

THE ICSID CONVENTION: A COMMENTARY

A Commentary on the Convention on the Settlement of Investment
Disputes between States and Nationals of Other States

SECOND EDITION

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modify or revoke them.⁹⁵ If the circumstances requiring the provisional measures no longer exist, the tribunal is under an obligation to revoke them.

Provisional measures will lapse automatically upon the rendering of the tribunal's award. They will also lapse upon the discontinuance of the proceedings in accordance with Arbitration Rules 43–45. Although neither Art. 47 nor Arbitration Rule 39 say so explicitly, this is a consequence of their provisional nature. 59

In *MINE v. Guinea*, a request was made for the re-hearing and modification of the provisional measures recommended on 4 December 1985. The ICSID Tribunal rejected this request on 5 February 1986.⁹⁶ 60

In *SGS v. Pakistan*, the Tribunal stressed its power to reconsider provisional measures at any time: 61

It is scarcely necessary to add that this like any procedural order on provisional measures may be re-visited on the application of either party and after hearing the other party, should circumstances change materially during the pendency of the jurisdictional phase of this proceeding.⁹⁷

In *City Oriente v. Ecuador*, the Tribunal, after holding a hearing, had ordered provisional measures on 19 November 2007. The order for provisional measures stated that they shall remain in force until modified or revoked by the Tribunal or until the rendering of the final award. On 1 February 2008, the Respondent filed a Request for Revocation of the Provisional Measures. After pleadings by both parties the Tribunal on 13 May 2008 decided to deny the request for revocation and “to ratify the Provisional Measures previously ordered”.⁹⁸ 62

D. “. . . if it considers that the circumstances so require, . . . which should be taken to preserve the respective rights . . .”

1. Necessity and Urgency

The preparatory works to the Convention give little indication of the circumstances which would require provisional measures, although more clarity on this point was at times demanded (History, Vol. II, pp. 337 *et seq.*, 515, 573). It was pointed out that such measures would only be used in situations of absolute necessity (at pp. 270, 523) and that tribunals would exercise self-restraint in their application (at p. 516). An attempt to have a reference to urgency and imminent danger included was defeated (at p. 815) but it is clear that provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits.⁹⁹ 63

⁹⁵ See also Note D to Arbitration Rule 39 of 1968, 1 ICSID Reports 100; History, Vol. II, p. 814. See also *Tokios Tokelés v. Ukraine*, Procedural Order No. 1, 1 July 2003, para. 5.

⁹⁶ Unreported. The decision is mentioned by the Court of First Instance of Geneva, 13 March 1986, 4 ICSID Reports 41, 43.

⁹⁷ *SGS v. Pakistan*, Procedural Order No. 2, 16 October 2002, 8 ICSID Reports 396. See also *Vacuum Salt v. Ghana*, Decision on Provisional Measures, 14 June 1993, 4 ICSID Reports 328.

⁹⁸ *City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, 13 May 2008, paras. 1, 78, 95, 96.

⁹⁹ This passage contained in the First Edition of this Commentary is quoted with approval in *Biwater Gauff v. Tanzania*, Procedural Order No. 1, 31 March 2006, para. 68.

- 64 ICSID arbitration practice shows that tribunals will only grant provisional measures if they are found to be necessary, urgent and are required in order to avoid irreparable harm. The requesting party has the burden of showing why the measures should be recommended. As noted by the Tribunal in *Maffezini v. Spain*:

The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application.¹⁰⁰

- 65 In *Tanzania Electric v. IPTL*, the Tribunal also held, with respect to the request for provisional measures, that the burden was on the requesting party to demonstrate that an urgent need existed for the relief sought. It denied the request *inter alia* because the requesting party had failed to comply with this requirement.¹⁰¹

- 66 The Tribunal in *Azurix v. Argentina* noted that Art. 47 of the Convention does not specify the degree of urgency required to grant provisional measures. It related the probability of prejudice to the requirement of urgency as follows:

Given that the purpose of the measures is to preserve the rights of the parties, the urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award.¹⁰²

- 67 The Tribunal in *Plama v. Bulgaria* also stressed that the need for provisional measures must be urgent and necessary to preserve the *status quo* or to avoid irreparable damage.¹⁰³ In the particular case, the Tribunal found both the urgency and the irreparable nature of the harm invoked by Plama to be lacking. The Tribunal's ability to decide on the Claimant's right to monetary damages would not be affected by the outcome of the proceedings in Bulgaria addressed in the Claimant's request for provisional measures.¹⁰⁴

- 68 In *Biwater Gauff v. Tanzania*, the Claimant justified the urgency of its request by stating that, in accordance with ICSID jurisprudence,

necessity and urgency are present where a Respondent fails to take steps to preserve or to provide documentation relevant to a Claimant's case, or in circumstances where there is a risk of loss or destruction of such documentation.¹⁰⁵

The Tribunal expressed the view that the degree of urgency required for a recommendation of provisional measures depended on the circumstances of the case and may be satisfied when a party can prove that there is a need to obtain the measure requested before the issuance of an award. The Tribunal added that it also believed that the level of urgency required depends on the type of measure requested.¹⁰⁶ In

100 *Maffezini v. Spain*, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, para. 10.

101 *Tanzania Electric v. IPTL*, Decision on Provisional Measures, 20 December 1999, para. 18. See also *Tanzania Electric v. IPTL*, Award, 12 July 2001, para. 31.

102 *Azurix v. Argentina*, Decision on Provisional Measures, 6 August 2003, para. 33.

103 *Plama v. Bulgaria*, Order on Provisional Measures, 6 September 2005, para. 38.

104 *Ibid.*, para. 46.

105 *Biwater Gauff v. Tanzania*, Procedural Order No. 1, 31 March 2006, para. 30. See also paras. 33, 44–54, 60.

106 *Ibid.*, para. 76.