

Comment

“Proceeding at Your Own Risk”: Evaluating a New Principle of International Law for Provisional Measures

Shouvik Bhattacharya†

In *Passage Through the Great Belt*, Finland requested the International Court of Justice to issue provisional measures preventing Denmark from constructing a bridge that could lead to an abridgment of Finnish ships’ rights of free passage through the Great Belt.¹ The ICJ denied Finland’s request for interim orders, and in so doing made a pointed note that “in principle . . . if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.”² Twenty years later, this statement would be institutionalized as “a principle of international law” in an arbitration proceeding between India and Pakistan.

Through a request dated May 17, 2010, the Islamic Republic of Pakistan initiated arbitration proceedings against the Republic of India under the Indus Waters Treaty of 1960.³ The dispute centered on India’s construction of the Kishenganga Hydroelectric Project (KHEP) that Pakistan claimed violated its rights under the Treaty.⁴ Pakistan subsequently requested provisional measures under Paragraph 28 of Annexure G of the Treaty⁵ on June 6, 2011,⁶ asking the Arbitration Panel to enjoin any further construction on the KHEP until the Panel’s award at the merits stage. Pakistan also asked the Panel to declare that

† Yale Law School, J.D. expected 2014; Vassar College, A.B. 2011. I am grateful to Professor W. Michael Reisman for his encouragement, and Adhira Mangalagiri for many insightful conversations. I also thank Joshua Silverstein and Eileen Zelek for their expert editorial work.

1. *Passage Through the Great Belt* (Fin. v. Den.), Provisional Measures Order, 1991 I.C.J. 12, ¶ 17 (July 29).

2. *Id.* ¶ 31.

3. *Indus Waters Treaty 1960, India-Pak.*, Sept. 19, 1960, 419 U.N.T.S. 125.

4. *See Indus Waters Kishenganga Arbitration* (Pak. v. India), Interim Protection Order, ¶ 6 (Perm. Ct. Arb. June 6, 2011), http://www.pca-cpa.org/showfile.asp?fil_id=1726 [hereinafter *Kishenganga Order*].

5. Paragraph 28 of Annexure G provides in relevant part:

Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute.

Indus Waters Treaty, *supra* note 3, at 220.

6. *Kishenganga Order*, *supra* note 4, ¶ 34.

“[a]ny steps India has taken or may take in respect of the KHEP are taken at its own risk and without prejudice to the possibility that the Panel may in its decision on the merits order that the works must not be continued or must be modified or dismantled.”⁷ The latter is Pakistan’s restatement of what it repeatedly referred to over the course of the arbitration proceedings as the “proceed at your own risk” principle of international law, which it claimed to derive from the *Great Belt* case.⁸ By an order dated September 23, 2011, the Kishenganga Order, the Panel granted Pakistan partial relief and enjoined India from constructing the dam portion of the planned project.⁹ As to the remaining parts of the project, while the Panel did not formally declare further provisional measures, it stated that “the continuation of such activity is appropriately governed by the ‘proceed at your own risk’ principle of international law”¹⁰ and thereby implicitly—functionally—granted Pakistan’s latter demand as well.

The Panel here declared a hitherto unarticulated principle of international law. After repeatedly framing the principle of risk allocation—the “proceed at your own risk” principle—only in terms of the articulation given to it by Pakistan,¹¹ the Panel became the first body to adopt it as “a principle of international law.”¹² Central to this declaration was India’s own acknowledgment on the last day of the hearings that the “proceed at your own risk” principle governed its construction work on the KHEP.¹³ Pakistan and India’s acquiescence to a principle, however, should not bind the international community.

The Kishenganga Panel was headed by an ex-President of the ICJ (Chairman Schwebel), and included the current ICJ president (Judge Tomka) and a recently retired ICJ Judge (Judge Simma) amongst its membership. Therefore it is highly probable that the panel’s endorsement of this principle of international law in the Kishenganga Order will have wide implications for the entire international community beyond the Kishenganga arbitration.

The institutionalization of the “proceed at your own risk” principle in the Kishenganga Order, I argue, is an example of how provisional measures can be abused.¹⁴ In this Comment, I am not concerned with whether the Kishenganga Order itself, or other orders on provisional measures, are “correct” or

7. *Id.* ¶ 52.

8. *Id.* ¶ 65.

9. *Id.* ¶ 147.

10. *Id.* ¶ 143.

11. *See, e.g., id.* ¶ 65 (“Pakistan invoked the principle (*considered by Pakistan to be one of international law*) applied by the [ICJ] in the *Passage through the Great Belt* case that ‘a state engaged in works that may violate the rights of another state can proceed only at its own risk.’” (emphasis added)); *id.* ¶ 122 (“The content of that principle is *expressed by Pakistan*, on the basis of the ICJ’s *Passage Through the Great Belt* provisional measures order, to be as follows: ‘a State engaged in works that may violate the rights of another State can proceed only at its own risk.’” (emphasis added)); *id.* ¶ 143 (“In the Court’s view, the continuation of such activity is appropriately governed by the ‘proceed at own risk’ principle of international law . . .”).

12. *See id.* ¶ 143.

13. *See id.*

14. While the “proceed at your own” risk principle may come to accrue significance in all kinds of cases, I analyze it only as applied to contested construction activity, as in the *Kishenganga* and *Great Belt* cases.

“incorrect.”¹⁵ Rather, the focus is on the *principles* guiding the decisions about provisional measures and how they can be framed to best balance the necessity of provisional measures against the potential for abuse. To this end, this Comment critically examines the “proceed at your own risk” principle, including not only its claim to being a “principle of international law,” but also its efficacy and utility as a guiding principle for provisional measures in the international adjudication of contested construction activities. It concludes that the principle is far from a good conduit for balancing both parties’ interests against abuse. In particular, in the context of bodies like the ICJ that base their jurisdiction on the consent of the two parties, the “proceed at your own risk” principle allows the Court, and indeed any applicant for provisional measures, to impose an unprecedented coercive force through the very application for provisional measures. In addition to the Kishenganga Order, this Comment limits itself to considering the jurisprudence of the ICJ, where litigating provisional measures has become increasingly popular.

In the 1980s there were only three requests for provisional measures at the ICJ, two of which were granted.¹⁶ The number of requests increased to ten in the next decade, and in five cases provisional measures were granted.¹⁷ Since 2000, eleven more such requests have been made, of which five have been granted.¹⁸ The corresponding scholarship has followed suit. While writing about provisional measures has attracted scholarly attention from the early days of the Permanent Court of International Justice,¹⁹ in the last decade there appears to have been a veritable explosion of work on provisional measures.²⁰ This Comment, therefore, joins an already lively conversation.

This Comment proceeds in four parts. Part I provides an overview of provisional measures in the ICJ. Part II turns to the problem of compliance with provisional measures and discusses the potential for their abuse. Part III

15. The Panel issued its partial award on February 18, 2013, in which it lifted its provisional measures after declaring that, subject to the restrictions of the final award, India had a right to build the KHEP under the Indus Waters Treaty. One might argue, then, that the provisional measures were “incorrect.” The Indus Waters Kishenganga Arbitration (Pak. v. India), Partial Award, ¶ 201 (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1392.

16. For a detailed listing of all provisional measure cases brought to the ICJ and how they were resolved, see MEHMET SEMIH GEMALMAZ, *PROVISIONAL MEASURES OF PROTECTION IN INTERNATIONAL LAW: 1907–2010*, at 142–48 (2011).

17. *Id.*

18. *Id.* Since the publication of Gemalmaz’s book, the ICJ has granted provisional measures in two cases. See Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning *Temple of Preah Vihear* (Cambodia v. Thai.), Provisional Measures Order, ¶ 69 (July 18, 2011), <http://www.icj-cij.org/docket/files/151/16564.pdf>; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures Order, ¶ 86 (Mar. 8, 2011), <http://www.icj-cij.org/docket/files/150/16324.pdf>.

19. See, e.g., EDWARD DUMBAULD, *INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES* (1932).

20. See, e.g., GEMALMAZ, *supra* note 16; CLARA BURANO HERRERA, *PROVISIONAL MEASURES IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2010); EVA RIETER, *PREVENTING IRREPARABLE HARM: PROVISIONAL MEASURES IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION* (2010); SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* (2005).

critically examines the "proceed at your own risk" rule as a principle of international law and suggests a possible way forward. Part IV concludes with the hope that the Kishenganga Order is the first and last articulation of the "proceed at your own risk" principle as one of international law.

I. PROVISIONAL MEASURES IN THE ICJ: AN OVERVIEW

In Jerzy Sztucki's definitive 1983 study, *Interim Measures in the Hague Court*,²¹ he describes provisional measures (also called interim orders) as "an integral part of the judicial peace-keeping machinery."²² Broadly, in the international arena provisional measures are primarily exercised for two purposes, both of which are "measures to preserve a *status quo pendente lite*."²³ First, as in the domestic context, interim protections are provided for the preservation of contested rights.²⁴ Article 41 of the ICJ statute explicitly allows for provisional measures to serve this purpose, but is silent on the issue of whether or not provisional measures can be used to safeguard the judgment on the merits.²⁵ However, the then-President of the Court Jiménez de Aréchaga laid the latter question to rest when he wrote in 1976 that "[t]he essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*."²⁶ Second, interim measures are also used to prevent the aggravation of disputes.²⁷ While the ICJ statute is again mute on this issue, treaties such as the Indus Waters Treaty specifically provide for such a justification for provisional measures.²⁸

The broad language of Article 41 of the ICJ statute is far from instructive on the legal requirements of a successful application for provisional measures. Specifically, given that the very possibility of international adjudication is founded on the consent of the two or more nations party to any particular dispute, the ICJ statute is deafeningly silent on the jurisdictional requirements for provisional measures. A respondent state almost always invokes a challenge

21. JERZY SZTUCKI, *INTERIM MEASURES IN THE HAGUE COURT* 1 (1983); see also LaGrand (Ger. v. U.S.), Provisional Measures Order, 1999 I.C.J. 9, 16 (Mar. 3) (separate opinion of President Schwebel) (identifying Sztucki's book as "the most authoritative work in the field").

22. SZTUCKI, *supra* note 21, at 1.

23. *Id.* at 12.

24. See *id.*; see also, e.g., Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.").

25. Article 41 in its entirety reads:

1. The Court 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.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Statute of the International Court of Justice art. 41, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

26. Aegean Sea Continental Shelf (Greece v. Turk.), Interim Protection Order, 1976 I.C.J. 3, 16 (Sept. 11) (separate opinion of President Jiménez de Aréchaga); see, e.g., Kishenganga Order, *supra* note 4, at 41 n.209.

27. See SZTUCKI, *supra* note 21, at 12.

28. See Indus Waters Treaty, *supra* note 3.

to the ICJ’s jurisdiction under Article 36 of the statute.²⁹ For the applicant to receive the benefits of interim protection without having conclusively established jurisdiction in the first place appears patently inequitable. On the other hand, requests for provisional measures are frequently of such an urgent nature that the delay contingent on a full judicial consideration of the question of jurisdiction may be untenable. In response, “the Court has built a body of precedent which affords it the authority to indicate provisional measures if the jurisdiction which has been pleaded appears, *prima facie*, to afford a basis on which the Court’s jurisdiction might be founded.”³⁰

The *prima facie* standard for jurisdiction is a less onerous burden than the clear demonstration of jurisdiction that the Court requires at the merits stage. Indeed, until the decision in the *Legality of Use of Force* cases in 1999, the Court had never rejected a single request for provisional measures for lack of *prima facie* jurisdiction.³¹ Further, in cases of great urgency—as in the *Breard* case and its progeny that sought to enjoin the United States from executing foreign nationals using the Vienna Convention on Consular Relations—the urgency of issuing orders effectively lowered the already low jurisdictional standard.³² In each of the Consular Relations cases, Judge Oda repeatedly stated in his declarations that although he believed that “provisional measures . . . should not have been indicated[,] . . . [he] voted in favor of the Order, for humanitarian reasons,”³³ and thus effectively distanced his rationale for granting provisional measures from any legal basis. Despite a nominally formalized framework for jurisdictional analysis that already favors the applicants, the overall effect of the ICJ’s case law on provisional measures seems to render the jurisdictional hurdle a non-issue at the provisional measures stage.

One constraint on the seemingly broad availability of provisional measures is that the requested interim measures must be incidental to the main dispute that is to be litigated. As President Owada explained in a recent dissent from a grant of provisional measures,

A request for the indication of provisional measures is made by one of the parties

29. Article 36, paragraph 6 provides, “in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.” Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

30. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Provisional Measures Order, 1984 I.C.J. 169, 206-07 (May 10) (dissenting opinion of Judge Schwebel).

31. See *Legality of Use of Force* (Yugoslavia v. U.S.), Provisional Measures Order, 1999 I.C.J. 916, 948 (June 2) (separate opinion of Judge Oda); see also Kaoru Obata, *The Relevance of Jurisdiction to Deal with the Merits to the Power to Indicate Interim Measures: A Critique of the Recent Practice of the International Court of Justice*, in 1 LIBER AMICORUM: JUDGE SHIGERU ODA 451, 451 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds., 2002) (noting that the cases “set a new precedent,” as it “was the first time a request was rejected for lack of *prima facie* basis of jurisdiction”).

32. Obata, *supra* note 31, at 457.

33. Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures Order, 1998 I.C.J. 248, 262 (Apr. 9) (declaration of Judge Oda); see also LaGrand (Ger. v. U.S.), Provisional Measures Order, 1999 I.C.J. 9, 20 (Mar. 3) (declaration of Judge Oda) (“I voted in favour of the Order *solely* for humanitarian reasons.” (emphasis added)); Avena and Other Mexican Nationals (Mex. v. U.S.), Provisional Measures Order, 2003 I.C.J. 77, 93 (Feb. 5) (declaration of Judge Oda) (“[My] doubts have already been clearly expressed . . . in connection with two similar cases decided by the Court.”).

during the course of the proceedings in the main case as its *incidental proceedings*. As such, the scope of the request and the jurisdiction of the Court to deal with the request is limited by its very nature to being incidental to the main case.³⁴

If provisional measures are conceived of as preventing irreparable harm to a party's rights, requiring that the requested measures be incidental to the main proceedings effectively limits the spectrum of rights and injuries the applying party can claim at the provisional measures stage.

Pushing against this constraint, however, is the Court's relatively new doctrinal innovation that provisional measures can protect "plausible rights." First invoked in the 2009 case of *Obligation to Prosecute or Extradite* (Belgium v. Senegal), in which the French text was authoritative,³⁵ this principle was institutionalized in the March 8, 2011 order in *Costa Rica v. Nicaragua* in which the English text was authoritative.³⁶ As Judge Koroma pointed out in his separate opinion in the latter case, "the plausibility standard . . . suffers from vagueness and ambiguity. It is unclear from the Court's Order whether the Court requires an applicant seeking provisional measures to demonstrate the plausibility of its legal rights, the plausibility of its factual claims, or both."³⁷ The plausibility standard "is inconsistent with the settled jurisprudence of the Court, according to which the applicant has to *demonstrate* that an existing right is threatened and needs to be protected,"³⁸ a much higher standard indeed. Despite the initial dissensus, however, the Court's order in *Temple of Preah Vihear* (Cambodia v. Thailand) has firmly settled the position of "plausibility" as a mainstay of provisional-measures analysis. The Court in that case stated that it could "exercise [its] power [to grant provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible."³⁹ Although the panel filed five dissents, two declarations (including one by Judge Koroma),⁴⁰ and one separate opinion, there was no disagreement about the majority's use of the plausibility standard

34. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thai.), Provisional Measures Order, ¶ 1 (July 18, 2011) (dissenting opinion of President Owada), <http://www.icj-cij.org/docket/files/151/16566.pdf>.

35. See Questions Relating to the Obligation To Prosecute or Extradite (Belg. v. Sen.), Provisional Measures Order, 2009 I.C.J. 139, ¶ 57 (May 28) ("[T]he power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible.").

36. See Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.), Provisional Measures Order, ¶¶ 53-54 (Mar. 8, 2011), <http://www.icj-cij.org/docket/files/150/16324.pdf> ("[T]he Court may exercise this power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible."). The only cited authority for the quoted proposition is the former case.

37. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures Order, ¶ 12 (Mar. 8, 2011) (separate opinion of Judge Koroma), <http://www.icj-cij.org/docket/files/150/16326.pdf>.

38. *Id.* ¶ 6.

39. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thai.), Provisional Measures Order, ¶ 33 (July 18, 2011) (declaration of Judge Koroma), <http://www.icj-cij.org/docket/files/151/16564.pdf>.

40. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thai.), Provisional Measures Order (July 18, 2011) (declaration of Judge Koroma), <http://www.icj-cij.org/docket/files/151/16568.pdf>.

in its analysis. As one commentator put it, in the aftermath of these three cases, plausibility is “now a distinct element [of provisional-measures analysis] and black-letter law.”⁴¹

Formally, then, an applicant for provisional measures must demonstrate that the Court has *prima facie* jurisdiction over the parties, that the rights sought to be protected are incidental—and now plausible—and that urgency demands the grant of provisional measures. This Section showed that the applicant’s actual burden appears to be much less demanding than the Court’s formal framework may suggest. The next Section turns from the ICJ’s legalistic analysis of provisional measures to the major extralegal problems that beset applications for, and the grants of, provisional measures.

II. PROBLEMS OF PROVISIONAL MEASURES

This Part considers two specific problems that plague provisional measures: their spotty compliance record and the possibilities of their abuse.

A. Compliance

One aspect of provisional-measures jurisprudence that remained controversial until the ICJ’s decision in *LaGrand* was whether provisional measures were binding on the parties or merely advisory. Scholars had long been divided on the issue⁴² and some state parties had found it convenient to treat interim orders as non-binding.⁴³ The Court itself had, until *LaGrand*, refrained from making a definitive statement one way or another. In *LaGrand*, however, the ICJ made an emphatic and pointed declaration that “orders on provisional measures under Article 41 have binding effect,”⁴⁴ a statement it has since affirmed in subsequent cases.⁴⁵

Considerations of the binding nature of international legal obligations inevitably lead to an analysis of their concomitant enforcement and compliance. On the question of compliance, Constanze Schulte notes a “big difference between the negative record for provisional measures and the largely positive one for judgments.”⁴⁶ Given that the provisional measures always favor the applicant and are issued against a respondent who almost always

41. Jacob Katz Cogan, *Current Developments: The 2011 Judicial Activity of the International Court of Justice*, 106 AM. J. INT’L L. 586, 599 (2012).

42. See Jörg Kammerhofer, *The Binding Nature of Provisional Measures of the International Court of Justice: the ‘Settlement’ of the Issue in the LaGrand Case*, 16 LEIDEN J. INT’L L. 67, 68-72 (2003).

43. See, e.g., Letter from Madeleine K. Albright, U.S. Sec’y of State, to the Honorable James S. Gilmore III, Governor of Va. (Apr. 13, 1998), in INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 120 (W. Michael Reisman et al. eds., 2004) (describing provisional-measures “injunction” against the United States in the ICJ’s *Breard* decision as “non-binding”).

44. *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 109 (June 27).

45. See, e.g., Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures Order, 2008 I.C.J. 353, 397 (Oct. 15); Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 168, 258 (Dec. 19).

46. CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 418 (2004).

challenges the Court's very jurisdiction over the present dispute, it appears perfectly logical for the respondent to refuse to comply with provisional measures. As Schulte notes, "where provisional measures are indicated in cases of joint submission, there is a greater likelihood of compliance."⁴⁷ Some respondents may comply with provisional measures because they, like some commentators,⁴⁸ believe that the finding of *prima facie* jurisdiction serves as an indication of the likely outcome on the jurisdictional finding at the merits stage. Another reading, indeed the officially endorsed reading, is that the Court may reject jurisdiction at the merits stage despite a finding of *prima facie* jurisdiction at the provisional measures stage.⁴⁹ On this account, however, a respondent nation that feels particularly strongly about the jurisdictional question would likely also hold out on compliance with provisional measures that it believes the Court has no power to declare.

If international adjudicatory bodies like the ICJ have power to demand compliance, they do so on the basis of the respective parties' consent.⁵⁰ Declarations of what are in effect injunctions in the absence of consent violates the most fundamental principles of international adjudication, and the practice of provisional measures may be the most normalized exception to the same. Normalized as they may be, and despite definitive declarations of their binding nature, provisional measures will likely always face compliance problems in the absence of consent from both parties. The Kishenganga Panel's repeated reliance on India's explicit promise to comply with any and all orders issued at the provisional measures stage, for instance, likely signals the Panel's implicit recognition of the importance of consent in ensuring that provisional measures prove to be effective.⁵¹

B. Abuse

The "abuse" of provisional measures refers to their use for purposes other than maintaining the status quo or preventing irreparable harm *pendente lite*. In particular, the concern is with their strategic use by the applicant to the detriment of the respondent in the absence of any good faith legal basis for the same. Although, formally, either party can request provisional measures, practice has conclusively established the unilateral character of provisional-measures applications, with the reins firmly in the hands of the applicant. Hugh Thirlway wrote in 1994, "a trend has been observed over the last 20 years or so

47. SCHULTE, *supra* note 46, at 420. See generally *id.* at 418-35.

48. See, e.g., Karin Oellers-Frahm, *Use and Abuse of Interim Protection Before International Courts and Tribunals*, in COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM 1685, 1685 (Holger Hestermeyer et al. eds., 2012).

49. In the *Interhandel* case, for example, the ICJ did not prejudge jurisdiction at the provisional-measures stage, but rejected jurisdiction at the merits stage. *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21).

50. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

51. Indeed, the entirety of Section IV.A of the Court's analysis is devoted to "India's Assurances and Representations." Kishenganga Order, *supra* note 4, ¶¶ 121-27.

for proceedings to be instituted before the Court in circumstances . . . to obtain the short-term tactical advantage of an order indicating provisional orders."⁵²

Thirlway's observation remains relevant today. For example, in a recent article, Karin Oellers-Frahm suggests that there are two main forms of provisional measures abuse, which have become part of a "litigation strategy": first, the interim orders are used to assess the strength of the case from the Court's perspective, and second, initiating the litigation gives the applicant a public platform to address the international community.⁵³ Neither purpose is recognized as a legitimate end of provisional measures. At the same time as the Court must find a way to secure the rights of applicants, it must also protect the rights of respondents and safeguard them from abuse. Article 41's use of the disjunctive "either" in authorizing the Court to take provisional measures "to preserve the rights of either party,"⁵⁴ should not come to mean "one party, paradigmatically the applicant, to the exclusion of the other."

Indeed, even in *not* declaring provisional measures, the Court may still effect a considerable coercive force on a protesting nation. In the *Great Belt* case, for example, although the Court refrained from granting provisional measures, it implicitly threatened Denmark with the possibility of a sizeable loss to the exchequer if it continued with its planned construction. That is the focus of the next Part.

III. THE *GREAT BELT* "PRINCIPLE" RECONSIDERED

Thinking of provisional measures only through the lens of strategic action may occlude the important functions they serve in their good-faith application. If one approaches the analysis of the *Great Belt* case's "proceed at your own risk" statement with a deeply held conviction about every applicant's good-faith legal basis for requesting provisional measures, the principle may appear just and equitable. After all, in advising Denmark that it was "proceeding at [its] own risk" the Court did no more than put the respondent on notice that while the prescription of provisional measures may be unwarranted, the Court may still order the undoing of any subsequent actions that it later finds to violate the applicant's legally-guaranteed rights. Indeed, that the Court should give the respondent State fair notice of the possibility of a subsequent adverse finding speaks in favor of its application and its inherent fairness. In my view, however, the promulgation of the *Great Belt* Court's statement into a principle or rule of international law only heightens the risk of unilateral abuse to which provisional measures seem so inherently susceptible.

52. Hugh Thirlway, *The Indication of Provisional Measures by the International Court of Justice*, in *INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS* 1, 27 (Rudolf Berhardt ed., 1994).

53. Oellers-Frahm, *supra* note 48, at 1686.

54. See Statute of the International Court of Justice art. 41, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

A. *Is It Really a Principle of International Law?*

The ur-statement of the principle declared in the Kishenganga Order reads, “in principle . . . if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.”⁵⁵

None of the major writings on provisional measures in the aftermath of the *Great Belt* case—and there has been a substantial amount in the past decade alone⁵⁶—identifies the ICJ’s statement here as an articulation of an international legal principle.

Mehmet Semih Gemalmaz’s account of *Great Belt*, for one, does not refer to this statement at all.⁵⁷ The important, if not the only, takeaway from this case for Gemalmaz is the more routine issue of the role of urgency in deciding whether or not a grant of provisional measures is warranted.⁵⁸

In Shabtai Rosenne’s meticulous recounting of the legal principles in all provisional measures decisions by the ICJ, the discussion of the *Great Belt* case makes no mention of the Court’s remark above as the founding declaration of a legal principle. Rather, Rosenne characterizes this statement as “advice,” asserting that, “the Court tendered some advice to each party, which assisted them in reaching an agreed solution of the dispute.”⁵⁹ Rosenne goes on to defend the Court against charges that “in giving advice of this nature or in making general statements ‘at large’ . . . in orders on provisional measures the Court is exceeding its functions, which are limited to declaring the law.”⁶⁰ Rosenne argues that giving such advice is perfectly acceptable if such “pronouncements lead to the settlement of the dispute outside the Court,” as happened in this case, for, as an organ of the United Nations, the Court may “take any action that furthers the maintenance of international peace.”⁶¹ In thus describing the Court’s statement, Rosenne implicitly, but definitively, accepts his opponents’ characterization of the same as extralegal. That this extralegal advice is converted into a “principle of international law” should at the very least give pause.

Karin Oellers-Frahm sees the *Great Belt* case as an instance where the Court’s rejection of provisional measures gave both parties “a first signal concerning the outcome of the case.”⁶² Her reading reveals the Court’s decision not to grant provisional measures, at the same time as it put respondent Denmark on notice that it might later undo any construction on the bridge that

55. *Passage Through the Great Belt (Fin. v. Den.)*, Provisional Measures Order, 1991 I.C.J. 12, ¶ 31 (July 29).

56. *See supra* note 20.

57. *See* GEMALMAZ, *supra* note 16, at 224-25.

58. *Id.* at 224.

59. ROSENNE, *supra* note 20, at 213.

60. *Id.*

61. *Id.*

62. *See* Oellers-Frahm, *supra* note 48, at 1687.

Denmark undertook, as a strategic and ultimately coercive one. She establishes a causative link between the Court's "clear indication . . . that an order to dismantle . . . could not be ruled out" and Denmark's willingness to negotiate a settlement.⁶³ In Oellers-Frahm's reading, Denmark negotiates a settlement "[a]s this possibility [of future dismantling] was highly unwelcome."⁶⁴ Like other commentators, Oellers-Frahm's analysis of the case does not seem to recognize or even suggest that the Court was spelling out a legal principle here. In fact, she finds it necessary to justify the Court's actions just as Rosenne did: There is no abuse of provisional measures here because the Court's decision "contributed to and facilitated the direct and friendly peaceful settlement of the dispute."⁶⁵

If the happy gloss that a "peaceful settlement" necessarily puts on all analysis is removed, Oellers-Frahm's reading reveals the unprecedented nature of the Court's coercive power here. The disjunction is between what the Court formally says and to what that functionally amounts. Even though, formally, it did not indicate provisional measures, the Court was still able to functionally give the applicant, Finland, the same outcome as if it had issued the requested provisional measures. For both Rosenne and Oellers-Frahm, however, the "peaceful settlement" is an important part of the analysis because they seem to read the Court's statement in the case to apply very specifically and narrowly to *this* particular case. They do not read the ICJ decision in *Great Belt*, as the Kishenganga Panel ultimately does, as a broad, all-encompassing principle of international law. Given that the ICJ itself has not recognized what Rosenne calls its "judicial dicta"⁶⁶ in the case as a principle of international law, where, apart from applicant Pakistan's repeated assertions to that effect, does the Kishenganga Panel derive the authority for such an unprecedented declaration?

The answer is simple, but instructive: the Kishenganga Order declares the "proceed at your own risk" principle to be one of international law because India, on the last day of the hearings, stated that it "[wa]s committed to proceed on 'the own-risk principle' of international law"⁶⁷—because of consent. A look at the text in which the Panel declares the "proceed at your own risk" principle one of international law reveals the centrality of India's consent to the Panel's determination:

[T]he continuation of such activity is appropriately governed by the "proceed at own risk" principle of international law, *as specifically recognized by India* during the hearing. The situation would merely be one in which India would have invested considerable sums of money without reaping the benefit of the operation of the KHEP as currently envisaged. This, however, is *precisely the risk that India has declared it is willing to assume . . .*⁶⁸

63. *Id.*

64. *Id.*

65. *Id.*

66. See ROSENNE, *supra* note 20, at 213 (explaining "judicial dicta" as "not part of the *ratio* but relevant to a collateral matter").

67. Kishenganga Order, *supra* note 4, ¶ 70.

68. *Id.* ¶ 143 (emphasis added).

Had India not accepted the principle advanced by Pakistan, and had it not given “unequivocal assurance” of compliance to the Panel—both decisions in which India likely did not realistically have an alternative choice in light of the slow but certain improvement in Indo-Pakistani relations—it is unlikely that the Panel would have so calmly declared a new principle of international law as well as “threatened” India with potential losses of “considerable sums of money” to the exchequer. In any case, it is not clear that Pakistan’s or India’s acceptance of the principle, either jointly or severally, should be enough to bind the entire international community through the force of custom.⁶⁹

If this principle were to be invoked by future applicants for provisional measures as a matter of norm in cases of contested construction, the applicant may get the benefit of the requested measures even if the Court does not explicitly grant them, and even if the Court ultimately finds its jurisdiction to be unfounded. Despite the Court’s formal judgment, then, an applicant may always obtain the functional outcome it desires. Indeed, the “proceed at your own risk” principle appears to encourage, even invite, abuse.

B. Moving Beyond a Problematic Principle of International Law

By converting the *Great Belt* principle into a rule of “international law,” the Panel has ensured that State A can now functionally enjoin any construction or similar activities by State B to which it objects through the very institution of proceedings against State B—irrespective of merit—when the application is accompanied by a request for provisional measures. If State B is rational it will willingly suspend all further activity that is complained of for fear of the “risk of proceeding” and its associated costs. This injunctive power, however temporary its benefits may actually be, does violence to the rights of, not the applicant, but the respondent while the litigation is pending. It opens the possibility for flagrant abuse such that the concept of the preservation of party rights is turned on its head as far as State B is concerned. This is an extralegal power in the hands of State A that strains the consensual foundations of international adjudication. Particularly in cases like the Kishenganga dispute where the stakes are so high—vast sums are lost due to delayed completion, the environmental damage is acute, and the political costs on both sides of the border are immense⁷⁰—a practicable framework is needed that both ensures the viability of provisional measures for the important purpose they serve, and curbs their abuse. The “proceed at own risk” principle is not part of that framework.

Given the acute applicant-bias provisional-measures adjudication already suffers from, any reform in conceiving of a practicable framework for their adjudication will need to strike an appropriate balance in the respondent’s

69. It remains unclear whether the “proceed at own risk” principle falls under international custom or general principles.

70. See Manav Bhatnagar, *Reconsidering the Indus Waters Treaty*, 22 TUL. ENVTL. L.J. 271 (2009).

favor. In the narrow context of a construction dispute, the most effective solution would be for the Court to follow a multi-prong test that the applicant must satisfy before interim measures are granted. The applicant should have the burden of demonstrating jurisdiction—not merely a prima facie showing. Further, the rights that the applicant seeks to preserve must be clearly shown to be justiciable by the adjudicatory body and not merely “plausible.” While urgency is a central concern in regular provisional-measures adjudication, such concerns are likely negligible in the construction context.⁷¹ Strict adherence to such requirements would stem possibilities of flagrant abuse. If the “proceed at your own risk” principle is introduced as an additional protection to the applicant, the entire jurisdictional analysis would amount to naught, and an applicant’s very act of application would accrue unjustifiable coercive force against the respondent.

The preceding discussion seems to sidestep one fundamental question: How, precisely, is a Court to carry out such a test? One equitable approach would be for the Court to undertake a much more fact-specific inquiry at the provisional measures stage itself that would allow it to make a definitive judgment about whether to grant interim relief. Where the Court, like the Kishenganga Panel, cannot make such a definitive judgment, the Court should deny interim relief, without any reference to the likes of a “proceed at your own risk” principle. Nothing would prevent the Court from declaring the respondent’s activities unlawful and ordering their destruction at the final merits stage.⁷² Such an approach *would*, however, prevent the very application for provisional measures from gathering coercive force, and allow the respondent to make its own independent cost-benefit analysis. Courts could, in this way, stymie the abuse of provisional measures.

IV. CONCLUSION

If the “proceed at your own risk principle” becomes completely institutionalized, the allocation of risk in any future adjudicated dispute between two nations over construction will always fall directly on the respondent the moment an applicant files for provisional measures. Irrespective of the adjudicatory body’s ultimate decision on the grant or denial of such measures, the very act of requesting provisional measures may come to acquire injunctive force as the respondent necessarily bears the cost of potentially undoing all its work. The applicant bias that provisional measures already suffer from on account of the low bar for finding jurisdiction, and the relatively new “plausibility” doctrine, will become only more extreme if the “*Great Belt*

71. “Urgency” can be said to exist in the construction context to the extent that provisional measures are needed to prevent irreparable damage that continuing construction might cause. In such a case, a court should grant provisional measures as the Kishenganga Panel did when it enjoined India from constructing the dam portion of the KHEP. Kishenganga Order, *supra* note 4, ¶ 147.

72. The Kishenganga Panel, however, ultimately allowed India to proceed with its construction, subject to conditions in its final award, which is still forthcoming as of this publication. Indus Waters Kishenganga Arbitration (Pak. v. India), Partial Award, ¶ 201 (2013).

principle” gains wide acceptance. This Comment is written in the hope that it does not.