Hakemli Makale

PROVISIONAL MEASURES IN ICSID PROCEEDINGS FOCUSING ON ENERGY RELATED DISPUTES

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ABSTRACT:

Provisional measures are very significant tools not only in national, also in international arbitration. They enable security for parties against any injustice in the course of a pending arbitration and therefore provide a successful outcome of the proceedings. Provisional measures include a variety of measures which range from freezing of assets, posting securities, preservation of status quo, etc. The purpose of this paper in general is to try to answer the question whether there are common grounds relied on by International Centre for Settlement of Investment Disputes (ICSID) tribunals to recommend parties provisional measures and in particular whether we can talk about any kind of classification for provisional measures regarding claimants' requests by giving examples of energy related cases. In order to examine these issues the power of an ICSID tribunal to recommend provisional measures, the benefits and the pre-requisites of these measures will be addressed.

Keywords: ICSID, Provisional Measures, Energy Investment, Energy Related Disputes.

ÖZET:

İhtiyati Tedbirler sadece iç hukukumuzda değil, aynı zamanda uluslararası tahkimde de başvurulan etkin bir araçtır. Tahkime taraf olanlar taraflar için tahkim yargılaması süresince ortaya çıkabilecek haksızlıklara karşı garanti sağlamasının yanı sıra, yargılamanın başarılı sonuçlanmasının da destekleyicisidir. İhtiyati tedbirler malvarlığının dondurulmasından, güvenlik sağlamaya, hâlihazır durumun korunması ve benzeri kadar muhtelif tedbirler içermektedir. Bu çalışmanın genel olarak amacı taraflara ihtiyati tedbirler önermesi açısından ICSID – Uluslararası Yatırım Anlaşmazlıkları Çözüm Merkezi'ne itimadın mantıklı temelleri olup olmadığı ve özelde enerji yatırımı uyuşmazlıklarından örnekler vererek davacıların talepleri ile ilgili olarak ihtiyati tedbirlerin bir sınıflandırılmasından söz edilip edilemeyeceğidir. Bu konuların analizi çerçevesinde, ihtiyati tedbir öneren bir ICSID hakem heyetinin yetkileri, bu tedbirlerin yararları ve ön şartlarına da değinilecektir.

Anahtar Kelimeler: ICSID, İhtiyati Tedbirler, Enerji Yatırımı, Enerji Uyuşmazlıkları.

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1. INTRODUCTION

Provisional measures are common in international arbitration. Arbitral tribunals recommend them as a matter of urgency to provide a certain status quo and protection for the interests of the parties during the arbitral proceedings are still going on, since parties may suffer from many damages till the tribunal reaches its final award, for example the right or property subject to dispute could be transferred to a third party or lose its edge, the evidences in relation to the dispute could get lost or one of the parties act may cause a harm on other's continuing business, etc.

Thus, the purpose of provisional measures are as explained by SCHREUER contributing to a successful judgement of the tribunal by *"securing discovery of evidence, preserving the parties' rights, preventing self-help, safeguarding the awards, eventual implementation and generally keeping the peace"*.[1]

ICSID tribunals are also familiar with this incident due to various requests for provisional measures in recent years. After the amendments in 2006, (to) ICSID's rules included revisions regarding to provisional measures, the relief mechanism of ICSID became much more likely for parties to obtain them in a timely and effective way.[2] However the ICSID Convention and Rules regarding investor-state arbitration requires a clear and solid statement of the parties addressing their consent in order to issue a provisional recommendation.

Furthermore, the ICSID Convention and Rules do not indicate the types of these measures clearlyso we have to look to the practice of arbitral tribunals based on their discretion which is oriented and formed by the nature and facts of the related cases.[3] In the light of tribunals' decisions on these provisions we can speak of that there are two types of reliefs. The first one is meaningful reliefs such as securing the existence of evidences, costs or attendancy of witnesses, etc. in order to provide an efficient arbitral procedure, while the second one aims parties' protection, namely the preservation of the status quo.[4]

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1 C. H. Schreuer, The ICSID Convention: A Commentary, 2nd ed., (Cambridge: Cambridge University Press, 2009) p. 759.

2 See infra para. 9.

3 L. Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Offer*, in International Investment Law for the 21st Century: Essays in Honour of ChristophSchreuer, (C. Binder, U. Kriebaum, A. Reinisch, S. Wittich, ed., New York: Oxford University Press, 2009), p. 171.

4 L. Y. Fortier and O. Renault, *Interim Measures: An Arbitrator's Provisional Views*, Fordham Law School Conference on International arbitration and Mediation, USA, 2008, (New York: MartinusNijhoff Publishers, 2008), p. 9.

Due to its important efficacies providing an expedited procedure to protect the investors' alleged rights from Host states' prejudicial conducts, there are a large number of provisional measures applications in ICSID awards[5] among which there are quite a few cases filed by companies in energy business.

The aim of this paper is to analyse examples of provisional measures relating to energy disputes in order to present the types of requests of provisional measures in energy related investment arbitration cases. Before doing this, the legal ground of ICSID tribunals' power to recommend provisional measures will first briefly addressed and the pre-conditions of these provisional measures will be examined. Finally common grounds relied on by International Centre for Settlement of Investment Disputes (ICSID) tribunals to recommend parties provisional measures will be presented.

2. THE POWER OF ICSID TRIBUNALS TO RECOMMEND PROVISIONAL MEASURES

The nature and scope of ICSID tribunals' powers with regard to provisional measures stem from two provisions, namely Article 47 of the ICSID Convention and ICSID Arbitration Rule 39. Article 47 of the ICSID Convention provides that:

"[e]xcept 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".[6]

In other words ICSID tribunals are empowered to recommend any provisional measures in any necessary situation in order to preserve parties' rights here. Although the language here pointing to the tribunals' authority ordering these measures do not seems to be coercive due the word '*recommend*', in reality they are empowered to order provisional measures.[7] This has been recognized by numerous international tribunals, for instance in the case of *Tokios Tokelé the* tribunal stated:

"*It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect*

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5 See for a table of ICSID decisions on provisional measures L. Rees, J. Paulson, N. Blackaby, Guide to ICSID Arbitration, (The Netherlands: Kluwer International, 2011), p. 418-435.

6 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (as amended and effective April 10, 2006), Article 47.

7 Occidental Petroleum Corporation Occidental Exploration and Production Company v The Republic of Ecuador, ICSID Case No. Arb/06/11, Decision on Provisional Measures, 17 August 2007, para. 58.

'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."[8]

Article 47 of the ICSID Convention has further been elaborated on in Arbitration Rule 39 as following:

Provisional Measures

(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.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.[9]

The recent amendments in 2006 made some revision in Rule 39 to enable parties to submit their request for provisional measures following the registration of the dispute with ICSID, for which the parties should wait until the tribunal had been constituted under the old rule.

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[8] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Procedural Order No. 1, 1 July 2003, para. 4.

[9] ICSID Rules of Procedure for Arbitration Proceedings, (as amended and effective April 10, 2006), Rule 39.

Even in the case of a jurisdictional objection, provisional measures may be granted before the tribunal decides on its own jurisdiction. Thus a *prima facie* showing of jurisdiction might be enough for tribunals for issuing these measures. The basis of this practice lies in Rule 36(3) of ICSID Convention regulating "*The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.*"[10] In other words ICSID provides a preliminary examination of jurisdiction.[11]

While the Rule 39 (2) indicates that the tribunals '*shall give priority to the consideration of a request*', the following paragraph entitles the tribunal to grant provisional measures on its own initiative. As rule 39 (1) states, a party can introduce its provisional measures request at any time after the institution of the arbitral proceedings, even though there is an objection against the jurisdiction of the tribunal.[12]

Arbitration Rule 39(5) stipulates that to apply local authorities for provisional measures, parties have to express their intention for this. In other words this provision has a limiting effect on the capacity of domestic courts ordering provisional measures by requiring a specific agreement from the parties on this issue.[13] Thus provisional measures are preserving the exclusivity of ICSID arbitration to the exhaustion of local administrative or judicial remedies as defined in Article 26 of the ICSID Convention.[14]

3. THE PRE-CONDITIONS FORICSID TRIBUNALS TO GRANT PROVISIONAL MEASURES

According to Article 47 of the ICSID Convention the circumstances under which provisional measures are required must clearly demonstrate the fact that these measures are necessary to preserve a party's rights and urgent to avoid irreparable harm.[15] In other words, there are two main issues leading a tribunal to grant provisional measures, a) the existence of a right to be preserved and b) circumstances of necessity and urgency to avoid irreparable harm.[16]

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[10] *See supra* para. 7, Article 36(3).

[11] *See* Schreuer, *supra* note 1, p. 771-772.

[12] *See id.*, p. 771.

[13] *See* Malintoppi, *supra* note 3, p. 160.

[14] Plama Consortium Limited v Republic of Bulgaria, ICSID Case No. ARB/03/24, Order, 6 September 2005, para. 38.

[15] *See* Occidental v Ecuador, *supra* note 7, para. 59.

[16] *See id.*, para 61

However, the way how these issues will be determined is open to interpretation, since it is not mentioned in the text of the ICSID Convention. The tribunal in Railroad Development v. Guatemala case determined the standard to be applied here as reasonableness, on which the tribunal will decide in the light of all the circumstances of the requests by considering the rights to be protected and their predisposition to irreversible damage.[17]

3.1. Necessity and Urgency

As the tribunal in Plama v Bulgaria states, "*the need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage*".[18]

The ambits of "urgency" are determined due to the circumstances of the related case and on the type of measure which is requested. This will generally point the urgency in the traditional sense which refers to a need in a short space of time, whereas in some cases the only time limit pertain to that the measure be granted before an award.[19]

The significance of the requested type of measure appears in *Railroad Development Corporation v. Guatemala* case, where the Claimant requested preserving "*all documents*" in the Respondent's possession arguing that they may get lost due to a change in Guatemala's government. The tribunal here tried to answer the question about the limits of the protection of documents and concluded that an objective consideration of the facts will enable the tribunal to determine this issue by examining whether the request is necessary and urgent and hold that the claimant had failed to prove these circumstances, since the claimant has only presented a disorder found in government offices, which couldn't justify the recommendation of provisional measures for preservation of "*all documents*" in tribunal's view and wasn't enough to "*place an unfair burden on the Government because of its excessive breadth*".[20]

Furthermore, as a general principle the burden of proving the necessity of these measures falls on the party making the application as presented by the tribunal in Maffezini v. Spain.[21]

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[17] Railroad Development Corporation v Republic of Guatemala, ICSID Case No. Arb/07/23, Decision on Provisional Measures, 15 October 2008, para. 34.

[18] *See* Plama v Bulgaria, *supra* note 14, para. 38, *Occidental v Ecuador*, *supra* note 7, para 59.

[19] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. Arb/05/22, Procedural Order N° 1, para. 76.

[20] *See* Railroad v Guatemala, *supra* note 17, para. 34-36.

[21] Emilio Agustín Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order N° 2, 28 October 1999, para 10.

3.2. Irreparable Harm

With 'provisional measures'it is not aimed to protect against any potential or hypothetical harm. An imminent harm, which may affect the requesting party, must be vindicated.[22] Furthermore, the tribunals adopt different approaches about essence of this harm. As can be seen from the following examples, while tribunals grant provisional measures to avoid irreparable harm, they prefer to award damages to compensate the alleged prejudices.

Thus, in *Plama v. Bulgaria*, the Tribunal stated that provisional measures must be necessary to "avoid the occurrence of irreparable harm or damage"[23]. Since the claimant in the present case is seeking only monetary damages for breaches of respondent's obligations under the Energy Charter Treaty and this can be compensated for by damages, the tribunal accepts that harm is not irreparable here.[24]

On the other hand, in *Burlington v. Ecuador*, the Tribunal found a risk of a potential destruction of an on-going investment therefore it ordered establishment of an escrow account to protect the investment.[25] Parallel to the tribunal's decision in *Perenco v. Ecuador* case, where also an escrow account was established to protect claimant from suffering "extensive seizure of its oil production or other assets".[26]

Thus, ICSID Tribunals make a distinction between[27]:

(a) situations where the alleged loss subject to the arbitration can be compensated by awarding damages; and

(b) situations where there is a serious risk of harm regarding to the on-going investment.

Furthermore, provisional measures may not be granted when they would cause irreparable harm to the rights of the opposite party,[28] otherwise it would

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22 *See* Occidental v Ecuador, *supra* note 7, para. 89.

23 *See* Plama v. Bulgaria, *supra* note 14, para. 38.

24 *See id.*, para. 46.

25 Burlington Resources Inc. and others v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para 83.

26 Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador, (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, para 60 and 63

27 Cemex Caracas Investments B. V. and Cemex Caracas Ii Investments B. V. v Bolivarian Republic of Venezuela, ICSID Case No. Arb/08/15, Decision on Provisional Measures, 03 March 2010, para. 55.

28 *See* Occidental v Ecuador, *supra* note 7, para. 93.

conflict with the rule indicating "*to preserve the respective rights of either party*"[29].

3.3. Existing Right

When a tribunal may face with a provisional measure request, it only considers the nature of the alleged right, not its existence.[30] According to the tribunal in Occidental case the right to be preserved which is subject to the provisional measure request, only has to be alleged as a 'theoretically existing right'[31]. In order to define the theoretically existing right, the tribunal refers to Maffezini case, where it was clarified as the right existing 'at the time of the request and not to be created in the future'[32].

Furthermore, this 'theoretically existing right' must present Claimants' legally protected interests, rather than a simple. Therefore, in order to test whether or not claimants' requests meet these criteria, the tribunal has to check Claimant's ability to invoke theoretically the mentioned rights.[33]

4. PROVISIONAL MEASURES REQUESTS AND ICSID DECISIONS IN ENERGY-RELATED CASES

Recent years have witnessed an increasing number of arbitration procedures involving energy companies' claims. This trend also reflected in demands of provisional measures. This chapter will address these cases by classifying them according to the types of the request made:

4.1. Non-Aggravation of the Dispute

Occidental v Ecuador

The matter of dispute here is about the termination of participation contracts regulating Claimant's exploration and exploitation activities in Amazon Region. Claimant described its argumentations for its rights shall be protected in two parts: Firstly, their contractual right to carry out exploration and exploitation activities on Block 15 and secondly their right to "prevent further aggravation of the dispute"[34]. In order to protect these rights, the claimant required a "third-party transfer notice" enabling them to be informed

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[29] Article 47 of the ICSID Convention

[30] *See* Occidental v Ecuador, *supra* note 7,, para 63.

[31] *See id.*, para 64.

[32] *See* Maffezini v Spain, *supra* note 21, para 13.

[33] *See Occidental v Ecuador*, supra note 7, para 65.

[34] *See id.*, para 62.

in advance about the intention of the government to award the block subject to dispute to a third party and obtainment of necessary precautions to be credited the oil produced from the said Block and shipped through the OCP pipeline towards Claimant's ship-or-pay obligations.[35] However these requests are rejected by the tribunal, since according to the tribunal the Claimant could not present sufficient evidence regarding to the presence of its right for specific performance containing restoration of Claimant's operatorship of Block 15 and benefits provided by this operatorship[36]. Besides claimant, respondent and the tribunal agreed on the fact that economic losses can be compensated by money damages, so the harm in question does not create any necessity or urgency to grant a provisional measure.[37]

4.2. Security for Cost

There is a common approach among the tribunals regarding to avoid granting the provisional measures involving security of cost. Malintoppi explains this phenomenon as a common perception of tribunals that any decision in this direction could be perceived as interference to the decision on the merits.[38]

Tanzania Electric Supply Company Limited (TANESCO) v Independent Power Tanzania Limited (IPTL)

In this case a Tanzanian public utility called Tanzania Electric Supply Company Limited (TANESCO) entered into a Power Purchase Agreement (PPA) with Independent Power Tanzania Limited (IPTL). Due to the terms of this agreement IPTL was entitled to construct, operate, maintain and own an electric-generating facility in Tanzania and sell electricity to TANESCO for 20 years, once the facility was established. However this agreement was terminated by TANESCO due to some emerging disputes, before the facility's construction had been finished.[39] Therefore IPTL requested from the tribunal provisional measures claiming to operate the facility and got capacity payments from the respondent till the tribunal reach an award.[40]

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35 *See id., para 26 and 30-32.*

36 *See id., para 22 and 86.*

37 *See id., para 98-99.*

38 *See* Malintoppi, *supra* note 3, p. 169.

39 J. Crawford, K. Lee and E. Lauterpacht, ICSID Reports, (Cambridge: Cambridge University Press, 2005), p. 221.

40 Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited, ICSID Case No ARB/98/8, Decision on Provisional Measures, 20 December 1999, attached as Appendix A to the Final Award on 22 June 2001, para. 3.

IPTL asserted that here is a risk for it to lose its enjoyed rights under PPA, since the lenders to IPTL may foreclose on the loan security and IPTL will lose facility's ownership and in addition to that by the time of the tribunal's final award, TANESCO may not be financially capable with the consequences of the award.[41] The tribunal could not find any evidence regarding to the alleged risk. In addition although in tribunal's view Rule 39 may allow the tribunals to order wholly or partly performance of a contract, tribunal did not agree that the request here is within the scope of Rule 39. In other words the tribunal adopts the view that provisional measures should not be recommended to secure the claim.[42]

RSM Production Corporation and others v Government of Grenada

Here the Claimant alleged that Granada did not stick to the agreement, which was signed by the parties in 1996 establishing a long-term arrangement for the exploration and extraction of potential oil and gas reserves. Under the terms and conditions of the agreement RSM was entitled to apply for an exploration license within 90 days of signing the agreement and Grenada was obligated to award this license. However, RSM's exploration application was denied by Grenada, which also terminated the contract and so RSM submitted a request for ICSID arbitration. The tribunal decided that Grenada did not breach the agreement, which leads RSM for annulment of this prior award and to refuse to pay advance on costs asked by the tribunal.[43] This act aroused Grenada to apply the tribunal for security for costs, since it concerned about that RSM will not pay the costs in the case of the tribunal decision for Granada's favor by the end of arbitral proceedings.[44] Besides RSM's disobedience the payment Granada pointed for its arguments the RSM's CEO's attempt to hide his personal assets from his creditors a decade ago.[45]

However the tribunal followed previous tribunal's decisions requiring justification of extreme circumstances by the applicant and denied Granada's application since it could prove neither RSM's inability nor its unwillingness to pay possible costs of the award[46]

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41 *See id.*, para 13 and 18.

42 *See id.*, para 14-16.

43 RSM Production Cooperation v. Government of Grenada, ICSID Case No. ARB/10/06, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, para. 2.

44 *See id.*, para. 3. 2.

45 *See id*, para. 5. 23.

46 *See id.*, para. 5. 21.

Libananco v. Republic of Turkey

The Claimant here is a concession holder operating ÇEAŞ and Kepez and has the right to perform electricity production, transmission, distribution and marketing functions in Turkey. This concession holder commenced ICSID arbitration proceedings following Turkish government's seizure of its assets and cancellation of its Concession. The Respondent applied for a security cost to preserve its rights in order to enforce a probable award for cost and argues that Libananco does not have an ability to pay this cost since it is a shell company without assets.[47] However the tribunal rejected this claim due to its dissatisfaction with Respondent's argument and stated that considering the standard practice for ICSID Tribunals making an award of costs against a losing Partyon merits, at this stage it is too early to prejudge such an issue.[48]

4.3. Suspension of Parallel Proceedings

***Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24**

Plama had filed a request for provisional measures in order to insulate its investments subject to the arbitration from all pending insolvency proceedings before the Bulgarian Courts and Bulgarian authorities. Plama claims in its application that it can no longer operate its refinery and keep its investment safe, if its investment vehicle Nova Plama liquidated and its inventory converted to cash due to the domestic courts remedies.

The tribunal admitted that the present proceedings may generally aggravate the dispute between the parties. However, in the tribunal's view if the right to non-aggravation of the dispute give rise to actions which would make the dispute resolution for the tribunal more difficult, it could not order provisional measures.[49]

There are two reasons which led the tribunal to reach this conclusion. First, some of these proceedings were claims of third persons against Plama and could not affect the outcome of the tribunal. The rest was belonging to some Bulgarian government agencies and therefore the tribunal seems to be able at the first stage ordering to discontinue the proceedings against Nova Plama, but subjects of the proceedings in Bulgaria were tax and state aid claims, which were not among claims before the tribunal. In other words in the first group of

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[47] Libananco Holdings Co. v Republic of Turkey, (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 28 June 2008, para. 31-32.

[48] *See id.*, para. 59.

[49] *See* Plama v. Bulgaria, *supra* note 14, para. 45.

cases the parties and causes of action were different, whereas in the second one claims are.[50]

5. CONCLUSION

The main structure of provisional measures under ICSID arbitration relies on Article 47 of the ICSID convention allowing the tribunals depending on the circumstances to recommend any provisional measures to protect parties' rights. Furthermore, ICSID Rule 39 sheds light on what kind of a procedural way will the tribunals follow to grant these measures. These rules also give us a precise idea about some characteristic features of provisional orders. As a beginning, provisional measures are mandatory in ICSID arbitration. Therefore, except the parties state their consent for domestic or local authorities to issue these reliefs, the tribunal will have jurisdiction to order provisional measures and despite the language of ICSID rules, which indicates that tribunals may 'recommend' them, these measures will be binding on all parties.

Furthermore, although ICSID rules do not grant a coercive authority to tribunals to enforce provisional measures against the disobeyer party, the tribunal as in *MINE* v. *Guinea* stated "*the Tribunal would take into account in its award the effects of any noncompliance by MINE with its recommendations*"[51]

Besides tribunals are allowed to take initiative, even if there is not any request in this direction, for granting provisional measures based upon the circumstances and to amend them[52]. This authority can also be used before the tribunals have ruled on their jurisdiction, namely in the case of jurisdictional objections. In other words this issue is dealt prima facia within the tribunal's jurisdiction, as the tribunal indicated in Occidental case '*without prejudging the future finding on the merits*'.[53]

The purpose of provisional measures is to protectparties' alleged rights whose existence might be imperilled without these measures.[54] However, it does not mean that these rights have to be proven as a pre-requisite to obtain provisional measures. The tribunal only deals with the nature of the rights claimed, not with their actual existence, which will be considered later on at the merit phase[55]. Furthermore, as the tribunal in Plama case addressed, the rights

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50 *See* Plama v. Bulgaria, *supra* note 14, para. 43-44.

51 *See* Schreuer, *supra* note 1, p. 768.

52 See *supra* note 9, ICSID Rule 39 (3).

53 *See* Occidental v Ecuador, *supra* note 7, para 55 and para 102.

54 *See id.*,, para 60.

55 *See id.*, para 63.

regarding to provisional measures must reasonably be in connection with the alleged rights in the dispute at the tribunal[56].

Another prominent feature of provisional measures granted by ICSID tribunals is that they show a certain degree of consistency.[57] They are generally issued to achieve three goals, namely maintenance of the status quo, assistance of the progress of arbitral tribunal and the enforcement of final award[58]. However, by serving these purposes the tribunals are certainly reluctant to grant provisional measures giving to one of the parties more rights than it ever possessed or have title to claim. In other words, the tribunals avoid improving the status of the claimant before the conclusion of the final award[59]. Besides these measures can only be granted in the presence of an existing right and in situations of necessity and urgency in order to protect the parties' rights, which are insecure.

Due to the cases examined above we can classify energy related ICSID cases according to the types of the requests made, which tend to fall into three main categories, namely non-aggravation of the dispute, security of cost and suspension of parallel proceedings.

It can be deduced from the parties' requests and measures granted in these cases, that requests regarding *non-aggravation of the dispute* and *suspension of parallel proceedings* referring similar reference points are more accurate, whereas any criteria has not been determined yet to demonstrate a test for unwillingness or for the degree of impecuniosity to comply with cost awards, although the tribunals agree that Rule 39 entitle them to grant measures in the form of security of costs.

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[56] *See* Plama v. Bulgaria, *supra* note 14, para. 40.

[57] *See* Malintoppi, *supra* note 3, p. 158.

[58] *See* L. Y. Fortier and O. Renault, *supra* note 4., p. 9.

[59] Phoenix Action v Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, para 37.

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Uluslararası Kararlar

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