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Introduction

I Provisional Measures in International Law

A *Definition and Character of Provisional Measures*

This study is concerned with provisional measures as awarded by international courts and tribunals, being orders requiring the parties to a dispute to do (or not do) something so as to preserve the subject matter of the dispute pending resolution.[1] Described by a variety of terms[2] – including 'provisional measures',[3] interim measures,[4] 'interim protection'[5] and 'interim measures of protection'[6] – the function of this device was described by the ICJ in the *Fisheries Jurisdiction* cases as follows:

> Whereas the right of the Court to indicate provisional measures [. . .] has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice

[1] Rüdiger Wolfrum, 'Interim (Provisional) Measures of Protection', *MPEPIL* (2006) §7. The literature on the topic as a whole is vast, but for earlier substantial studies in the field, see Edward Dumbauld, *Interim Measures of Protection in International Controversies* (The Hague: Martinus Nijhoff, 1932); Jerome B Elkind, *Interim Protection: A Functional Approach* (The Hague: Martinus Nijhoff, 1981); Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (Deventer: Kluwer, 1931); Lawrence Collins, 'Provisional and Protective Measures in International Litigation' (1992) 234 Hague *Recuiel* 9; Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2005); Mehmet Semih Gemalmaz, *Provisional Measures of Protection in International Law* (Istanbul: Legal Kitapevi, 2011).

[2] For the sake of convenience, this study will use the term 'provisional measures' throughout, occasionally interchanged with 'interim relief'.

[3] ICJ Statute, Art 41; ICJ Rules, Arts 73–8; UNCLOS Art 290; ICSID Convention, Art 47.

[4] Rules of the European Court of Human Rights, Art 39, in *Basic Documents: Settlement*, doc 31.b; 1976 UNCITRAL Rules, Art 26; 2010 UNCITRAL Rules, Art 26; Rules of the Iran–US Claims Tribunal, Art 26, in *Basic Documents: Settlement*, doc 62.b.

[5] ICJ Rules, Section D, subsection 1; Rules of Court (1922) PCIJ Ser D No 1, Art 57 (1st edn).

[6] Rules of Court (1931) PCIJ Ser D No 1, Art 57 (2nd edn); Rules of Court (1936) PCIJ Ser D No 1, Art 61 (3rd edn).

> should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue.[7]

In this light, provisional measures in international law may be seen to play broadly the same role as municipal equivalents such as the Anglo-American interlocutory injunction, the French *ordonnance de référé* and the German *einstweilige Verfügung* (i.e. to preserve rights that are the subject of litigation between the parties until such time as the dispute can be resolved, or *pendente lite*). In international law, this function takes on special importance due to the relatively slow pace of proceedings, in which years may elapse before disputes are finally adjudicated.

Provisional measures may be said to serve a number of related objectives beyond the protection of rights *pendente lite*.[8] Some sources assert that the purpose of interim relief is preservation of the *status quo*, and indeed this was the position taken in the constitutive instrument of one of the earliest permanent international tribunals, the CACJ.[9] Others still speak of the need to safeguard the jurisdiction of the court or tribunal such that any final decision will be effective as between the parties.[10] Such motivations, however, express the same prophylactic impulse as demonstrated by the ICJ in the *Fisheries Jurisdiction* cases – the desire to temporarily protect the subject matter of the dispute. An exception to this unity of purpose is seen in the pronouncement of the PCIJ in *Electricity Company*, which referred to provisional measures as reflecting:

> [T]he principle universally accepted by international tribunals [. . .] to the effect that the parties to a case must abstain from any measures capable of exercising a prejudicial effect in regard to the execution of the decision to

[7] *Fisheries Jurisdiction (UK v Iceland)*, Interim Measures, ICJ Reports 1972 p 12, 16; *Fisheries Jurisdiction (FRG v Iceland)*, Interim Measures, ICJ Reports 1972 p 30, 34.

[8] Chester Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007) 121–3.

[9] Convention for the Establishment of a Central American Court of Justice, 20 December 1907, 206 CTS 78, Art XVIII. Further: Chapter 2, §III.B.2.

[10] *Aegean Sea Continental Shelf (Greece v Turkey)*, Interim Measures, ICJ Reports 1976 p 3, 16 (President Jiménez de Aréchaga); *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Provisional Measures, ICJ Reports 1990 p 64, 79–80 (Judge *ad hoc* Thierry, diss). Further: Bernard Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures', in L F Damrosch (ed), *The International Court of Justice at a Crossroads* (Dobbs Ferry: Transnational Publishers, 1987) 323, 324–6; M H Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction' (1972–1973) 46 *BYIL* 259, 259.

> be given and, in general, not allow any step of any kind to be taken which might aggravate and extend the dispute.[11]

This might very well be seen as yet another example of a measure designed, after a fashion, to preserve rights *pendente lite*. But an examination of the origins of interim relief indicates that although related to the need to protect rights subject to litigation, measures designed to prevent aggravation or extension of a dispute have a separate legal and historical basis, and so retain an independent existence as a general directive to the parties not to do anything that might worsen the dispute – even if the relevant act does not directly damage the subject matter of the proceedings.[12] Accordingly, they may be awarded alongside more specific measures of protection so as to enhance stability of relations between the parties.[13]

Beyond the general purposes for which interim relief might be awarded, specific courts or tribunals may be authorized to protect additional rights by way of provisional measures. Most prominently, UNCLOS Article 290 permits bodies exercising powers under Part XV of the Convention to issue orders 'for the prevention of serious harm' to the marine environment – even if rights pertaining to the marine environment are not directly the subject of litigation.[14] Other bodies might develop expertise in particular manifestations of the general function, such as the practice of investor-state arbitration tribunals awarding provisional measures that restrain parallel proceedings before domestic courts so as to preserve the exclusivity of the tribunal's jurisdiction.[15]

[11] *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (1939) PCIJ Ser A/B No 79, 199.

[12] Cf. *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Provisional Measures, ICJ Reports 2007 p 3, 13, 16. Further: Chapter 5, §III.B.1.

[13] See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures, ICJ Reports 2008 p 353, 398–9.

[14] See e.g. *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)*, Provisional Measures (1999) 117 ILR 148, 163–4. Cf. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3, Art 31(2), permitting the award of interim relief to prevent damage to relevant fish stocks.

[15] See e.g. *E-Systems Inc v Iran* (1983) 2 Iran–US CTR 51, 57; *SGS Société Générale de Surveillance SA v Pakistan*, Procedural Order No 2 (2002) 8 ICSID Reports 388, 391–7; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, PCA Case No 2009–23 (First Interim Award on Interim Measures, 25 January 2012) 16. Further: Charles N Brower and Ronald E M Goodman, 'Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity Against Municipal Proceedings' (1991) 6 *ICSID Rev – FILJ* 431. Further: Chapter 8, §II.C.

B *Provisional Measures and the Inherent Powers of International Courts and Tribunals*

When ordering provisional measures, most courts or tribunals rely expressly on a provision in their constitutive instrument or procedural rules – the ICJ refers to Article 41 of its Statute, ITLOS and Annex VII tribunals to UNCLOS Article 290, an ICSID tribunal to Article 47 of the ICSID Convention, a NAFTA tribunal to NAFTA Article 1134, *ad hoc* investor-state bodies to Article 26 of the 1976 or 2010 UNCITRAL Arbitration Rules as required, and so forth. As a matter of the general practice of international courts and tribunals, however, the express words of a constitutive instrument do not embody the source of the power to award provisional measures in its entirety. Rather, the authority to grant interim relief may be seen as one of the inherent powers of international courts and tribunals, descending implicitly from their judicial function and their need to protect their jurisdiction and procedure from being undermined.[16] Consequently, to the extent that such provisions do not seek to modify that inherent power by way of *lex specialis*, the express grant of the power to order provisional measures does no more that 'in effect give life and blood to a rule that already exists in principle'.[17] As the ICSID tribunal in *Biwater Gauff v Tanzania* observed:

> It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of proceedings, or (2) aggravate or extend the dispute. Both may be seen as a particular type of provisional measure [. . .] *or simply as a facet of the tribunal's overall procedural powers and its responsibility for its own process.*[18]

[16] *Northern Cameroons (Cameroon v UK)*, Preliminary Objections, ICJ Reports 1963 p 15, 103 (Judge Fitzmaurice); See also: *Nuclear Tests (Australia v France)*, ICJ Reports 1974 p 253, 259–60; *Nuclear Tests (New Zealand v France)*, ICJ Reports 1974 p 457, 463; *Legality of the Use of Force (Serbia and Montenegro v UK)*, Preliminary Objections, ICJ Reports 2004 p 1307, 1361–2 (Judge Higgins). Further: Dinah Shelton, 'Form, Function and the Powers of International Courts' (2009) 9 *CJIL* 537, 548–50.

[17] Edvard Hambro, 'The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice', in W Schätzel and H-J Schlochauer (eds), *Rechtsfragen der Internationalen Organisation – Festschrift für Hans Wehberg zu seinem 70 Geburtstag* (Frankfurt am Main: Vittorio Klostermann, 1956) 152, 167. The ICJ has made a similar pronouncement with respect to its ability to determine its own jurisdiction (*compétence de la compétence*): *Nottebohm (Liechtenstein v Guatemala)*, Preliminary Objections, ICJ Reports 1953 p 111, 119.

[18] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22 (Procedural Order No 3, 29 September 2006) §135 (emphasis added).

In implying that there is a common source for the power to award interim relief, this statement and others like it invite the inference that there exists in international law a unified approach to provisional measures, wherein international courts and tribunals draw on each other's practice in order to comprehend the scope and limitations of the power.

II Scope of the Book

A Overall Purpose

In his 2007 book, *A Common Law of International Adjudication*, Chester Brown put forward a persuasive argument for the existence of an inherent power to award interim relief, by reference to what he called the practice of 'cross-fertilization' between international courts and tribunals.[19] This study aims to expand on that position to argue that not only is there a common and comparative body of principles with respect to the grant of interim relief in international law but that it has rapidly developed in scope and complexity.[20] The catalyst for this development, it is suggested, was the landmark decision of the ICJ in *LaGrand*, wherein it was determined that provisional measures ordered under Article 41 of the ICJ Statute were binding on the parties to a dispute.[21] This determination, in turn, prompted the Court to develop its jurisprudence on interim measures so as to enhance the legitimacy of its orders and increase the pull towards compliance. These elaborations were subsequently adopted by a variety of other international courts and tribunals – or, in some cases, those courts or tribunals developed similar devices *sua sponte* to address similar needs.

The intuition that the practice of international courts and tribunals has cohered so as to provide a uniform model for the award of interim relief forms the overarching thesis of this book. At the same time, the book also seeks to provide a comprehensive overview of provisional measures in international law – at least with respect to those courts and tribunals that are the subject of analysis. This entails the examination of a far larger body of case law than has been available to previous studies of the question,

[19] Brown, *Common Law*, 119–51.

[20] Cf. Bernhard Kempen and Zen He, 'The Practice of the International Court of Justice on Provisional Measures: The Recent Development' (2009) 69 *ZaöRV* 919; Yoshiyuki Lee-Iwamoto, 'The Repercussions of the *LaGrand* Judgment: Recent ICJ Jurisprudence on Provisional Measures' (2012) 55 *JYIL* 237.

[21] *LaGrand (Germany v US)*, ICJ Reports 2001 p 466, 501–2. Further: Cameron A Miles '*LaGrand (Germany v United States of America)*', in E Bjorge and C A Miles (eds), *Landmark Cases in Public International Law* (Oxford: Hart, 2017) ch 23 (forthcoming).

the result not only of an increasing recourse to international adjudication on the part of states but a parallel increase in the number of international forums in which such disputes can be heard. Whereas studies of interim relief published in the early 1980s had to make do with the six decisions of the PCIJ and seven decisions of its successor, the modern scholarship may have recourse to orders emerging from more than thirty disputes before the ICJ as well as a further nine disputes arising under UNCLOS Part XV and dozens of orders emerging from the various modes of investor-state dispute settlement.[22] The result is a substantial comparative jurisprudence that this book seeks to identify, evaluate and consolidate.

Furthermore, the evolution of provisional measures has led to the development of a new suite of contemporary issues. Although earlier texts gave substantial consideration to matters such as whether provisional measures could be awarded where jurisdiction had yet to be decided or whether such measures were binding,[23] the field has moved on. New questions abound. How may the rights that are to be the subject of final adjudication figure in an application for provisional measures? What is the appropriate threshold of merits review at the provisional measures stage? What is the relationship between measures for the protection of a right *pendente lite* and measures for the non-aggravation of the dispute? If provisional measures are binding, what are the consequences of a breach from the point of view of state responsibility and the procedure of international courts and tribunals? How do provisional measures interact with other aspects of international procedure? What role might provisional measures play in international litigation strategy? This book seeks to provide answers to such questions.

B Coverage of International Courts and Tribunals

This book is concerned with international courts and tribunals.[24] It is not, however, concerned with *every* international court and

[22] The increase in judicial and arbitral output has been exponential. Even the most recent substantive study produced by a major publisher on the topic, Rosenne's *Provisional Measures*, was only able to draw on 23 ICJ and four ITLOS/Annex VII orders.

[23] See e.g. Elkind, *Interim Protection*, chs 6 and 7; Sztucki, *Interim Measures*, ch 5. These in their own right represented a significant advance on the thinking of the first part of the twentieth century, in which a great deal of time was spent attempting to ground international forms of interim relief in procedural science and domestic legal orders: Dumbauld, *Interim Measures*, chs 1 and 2.

[24] For a general overview of the field, see Ruth Mackenzie et al., *The Manual on International Courts and Tribunals* (Oxford: Oxford University Press, 2nd edn, 2010). A wider survey of international dispute settlement can be found in J G Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 5th edn, 2011).

tribunal – and the inclusion of some bodies at the expense of others will impact the conclusions reached. Consequently, some insight into the reasons for selection should be given.

The present study confines itself to the provisional measures practice of four categories of international court or tribunal: (1) the ICJ (as it emerged from that of the PCIJ); (2) bodies which have exercised jurisdiction under UNCLOS Part XV, i.e. ITLOS and the various Annex VII tribunals; (3) *ad hoc* inter-state arbitral tribunals that have issued provisional measures, of which there is currently only one example, namely the Court of Arbitration convened under the Indus Waters Treaty[25] in *Kishenganga*;[26] and (4) investor-state arbitration tribunals arising under a variety of international regimes, including the Iran–US Claims Tribunal, the ICSID system and its associated Additional Facility, NAFTA Chapter 11 and *ad hoc* investor-state tribunals convened under the 1976 or 2010 UNCITRAL Rules. These courts and tribunals have been selected because of their international character, backed by treaty and in large part decoupled from any domestic regime. The bodies in question also bear a measure of commonality in that the provisional measures practice of each is linked – directly or indirectly – to that of the ICJ, which continues to function as a uniform point of reference (and occasional point of opposition) for the courts and tribunals considered.

This leaves to the side a number of other bodies that might be thought worthy of inclusion. In the first place, there are the international human rights bodies, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and People's Rights and the various UN committees. By virtue of their subject matter, these bodies have developed a slightly different tradition of interim relief that has been the subject of extensive review elsewhere.[27] In the second, there is the Court of Justice of the European Union, empowered to prescribe any necessary interim measures by its constitutive instrument. The law of the EU is such that although it is a creature of international law (in the sense that a series of treaties provide its legal foundation),

[25] 19 September 1960, 419 UNTS 215.

[26] *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Interim Measures (2011) 150 ILR 311.

[27] Eva Reiter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersetia, 2010). See also Jo M Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 *Vand JTL* 1; Helen Keller and Cedric Marti, 'Interim Relief Compared: Use of Interim Measures by the UN Human Rights Committee and the European Court of Human Rights' (2013) 73 *ZaöRV* 325.

the CJEU may be said to have developed its own distinct character such that it does not necessarily interact (or 'cross-fertilize', to use Brown's terminology) with other international bodies at all or at least to the same degree. A third category that might be mentioned is that of international commercial arbitration.[28] Although these bodies share certain similarities with investor-state bodies – and may even use the same procedure in the event that the 1976 or 2010 UNCITRAL Rules are selected – they are distinct from the other courts and tribunals considered in that they do not include a state as a party, and may therefore be said to lack a footing in international law.

Furthermore, although this book argues for the existence of an inherent power on the part of international courts and tribunals to award provisional measures, it will not hypothesize how those courts and tribunals that have not displayed an inclination to award interim relief might go about doing so. This excludes from consideration the WTO panels and Appellate Body[29] and international criminal bodies such as the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon and so on.

III Outline of the Book

This book consists of ten chapters, divided into three parts. Part I on 'Preliminary Matters' seeks to introduce the subject of provisional measures and provide essential background to the field. To this end, Chapter 2 seeks to revisit the historical origins of provisional measures. The commonly understood conception of interim relief in international disputes arises from the PCIJ and several earlier, now-forgotten, international courts and tribunals, most notably the CACJ and the mixed arbitral tribunals formed to resolve disputes between states and natural or juridical persons following the First World War. Within these early precedents, moreover, domestic analogies may perhaps, hesitantly, be detected. If this be the case, then the signal achievement of the PCIJ was the merging of two previously separate traditions of interim relief – the domestic and the international – to create the first 'modern' law of provisional

[28] Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (The Hague: Kluwer, 2005); Gary Born, 2 *International Commercial Arbitration* (Alphen aan den Rijn: Kluwer, 2nd edn, 2014) ch 17.

[29] Cf. Brown, *Common Law*, 133–5.

measures capable of dealing appropriately with a wide range of international disputes, inter-state and otherwise.

Chapter 3 will introduce the courts and tribunals that are the subject of analysis in Parts II and III, chart their formation as international institutions and analyze those elements of their constituent instruments and procedural rules that govern the award of interim relief. Given the predominant focus in Parts II and III on concerns of substance (which very often are not the subject of express reference in the relevant documents), this investigation will focus on the procedural aspects of provisional measures. This chapter will also extract the relevant provisions from treaties and procedural rules that shape the award of interim relief – which may also be found set out in the Appendix.

Part II, entitled 'Provisional Measures in General', seeks to set out the manner in which interim relief functions before international courts and tribunals. In particular, it will focus on the preconditions for interim relief that have been developed through consistent international practice, as well as considering both the binding character of provisional measures and the consequences that flow therefrom. Five broad preconditions may be identified in international judicial and arbitral practice, though the extent to which each has been adopted varies from body to body. These are: (1) *prima facie* jurisdiction (and perhaps admissibility); (2) a link between the measures requested and the rights that fall to be adjudicated in the final judgment; (3) some form of oversight of the merits, whether through determination that the rights to be protected are 'plausible' or a more exacting *prima facie* review; (4) risk of 'irreparable' prejudice; and (5) urgency.

Chapter 4 concerns a variety of issues that must be addressed before a wider application for interim relief can be considered by an international court and tribunal. In the first place, it addresses the overall character of provisional measures as incidental proceedings; that is to say proceedings that are ancillary to a main claim and that cannot be launched independent of some wider dispute that is already before the international court or tribunal in question. It will also consider the source of the power to award provisional measures. In the second, it will consider the extent to which the jurisdiction of the court or tribunal must be established, focusing on the widespread adoption of the *prima facie* standard first promoted by Judge Lauterpacht in *Interhandel*.[30] Third, it will consider the

[30] *Interhandel (Switzerland v US)*, Interim Relief, ICJ Reports 1957 p 105, 118–19 (Judge Lauterpacht).

question of whether, in addition to the jurisdiction of the court or tribunal, the admissibility of the claim must also be proved to some preliminary level. Finally, it will consider the extent to which the admissibility of the application for interim relief itself will have some bearing on its final outcome.

Chapter 5 will consider a range of issues in the uniform approach to provisional measures that have gained further traction in the wake of the ICJ's decision in *LaGrand*. These are, in the main, linked to the overall purpose for which provisional measures may be awarded, which is twofold. In the first place, we have those measures that may be awarded for the protection of rights *pendente lite*. Two vital corollaries emerge from this purpose, being the need for the rights to be protected through interim relief to be 'linked' to the subject of the main proceedings, and the need for some form of preliminary review of the applicant's prospects of success on the merits. In the second, we have measures that may be awarded for the non-aggravation of a dispute. Whilst there is no need for linkage or merits review with respect to such measures, being designed to protect an objective as opposed to subjective interest, questions have arisen as to whether such measures can be awarded independently of measures for the protection of rights *pendente lite*.

Chapter 6 will consider the dual requirements that most often will decide a request for interim relief, being the need for prejudice to rights *pendente lite* and the need for such prejudice to occur prior to the likely date of judgment – also called the requirement of urgency. This chapter will attempt to determine precisely what the ICJ and other international tribunals mean when they speak of 'irreparable' prejudice and the difference, if any, between this concept and that the putatively separate standard of 'significant' prejudice that has been advanced by certain ICSID tribunals. With respect to urgency, attention will be paid in particular to the jurisprudence of ITLOS and the extent to which the precautionary principle has modified the consideration of urgency by that tribunal in the context of serious harm to the marine environment.

Chapter 7 considers a suite of issues that arise following the decision to award interim relief. This firstly includes brief commentary on the question of whether provisional measures are binding, which, although their status as such is now the *status quo* is nonetheless deserving of reprisal. With this in mind, the chapter turns to the question of the content of provisional measures and also addresses questions of proportionality and duration. Finally, it will address the question of how provisional measures might best be enforced in the event that they are ignored by