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## The Future of Interim Relief in International Disputes

Pieter Bekker (Crowell & Moring LLP) · Wednesday, March 4th, 2009 · American Society of International Law (ASIL)

On August 14, 2008, while the armed conflict over Abkhazia and South Ossetia between Georgia and Russia was raging, Georgia filed a request for the indication of provisional measures with the International Court of Justice (ICJ) in The Hague in order to preserve its rights under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries." Georgia clearly was losing the military battle with Russia, so it started a judicial fight, profiting from the existence of CERD, a treaty ratified by both parties to the war.

Catering to Georgia's wishes, the ICJ was quick to find that it had *prima facie* jurisdiction over the case and Georgia's request, that there existed a link between the alleged rights to be protected and the subject of the proceedings on the merits, and that there was risk of irreparable harm and urgency. The ICJ's terse analysis led the seven-judge minority to conclude in a joint Dissent that the Court's Order "is not well founded in law." The unusually large minority faulted the Court for having failed to define both the precise manner in which rights are threatened and the irreparable harm these rights might suffer. The Dissent pointed out that the weakness of the majority's consideration of urgency is echoed in the operative paragraph of the Court's Order, in which the Court ultimately directs both parties to respect the CERD, which they are in any event obliged to do, with or without provisional measures.

Sitting at the apex of international courts and tribunals, the ICJ's authoritative statements and rulings affect other tribunals, including arbitral panels. Arbitral tribunals sitting in investment cases have been known to adopt the ICJ's analysis of interim relief requests. The rules regarding interim relief of various arbitration institutions were inspired by the language of the ICJ Statute. For example, Article 41 of the ICJ Statute served as an inspiration for Article 47 of the ICSID Convention.

Lack of specific conditions for interim relief in the applicable arbitration rules leave the arbitrators with little guidance. So it should not come as a surprise that they often turn to the published interim relief rulings of the ICJ. As the Georgia case demonstrates, they will do so at their own peril.

Also relevant in this context is the fact that recent amendments of the ICSID Arbitration Rules have facilitated the submission of requests for provisional measures and their administration at an early stage of a dispute (see Rule 39(5)). Clearly, such amendments are designed to accommodate

claimants in ICSID proceedings, constituting the institution's main clientele.

As a consequence of recent developments in international investment arbitration, including the dispute between Exxon-Mobil and Venezuela in which Exxon obtained far-reaching freezing orders in aid of arbitration, investor-State arbitration is increasingly seen by industry as an instrument for enhancing bargaining leverage in negotiations over unilaterally or coercively revised terms. Arbitration is seen as a bargaining chip. Where IOCs traditionally have been reluctant to pick a fight with the host State in the form of a full-fledged arbitration, they may want to settle for a "mini-fight" triggered by a request for interim relief in aid of arbitration and early in the proceedings in hopes of reaching an amicable settlement on favorable economic terms with the host State. This has led to an increased focus on the part of industry on contractual clauses providing for arbitration, and especially interim relief provisions within those clauses.

These recent developments raise a number of fundamental questions. When it comes to interim relief, are investor-State tribunals really akin to the ICJ, the world's only court with general jurisdiction over inter-State disputes, or should they be assimilated with domestic courts? Domestic courts, certainly those in the United States, have required the satisfaction of a condition lacking in the ICJ and other international tribunals: A successful party requesting interim relief in a U.S. domestic court must demonstrate reasonable likelihood of success on the merits.

For purposes of interim relief, there is something to be said for assimilating arbitral tribunals sitting in investment cases to domestic courts, rather than the ICJ. The amounts at stake, and awarded, in investment arbitrations certainly are more like what one is used to seeing in U.S. domestic courts than what States claim before, and receive from, the ICJ, where declaratory relief is the standard. The context within which interim relief requests are made before the ICJ often is fundamentally different, involving armed conflict and diplomatic tensions.

The manner in which arbitral tribunals approach requests for interim relief and issue rulings could have far-reaching effects on the legitimacy of the System of investor-State arbitration. It could turn a watershed development into a backlash. One solution might lie in including more detailed guidance in the arbitration rules under which arbitral tribunals operate.

As the ICJ case between Georgia and Russia demonstrates, and certainly the Dissent issued in that case, urgency should be the principal consideration-and not an afterthought employed to defeat a request that is otherwise wanting, as in the August 17, 2007 ruling in *Occidental Petroleum, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11) (Fortier, Stern, Williams, arbitrators).

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