

THE ISSUANCE OF INTERIM MEASURES IN INTERNATIONAL  
DISPUTES: A PROPOSAL REQUIRING A REASONABLE  
POSSIBILITY OF SUCCESS ON THE UNDERLYING MERITS

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## I. INTRODUCTION

Think about this: What would happen if the balmy Caribbean state of Grenada hauled Canada before the International Court of Justice (ICJ) claiming that the similarity in the names Canada and Grenada caused confusion in the eyes of the global public and a concomitant reduction in its tourist trade? What if, in addition, Grenada sought interim relief barring Canada from using its name (but helpfully proposing in its place more distinctive, not to say descriptive, names like "The Deep Freeze" or "Frozen Tundra")? Leaving aside the question of jurisdiction, the answer, with respect to the request for interim relief, is that the ICJ would *not* permit itself to consider the merits of the underlying case, notwithstanding its evident frivolity, in determining whether interim measures were warranted.

While some national jurisdictions, notably the United States, require that the underlying substantive case meet some standard of probability of success on the merits before interim or provisional measures will be issued, this has not generally been required in international proceedings. The principal rationale offered for excluding such a requirement in international disputes is that to do otherwise would foster the appearance of prejudging the case. However, such a concern, while valid, does not justify excluding any and all consideration of the merits. In particular, one countervailing factor that should be borne in mind is that interim measures are an exceptional remedy, which departs from the normal rule that a claimant may not obtain relief until that claimant has proved its case. Indeed, the granting of interim measures before the merits are finally determined may well impose a burden on the party opposing the application for interim relief that turns out in the end to be unjustified, including where the opposing party ultimately prevails on the merits. This Article proposes instead that in international disputes, an applicant for interim relief should have to demonstrate a reasonable possibility of success (but no more) on the underlying merits. Such a requirement would prevent any prejudice arising from the issuance of interim measures based on claims that are wholly without merit, but would not, at the same time, require an assessment as to whether the applicant was more likely than not to prevail on its substantive claim. In fact, as discussed in more detail below, the recent work of the Working Group on Arbitration and Conciliation (Working Group) of the United Nations Commission on International Trade Law (UNCITRAL),

in preparing a new draft Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, supports such a requirement.<sup>1</sup>

This Article is structured as follows: Part II examines the relevant decisions (or more accurately, the lack thereof) of international courts and tribunals on requiring an applicant requesting interim relief to demonstrate some standard of probability of success on the underlying merits. Part III explores domestic United States law, specifically United States federal law, regarding such a requirement, and contrasts the American position with that presently taken in international disputes. Part IV advocates a different approach for international disputes, namely that an international tribunal or court should consider the merits in determining interim measures but only to the extent necessary to determine if there is a reasonable possibility of success. Part IV further looks to draft Article 17 of the UNCITRAL Model Law on International Commercial Arbitration as support for the position advanced. Part V concludes with the hope that on the eventual adoption of draft Article 17, what is now at best a trend supporting such a requirement will gain momentum and translate into a rule in the context of international disputes.

## II. INTERIM RELIEF IN INTERNATIONAL DISPUTES

The purpose of interim measures is to preserve the court's ability to render a meaningful decision. More specifically, interim measures prevent a party from incurring further damages before judgment. Thus, the court is in a position to grant appropriate relief when it does render judgment after having afforded the parties the procedural rights to which they are due.<sup>2</sup> While the standards applied for the issuance of interim measures in international proceedings are not uniform, they typically include urgency, imminent or irreparable harm, and maintenance of the status quo.<sup>3</sup> In general, however,

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<sup>1</sup> See, e.g., *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Second Session*, UNCITRAL, 38th Sess., paras. 11-69, U.N. Doc. A/CN.9/573 (2005).

<sup>2</sup> Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals for Moving Forward*, in *INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS* 82, 82-83 (Albert Jan van den Berg ed., 2003).

<sup>3</sup> See, e.g., CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 751 (2001) (noting that circumstances giving rise to a need for provisional measures in ICSID arbitrations must normally indicate necessity and urgency); CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 218 (1998) (noting that "the [Iran-United States Claims Tribunal] will require the party seeking interim protection to prove . . . that there exists a threat of irreparable harm to property or to a right capable of being protected by the

international courts and tribunals do not require an applicant requesting interim or provisional relief to demonstrate any standard of probability of success on the underlying merits.<sup>4</sup> In most cases, the relevant rules authorizing the issuance of interim measures make no specific mention of any such requirement, but instead grant the court or tribunal broad discretion to issue such measures. While this broad discretion would allow a court or tribunal to impose such a requirement, this has not happened. For example, Article 26(1) of the Tribunal Rules of Procedure of the Iran-United States Claims Tribunal, which authorizes the Tribunal to “take any interim measures it deems necessary in respect of the subject-matter of the dispute,”<sup>5</sup> has never been applied by the Tribunal so as to impose a merits test. As one authoritative commentator on Tribunal procedures has observed, “[t]here is . . . no general requirement of likelihood of success, on the merits, as required under several legal systems, including U.S. law.”<sup>6</sup> Similarly, the respective rules governing the issuance of interim relief in international arbitration under many major arbitral institutions including the International Chamber of Commerce,<sup>7</sup> the

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Tribunal . . . [and] that an urgent situation exists justifying interim measures being taken”); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 63(2), 1144 U.N.T.S. 123, 159 (entered into force July 18, 1978) (authorizing the Inter-American Court of Human Rights to adopt provisional measures in “cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”); United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 290(1), 1833 U.N.T.S. 397, 511 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (permitting the issuance of interim measures that are considered “appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision”).

<sup>4</sup> See Donovan, *supra* note 2, at 128 (“[I]nternational courts and tribunals deciding disputes between states have . . . shied away from [a requirement that the applicant show a likelihood of success on the merits].”).

<sup>5</sup> Iran-United States Claims Tribunal, Tribunal Rules of Procedure, art. 26(1)(1983), <http://www.iusct.org/tribunal-rules.pdf>.

<sup>6</sup> JACOMIJN J. VAN HOF, COMMENTARY OF THE UNCITRAL ARBITRATION RULES: THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL 190 (1991).

<sup>7</sup> See INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, art. 23, at 24 (2004), [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules_arb_english.pdf).

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

London Court of International Arbitration (LCIA)<sup>8</sup> and the International Centre for Settlement of Investment Disputes (ICSID)<sup>9</sup> do not refer to such a requirement.<sup>10</sup> As a result, there are practically no published decisions involving international disputes that refer to such a requirement, much less discuss it at any length. Indeed, so keen is the desire to avoid any reference to the merits in the determination of interim measures that courts have side-

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*Id.*

<sup>8</sup> Article 25(1) of the LCIA Arbitration Rules provides as follows:

The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

- (a) to order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;
- (b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and
- (c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

London Court of International Arbitration, The LCIA Rules, art. 25(1), at 17-18 (n.d.), <http://www.lcia-arbitration.com/download/rules/pdf> (last visited May 1, 2005).

<sup>9</sup> See Convention on the Settlement of Investment Disputes Between the States and Nationals of Other States, Mar. 18, 1965, art. 47, 17 U.S.T. 1270, 575 U.N.T.S. 159: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party." *Id.*; see also INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, in ICSID CONVENTION, REGULATIONS AND RULES, R. 39(1), at 117 (2003), <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>: "At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures." *Id.*

<sup>10</sup> *But cf.* Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 129 (1999) (noting, although without supporting citations, that the "[u]sual requirements [for granting interim remedies in international commercial arbitration] include . . . likelihood of success on the merits").

stepped the issue even when the parties have expressly raised it, as has happened with the ICJ in the *Case Concerning Passage Through the Great Belt (Great Belt)*.<sup>11</sup>

In *Great Belt*, Finland objected to Denmark's plans to construct a bridge over the Great Belt, one of the Danish Straits, on grounds that the construction as planned would prevent Finland from exercising its alleged right of free passage through it. In particular, Finland contended that the passage of drill ships and oil rigs manufactured in Finland would be obstructed as they were taller than the clearance provided under the proposed bridge.<sup>12</sup> Finland applied to the ICJ for a declaration that the construction was in fact incompatible with its right of free passage, and also requested provisional measures to stop the bridge construction works.<sup>13</sup> Finland based its latter application on Article 41 of the ICJ Statute,<sup>14</sup> which provides that the ICJ "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."<sup>15</sup>

In opposing Finland's request for provisional measures, Denmark argued, *inter alia*, "that for provisional measures to be granted it is essential that Finland be able to substantiate the right it claims to a point where a reasonable prospect of success in the main case exists, and that not even a *prima facie* case exists in favour of the Finnish contention."<sup>16</sup> In response, Finland argued that the ICJ could not enter into the merits of a particular case when determining the issuance of provisional measures. Without deciding whether or not such a requirement exists, the ICJ addressed the parties' arguments as follows:

Whereas it is the purpose of provisional measures to preserve "rights which are the subject of dispute in judicial proceedings"; whereas the Court notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over the nature and extent of that right, including its applicability to certain drill ships and oil rigs; whereas such a disputed right may be protected by the indication

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<sup>11</sup> *Concerning Passage Through the Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12 (Provisional Measures Order July 29) [hereinafter *Great Belt*].

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.* at 13-14.

<sup>14</sup> *Id.*

<sup>15</sup> Statute of the International Court of Justice, June 26, 1945, art. 41, 59 Stat. 1055, 1061.

<sup>16</sup> *Great Belt*, *supra* note 11, at 17.

of provisional measures under Article 41 of the Statute if the Court "considers that circumstances so require". . . .<sup>17</sup>

Ultimately, the ICJ denied the request for provisional measures, although it appeared in reaching this result to rely primarily on the fact that the bridge would not be completed, and therefore would not present any physical obstruction, until after the ICJ would foreseeably have given judgment on the merits.<sup>18</sup>

Plainly, the ICJ's pronouncement is less than satisfactory insofar as it avoids grappling directly with the question of whether an applicant for provisional relief must demonstrate a probability of success in the underlying case. Indeed, Judge Shahabuddeen penned a separate and highly instructive opinion in the case solely to highlight this issue.<sup>19</sup> As he saw it, the problem presented to the ICJ was as follows: "[I]s it open to the Court by provisional measures to restrain a State from doing what it claims it has a legal right to do . . . without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought?"<sup>20</sup> Answering the question in the negative, Judge Shahabuddeen first noted the exceptional character of interim measures: "Interim measures always constitute an exceptional remedy. They derogate from the usual rule that a plaintiff can not obtain relief until he has thoroughly proved his case, and all defenses and objections of his adversary have been heard and considered."<sup>21</sup>

As Judge Shahabuddeen went on to observe, this factor has led a commentator to suggest that in considering what circumstances indicate a need for interim measures, the ICJ should require "a prima facie showing of probable right and probable injury."<sup>22</sup> Judge Shahabuddeen acknowledged that as against this factor, the Court had to guard against the "appearance of prejudgment," which he described as "[p]ossibly the most influential factor contributing to a discernible and perhaps understandable general impression that the Court should not consider whether there is a prima facie case as to the

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<sup>17</sup> *Id.* (citation omitted).

<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Id.* at 28 (separate opinion by Judge Shahabuddeen).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 29 (separate opinion by Judge Shahabuddeen) (quoting EDWARD DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 184 (1932)).

<sup>22</sup> *Id.* (separate opinion by Judge Shahabuddeen) (quoting DUMBAULD, *supra* note 21, at 160-61).

existence of the right claimed."<sup>23</sup> He noted, however, that "that consideration needs to be balanced against the reflection that the State which is sought to be constrained may itself have an interest in showing that the requesting State has failed to demonstrate a possibility of the existence of the right sought to be protected . . . ."<sup>24</sup>

Additionally, Judge Shahabuddeen pointed out that the ICJ's failure to respond to this issue was at odds with its jurisprudence. Specifically, given that the ICJ required an applicant for interim relief to prove that the Court has *prima facie* jurisdiction over the underlying dispute, i.e., the merits, and that jurisdiction over the merits is but one element that the applicant must establish in order to succeed on the substantive case, there was no reason that the applicant should be required to show a *prima facie* case in respect of only one such element.<sup>25</sup> Judge Shahabuddeen emphasized that what was called for was not "proof of the definitive existence of the right claimed" but rather that "enough material . . . be presented to demonstrate the possibility of existence of the right sought to be protected."<sup>26</sup> Judge Shahabuddeen's observation is particularly pertinent as it is not only the ICJ that requires applicants for interim relief to make out a *prima facie* case with respect to jurisdiction over the merits, but also various other international courts and tribunals.<sup>27</sup> It therefore stands to reason that, at least with respect to such international courts and tribunals, there should be a requirement that applicants for interim relief demonstrate a possibility of success on the merits.

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<sup>23</sup> *Id.* (separate opinion by Judge Shahabuddeen). Relevantly, the ICJ took care in the penultimate paragraph of its decision, which immediately precedes the *dispositif*, to distance itself from any such prejudgment: "Whereas the decision given in the present proceedings in no way prejudices any question relating to the merits of the case, and leaves unaffected the rights of the Governments of the Republic of Finland and the Kingdom of Denmark to submit arguments in respect thereof . . . ." *Id.* at 20.

<sup>24</sup> *Id.* at 29 (separate opinion by Judge Shahabuddeen).

<sup>25</sup> *Id.* at 30-31 (separate opinion by Judge Shahabuddeen).

<sup>26</sup> *Id.* at 31 (separate opinion by Judge Shahabuddeen).

<sup>27</sup> See Donovan, *supra* note 2, at 128 (noting that "international courts and tribunals . . . consider[ ] the merits . . . to the extent necessary for a finding of *prima facie* jurisdiction"); see, e.g., *Component Builders, Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 216, 220 (1985) ("One requirement for the issuance of interim measures is that there be, at least *prima facie*, a basis on which the jurisdiction of the [Iran-United States Claims] Tribunal might be founded."); see also UNCTAD, *supra* note 3, art. 290(1), 1833 U.N.T.S. at 511 ("If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction . . . , the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances . . . .").

As Judge Shahabuddeen's opinion makes clear, in the broader inquiry there is more in the balance than the consideration that a court or tribunal may be seen as prejudging the case if it were to look to the underlying merits.<sup>28</sup> In particular, one should account for the fact that the exceptional nature of interim remedies militates against their issuance in the ordinary case and that the party opposing the application for interim relief has an interest in showing that the underlying case is without merit, i.e., that there is not even a "possibility" that the applicant will prevail in the underlying case.<sup>29</sup> After all, the issuance of interim measures before the merits are finally determined may well impose a burden on the party opposing the application that turns out in the end to be unjustified, such as where such party ultimately prevails on the merits.<sup>30</sup> As the opinion also suggests, these opposing considerations are best resolved by requiring that the applicant show a *prima facie* case with respect to the underlying merits, or as proposed in this Article, that the applicant be required to show a reasonable possibility of succeeding on the underlying merits.

### III. INTERIM RELIEF UNDER UNITED STATES LAW

In contrast to international courts and tribunals, U.S. courts generally require an applicant seeking interim relief (typically in the form of a preliminary injunction) to show some standard of probability of success on the merits. While this is true both under state and federal law,<sup>31</sup> this Article will examine only federal law as there is a fairly uniform and established body of law thereunder regarding the issue.

Under federal law, "in considering a plaintiff's request for a preliminary injunction a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether

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<sup>28</sup> *Great Belt*, *supra* note 11, 1991 I.C.J. at 29 (separate opinion by Judge Shahabuddeen).

<sup>29</sup> *Id.* at 30 (separate opinion by Judge Shahabuddeen).

<sup>30</sup> *Id.* at 29 (separate opinion by Judge Shahabuddeen).

<sup>31</sup> See Jason S. Wood, *A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions*, 5 VA. J.L. & TECH. 14, 24 (2000) (noting that a plaintiff in many states must show *inter alia* that "there is a reasonable likelihood of success on the merits" in order to obtain a preliminary injunction); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995) (noting that one of the most important factors in determining whether to grant or deny a preliminary injunction is "the probability that plaintiff will succeed on the merits").

the grant of an injunction would further the public interest.”<sup>32</sup> No one factor is necessarily determinative, rather, “[t]he court must balance these factors against one another and against the extent of the relief sought.”<sup>33</sup> However, the factor regarding the degree of likelihood of success on the merits assumes particular importance when the court determines in weighing the relative hardships (i.e., factor (2) above) that one party or the other will be injured whichever course is taken. In such a case, the court adopts a “sliding scale” balancing approach such that an applicant will have to prove a higher probability of success on the merits where there is a lower likelihood that an applicant will be injured if the court fails to act and vice versa.<sup>34</sup>

The purpose of preliminary injunctions, similar to the purpose of interim relief in international proceedings, is “to protect [the] plaintiff from irreparable injury and to preserve the court’s power to render a meaningful decision after a trial on the merits.”<sup>35</sup> As with the issuance of interim relief in international disputes, however, “judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified.”<sup>36</sup> The formulation and the exercise of balancing the four factors described above are therefore designed to implement the policy of granting preliminary injunctions only when the need to preserve the court’s power to decide the case effectively outweighs the risk of imposing an interim restraint before the case is in fact decided.<sup>37</sup> Given this convergence of purpose and risk with respect to interim relief in both U.S. federal and international proceedings, the question naturally arises: Why the difference between the factors governing the issuance of interim relief in the two kinds of proceedings? Specifically, why are applicants for interim relief in international proceedings not required to demonstrate a “substantial likelihood of success on the merits of the case”?

The answer lies partly in the way each forum regards the implications of such a requirement. Unlike international courts and tribunals, U.S. federal

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<sup>32</sup> *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (citations omitted); *see also* WRIGHT, MILLER & KANE, *supra* note 31, § 2948 (noting that the formulation involving these four grounds for granting or denying a preliminary injunction has become “popular in all kinds of cases [involving preliminary injunctions]”).

<sup>33</sup> *Jack Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1363 (Fed. Cir. 2002) (quoting *Sofamor Danek Group v. Depuy-Motech*, 74 F.3d 1216, 1219 (Fed. Cir. 1996)).

<sup>34</sup> *See* WRIGHT, MILLER & KANE, *supra* note 31, § 2948.3.

<sup>35</sup> *Id.* § 2947; *see also supra* note 2 and accompanying text.

<sup>36</sup> WRIGHT, MILLER & KANE, *supra* note 31, § 2947.

<sup>37</sup> *Id.*

courts do not seem overly concerned about giving rise to an appearance of prejudice when determining the likelihood of success on the merits. Instead, they recognize that the very nature of the relief requested—that it “often, perhaps typically, depend[s] on underlying premises as to the substantive law defining legal rights”<sup>38</sup>—can frequently require a preliminary estimate of the strength of a plaintiff’s suit.<sup>39</sup> In contrast, international courts and tribunals are sensitive to the risk of appearing to prejudice a case, a concern that is particularly justified when a sovereign State is party to the proceedings.<sup>40</sup> Additionally, in the case of international arbitration, because arbitrators for the most part sit by appointment on the consent of the parties, their perceived ability to decide disputes impartially is an aspect of their professional reputation that they zealously guard.<sup>41</sup> They may tend, therefore, to be more sensitive to avoiding the appearance of prejudging any dispute. Further, the increased wariness of international courts and tribunals against appearing to have prejudged a case can perhaps be justified in light of the fact that unlike in federal courts, where a party may appeal both any preliminary injunction granted as well as the judgment,<sup>42</sup> international proceedings do not generally provide an opportunity to appeal the substantive decision, let alone any interim relief granted.<sup>43</sup>

In sum, inherent differences in the nature of international and U.S. federal courts and proceedings explain and arguably justify their respective contrasting

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<sup>38</sup> *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 619 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 911 (1971).

<sup>39</sup> See WRIGHT, MILLER & KANE, *supra* note 31, § 2948.3.

<sup>40</sup> *Great Belt*, *supra* note 11, 1991 I.C.J. at 29 (separate opinion of Judge Shahabuddeen) (explaining that the need to avoid the appearance of prejudice “is clearly of special importance in the sensitive field of litigation between States”).

<sup>41</sup> Josef Rohlik, *Arbitration as a Model for Resolution of Health Care Disputes Between Health Care Professionals and Health Care Organizations*, 41 ST. LOUIS U. L.J. 1005, 1012 (1997) (stating that “[s]ince arbitrators’ appointments are dependent on the consent of all parties to a dispute, such arbitrators depend on their reputation”).

<sup>42</sup> Preliminary injunctions may be appealed under 28 U.S.C. § 1292(a)(1) (1992), while final decisions of district courts may be appealed pursuant to 28 U.S.C. § 1291 (1992).

<sup>43</sup> See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 60, 59 Stat. 1055, 1063 (“The judgment is final and without appeal.”); *Dev. & Res. Corp. v. Iran*, 26 Iran-U.S. Cl. Trib. Rep. 256, 260 (1991) (noting that “the [Iran-United States Claims] Tribunal Rules do not provide for any appeal or reconsideration of an Award”); William H. Knull & Noah D. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 531 (2000) (“‘[F]inality,’ meaning principally the lack of appeal on the merits of the dispute, has been counted among the advantages of [global] private dispute resolution over court litigation.”).

attitudes toward the need to avoid the appearance of prejudging a case. Thus, notwithstanding the fact that interim remedies serve the same overall purposes in both U.S. federal and international proceedings, a requirement that an applicant prove a "substantial likelihood of success on the merits of the case" (or a similar standard calling for some degree of probability of success) is not appropriate in the latter as the international court or tribunal will otherwise have to determine expressly and in advance of a full briefing on the merits whether the applicant is more likely than not to prevail on the merits, which will substantially expose it to the risk of appearing to have prejudged the case.

#### IV. A PROPOSAL REQUIRING A "REASONABLE POSSIBILITY" OF SUCCESS

While it may be the case that a requirement based on a substantial probability of success on the merits is not tenable as a condition for the issuance of interim relief in international proceedings, the present approach of international courts and tribunals, which is to avoid any consideration of the merits whatsoever, does not recommend itself either. Specifically, the current approach fails properly to address the exceptional nature of interim relief and the risk that any interim relief granted may turn out in the end to be unjustified.

To counter the imbalance described above, this Article proposes instead that parties seeking interim relief in international proceedings be required to demonstrate that they have a reasonable possibility (as distinct from a "probability") of succeeding on the merits. The adoption of such a requirement would take account of the exceptional character of interim remedies by preventing the granting of interim remedies based on evidently unmeritorious claims.<sup>44</sup> At the same time, in granting interim relief under this standard, an international court or tribunal would not have to determine in fact that the applicant was more likely than not to succeed on the merits, but merely that it was at least reasonably possible for the applicant to do so.

Admittedly, an applicant who has a reasonable possibility of succeeding on the merits may well not prevail in the end. However, even the adoption of a

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<sup>44</sup> Cf. MATTI PELLONPÄÄ & DAVID D. CARON, *THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN THE LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 442 (1994) (stating that "[a]lthough at the stage of interim measures an arbitral tribunal should not be overly concerned with the merits of the case, a party whose case is clearly without merit should not be granted a request for interim measures"). Additionally, the application of such a standard has the potential of discouraging, if not preventing, the strategic use of interim remedies, for example, to delay the final resolution of the claims or to obtain leverage in the hopes of exacting a settlement.

substantial probability of success standard will not ensure otherwise; indeed, nothing short of requiring absolute certainty of success will guarantee that result, a requirement which would of course simply swallow the substantive case itself. Rather, the point of the inquiry is to locate a standard that reduces, as far as possible, that risk but without placing the court or tribunal in the position of having to determine whether a party is more likely than not to succeed on the merits. Arguably, a standard based on a “reasonable possibility” of success on the merits does just that. In fact, there is support for this approach in the recent work of the UNCITRAL Working Group on Arbitration and Conciliation (Working Group), in preparing a new draft of Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, which sets out the circumstances under which interim measures are permitted.<sup>45</sup> Specifically, as of this writing,<sup>46</sup> draft Article 17(3)(b) provides that an applicant must satisfy the arbitral tribunal that “[t]here is a reasonable possibility that the requesting party will succeed on the merits.”<sup>47</sup> As discussed below, the drafting history of draft Article 17, and subparagraph 3(b) in particular, provides further support for the adoption of the proposed standard.

In 1999, the Working Group on Arbitration and Conciliation (Working Group) was tasked with revisiting the 1985 UNCITRAL Model Law of International Commercial Arbitration (Model Law); more specifically, the Working Group was to address the question of the enforceability of interim measures of protection, a task which the Commission felt was overdue.<sup>48</sup> In that process, the Working Group turned its attention to article 17 of the Model Law, which provides in relevant part that “[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider

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<sup>45</sup> Currently, Article 17, “Power of arbitral tribunal to order interim measures,” reads:

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

UNCITRAL Model Law on International Commercial Arbitration, art. 17 (1985) [hereinafter Model Law], <http://www.uncitral.org/en-index.htm>.

<sup>46</sup> See *infra* note 57.

<sup>47</sup> *Report of the Working Group on Arbitration on the Work of Its Fortieth Session*, UNCITRAL, 37th Sess., at 18, U.N. Doc. A/CN.9/547 (2004).

<sup>48</sup> See *Report of the Working Group on Arbitration on the Work of Its Thirty-Fourth Session*, UNCITRAL, 34th Sess., at 3, U.N. Doc. A/CN.9/487 (2001).

necessary in respect of the subject matter of the dispute.”<sup>49</sup> The Working Group noted that while the provision authorized the issuance of interim measures, it did not address the criteria for such issuance.<sup>50</sup> Because such guidance would enhance the certainty and the acceptability of the power of the arbitral tribunal to issue interim measures of protection, the Working Group charged the Secretariat with the task of establishing the terms, conditions, and circumstances in which an arbitral tribunal could or should issue interim measures of protection, the result of which would be drafted as a new Article 17.<sup>51</sup>

As part of his research, the Secretariat distributed questionnaires to various governments to ascertain information on the power of courts to order interim measures in support of arbitration.<sup>52</sup> Based on the results thereof, which found in relevant part that “[m]any laws establish a number of prerequisites for the issuance of interim measures by courts in support of arbitration,” including “in most jurisdictions, that there is a likelihood of the applicant succeeding on the merits of the underlying case,”<sup>53</sup> the Secretariat proposed the following draft Article 17(2)(c) (since renumbered as 17(3)(b)):

The party requesting the interim measures should furnish proof that . . . there is a likelihood of the applicant for the measure succeeding on the merits of the underlying case.<sup>54</sup>

On consideration of this first draft, the Working Group felt that the phrase “substantial possibility” was “preferable” to the term “likelihood” (although without detailing the reasons for the preference), and thus revised the provision to require instead that an applicant demonstrate a “substantial possibility” that the requesting party will succeed on the merits of the dispute.<sup>55</sup> Subsequently, however, the Working Group determined after further discussion that to require “a substantial possibility” on the merits could be misinterpreted as

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<sup>49</sup> Model Law, *supra* note 45, art. 17.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.* at 20.

<sup>52</sup> *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection, Note by the Secretariat, UNCITRAL, 36th Sess., at 4, U.N. Doc. A/CN.9/WG.II/WP.119 (2002).*

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *Id.* at 22.

<sup>55</sup> *Report of the Working Group on Arbitration on the Work of Its Thirty-Sixth Session, UNCITRAL, 35th Sess., at 15-16, U.N. Doc. A/CN.9/508 (2002).*

requiring the tribunal to make a prejudgment on the merits of the case and it was therefore proposed that the wording be revised to refer instead to a “reasonable prospect” of success and to make clear that any determination of the same did not prejudice the findings of the tribunal at a later stage.<sup>56</sup> The result is that draft Article 17(3)(b), as of May 2005,<sup>57</sup> provides:

The party requesting the interim measure of protection shall satisfy the arbitral tribunal that . . . [t]here is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.<sup>58</sup>

As can be seen, the drafting history of draft Article 17 highlights the various concerns discussed in this Article regarding a tribunal’s consideration of the merits in the determination of interim relief. Significantly, the Working Group was alert to the reluctance of tribunals to examine the merits in determining interim relief for fear of appearing to have prejudged the case. At the same time, by maintaining the consideration of the merits as a requirement for interim relief, the Working Group effectively acknowledged the need for a tribunal to be persuaded that there was some merit to the substantive claim. Therefore, in moving away from the Secretariat’s formulation of requiring the applicant to show a “likelihood” of success, to a “substantial possibility” of success, and finally to a “reasonable possibility” of success, the Working Group appears to have settled on a standard that would require the tribunal to conclude that it was a non-frivolous case, without determining that an

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<sup>56</sup> *Report of the Working Group on Arbitration on the Work of Its Thirty-Seventh Session*, UNCITRAL, 36th Sess., at 13-14, U.N. Doc. A/CN.9/523 (2002).

<sup>57</sup> The Working Group was scheduled to discuss paragraphs (1) through (6 bis) of draft Article 17 at its forty-first session in Vienna, Austria, in September 2004, *Report on the Working Group on Arbitration and Conciliation on the Work of Its Forty-First Session*, UNCITRAL, 38th Sess., at 5-6, 20, U.N. Doc. A/CN.9/569 (2004), but, because of a lack of time for discussion, decided to examine those paragraphs at a future session. *Id.* at 20. The Working Group did not discuss paragraphs (1) through (6 bis) at its forty-second session in New York in January 2005, see *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Second Session*, *supra* note 1, at 3-5, and it is unclear at this time when the group plans to return to these provisions.

<sup>58</sup> *Report of the Working Group on Arbitration on the Work of Its Fortieth Session*, *supra* note 47, at 18.

applicant was more likely than not to succeed on the merits.<sup>59</sup> Although still a work in progress, it is hoped that with its eventual adoption, draft Article 17 will influence international courts and tribunals to adopt such a standard.

#### V. CONCLUSION

Applicants for interim relief in international disputes should be required to demonstrate a "reasonable possibility" of success on the merits. This standard acknowledges the exceptional nature of interim remedies yet addresses the concern on the part of courts and tribunals with avoiding the appearance of prejudgment. If draft Article 17 of the UNCITRAL Model Law is finally adopted in its current form, one can be more optimistic about the prospect that international courts and tribunals will in turn adopt the proposed requirement, giving that standard, dare I say it, a reasonable possibility of success.

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<sup>59</sup> See Donovan, *supra* note 2, at 128 (noting that in arriving at a prior draft of Article 17 requiring a "substantial possibility," the Working Group "looked for a formulation that would require the tribunal to conclude that the case was a serious one, without having to decide whether the applicant was more likely than not to succeed on the merits").