

The search included only the decisions, published in their original form or through an academic article, which quoted significant parts of the decisions. The search primarily included findings of the tribunals, operating under the bilateral and multilateral investment treaties and excluded the practice of more specialised tribunals such as the Iran-United States Claims Tribunal.

- **Phase 2:** setting the research questions, legal research, 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% is shown as 24%, 59.52% as 59.5% and 4.76% as 5%). 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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