

Arbitration of Energy Disputes: New Challenges

Conference Organized by the Danish Institute of Arbitration
September 1, 2014 Copenhagen, Denmark

PANEL II: INTERIM MEASURES AND THEIR ENFORCEMENT

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OVERVIEW OF PRESENTATION

1. Standards applied to grants of interim measures in investor-State arbitrations.
2. A particular interim measure repeatedly sought in energy arbitrations: orders to suspend judicial or administrative proceedings in the host country or otherwise to preserve the *status quo*.

1. Standards for granting interim measures

ICSID Convention Article 47:

“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.”

ICSID Arbitration Rules Article 39(1):

“At any time after the institution of 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.**”

1. Standards for granting interim measures

UNCITRAL Arbitration Rules Art. 26(1) (1976):

“At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.”

1. Standards for granting interim measures

UNCITRAL Arbitration Rules Art. 26(2) (2010):

“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- (a) Maintain or **restore the status quo** pending determination of the dispute;
- (b) Take action that would prevent, or **refrain from taking action that is likely to cause**, (i) current or imminent harm or (ii) **prejudice to the arbitral process itself**;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) **Preserve evidence** that may be relevant and material to the resolution of the dispute.”

1. Standards for granting interim measures

UNCITRAL Arbitration Rules Art. 26(3) (2010):

“The party requesting an interim measure under paragraphs 2(a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”

1. Standards for granting interim measures

UNCITRAL had three motives in replacing the general standard for granting interim measures under the 1976 Arbitration Rules with the more detailed regime of the 2010 Rules:

- A fear that the general standard left tribunals uncertain of their authority, causing them sometimes to hesitate to grant interim relief.
- A desire to reassure national courts, when asked to enforce arbitral interim measures, as to the arbitrators' authority.
- A desire to encourage national legislatures to authorize court enforcement of arbitration interim measures

2. A measure repeatedly sought in energy arbitrations: preserving the *status quo*

Long-term concessions for oil or gas (and for other extracted resources) may become subject to substantial changes in tax or legal regimes or government effort to revoke or disregard the concession, which may provoke investment treaty claims by the concessionaire in arbitration that the host government may then try to prevent or hinder.

Ecuador's Law 2006-42: *Occidental Petroleum Corp. v. Ecuador* (ICSID 2007)

City Oriente Ltd. v. Ecuador (ICSID 2007)

Perenco Ecuador Ltd. v. Ecuador (ICSID 2009)

Burlington Resources Inc. v. Ecuador (ICSID 2009)

2. A measure repeatedly sought in energy arbitrations: preserving the *status quo*

Bolivia's Revocation of Mining Concessions: *Quiborax S.A., et al. v. Bolivia* (ICSID 2010)

Indonesia's Attempt to Enjoin Enforcement of Award To Geothermal Plant Owner:
Himpurna California Energy Ltd. v. Indonesia (UNCITRAL Rules 1999)

Mongolia's Windfall Profits Tax on Gold Mining:
Sergei Paushok et al. v. Mongolia (UNCITRAL Rules 2008)

Republic of Congo's Nationalization of an oil distribution company:
AGIP v. Congo (ICSID 1979)

Bulgaria's attempt (by municipal government of Sofia) to enforce disputed electricity tariffs by court compulsion:

Electricity Company of Sofia – Belgium v. Bulgaria (P.C.I.J. 1939)

2. A measure repeatedly sought in energy arbitrations: preserving the *status quo*

- All of these tribunals, except in *Occidental Petroleum* and *Himpurna*, granted measures directing the host state to restore the *status quo* by suspending civil, administrative, or criminal proceedings and/or by restoring claimant's access to sequestered evidence
- However, in issuing such orders, none of the recent tribunals relied on the very general standards for granting interim measures set forth in Article 47 of the ICSID Convention or Article 26 of the 1976 UNCITRAL Rules.

2. A measure repeatedly sought in energy arbitrations: preserving the *status quo*

“... in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of **necessity** and **urgency** to avoid **irreparable harm**.”

– *Occidental Petroleum v. Ecuador* (ICSID 2007)

See also C. Schreuer et al., THE ICSID CONVENTION, p. 776 (2nd ed. 2009)

2. A measure repeatedly sought in energy arbitrations: preserving the *status quo*

Illustrative Examples:

ICSID Convention/Rules: *Burlington Resources v. Ecuador*
(2009)

UNCITRAL Rules: *Sergei Paushok v. Mongolia* (2008)