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Summary of Young-OGEMID Hot Topic Discussion No. 2: "Empirical Study - Provisional Measures in Investor-State Arbitration" (February 2023)

by R. Kaur Bali

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Summary of Young-OGEMID Hot Topic Discussion No. 2: "Empirical Study - Provisional Measures in Investor-State Arbitration" (February 2023)

By Ruchira Kaur Bali[*]

Topic: *Empirical study - Provisional measures in investor-state arbitration*

Discussants: Dr. Prof. Yarik Kryvoi and Mr. Ivan Philippov

Moderator: Dr. S.I Strong

Hot Topic Reporter:

Executive Summary

Young OGEMID organized a 3-day virtual hot-topic discussion on the 2023 collaborative report between BIICL and White & Case report on the study of provisional measures issued by ICSID tribunals.[1]

The study consists of three parts, summarising key new developments that have occurred since a 2019 report on provisional measures in investor-state arbitration, exploring procedural efficiency in the resolution of requests for provisional measures, and updating the 2019 report's findings in accordance with the newly available cases. Two of the authors of the report, ***Professor Yarik Kryvoi*** *and* ***Ivan Philippov****, were present during the discussion to answer questions from Young-OGEMID members.*

These provisional measures have been the source of debate and contestations owing to various reasons including the costs involved, controversies regarding virtual versus real-time proceedings, and standards and burden of proof involved, etc. This hot-topic debate discussed how the current study on ISDS Measures builds on the 2019 report, the entirety of the study sponsored by White & Case LLP.

Professor Yarik Kryvoi *is the Senior Fellow in International Economic Law and Director of the Investment Treaty Forum at BIICL in London. He is also an Of Counsel at Keidan Harrisson in London. Before moving to academia, he practised law with Freshfields Bruckhaus Deringer in London, Morgan Lewis & Bockius in Washington, DC and Baker & McKenzie in Saint Petersburg.*

Ivan Philippov *is a solicitor of England and Wales and associate of the White & Case International Arbitration Group, based in London. Ivan has a broad practice in complex cross-border arbitration disputes in Europe, Latin America and the Middle East. Prior to joining White & Case, Ivan worked as an intern at the Arbitration Institute of the Stockholm Chamber of Commerce. Ivan is committed to pro bono work and was awarded the Firm's Pro Bono*

[*] The author would like to thank the TDM editorial team and reviewers for their assistance in preparing this report.

[1] A copy of the study is available at https://www.biicl.org/publications/empirical-study-provisional-measures-in-investorstate-arbitration-2023 and https://www.whitecase.com/insight-our-thinking/empirical-study-provisional-measures-investor-state-arbitration-2023.

Award in 2021 and 2023. Ivan is also a member of the Steering Committee of Young Investment Treaty Forum, organised under the patronage of BIICL.

Introduction

Dr. S.I Strong introduced the participating authors, **Prof. Yarik Kryvoi** and **Mr. Ivan Philippov**. After thanking the moderator, the authors began discussing the Report.

The Hot Topic Discussion was led by **Prof. Kryvoi:**

He explained how approximately 160 decisions were examined in detail and that they could track main patterns of decision making and most recent trends related to provisional measures in ISDS.

Prof. Kryvoi and Mr. Ivan Philippov also iterated how ICSID and ICSID Additional Facility Rules were revised more significantly over the previous 3 years than in their entire history. Additionally, he noted a notable increase in the number of publicly available decisions on provisional measures. The decisions provide clarity on the criteria used by the tribunals, an understanding of these criteria, the success rate by these applicable arbitration rules and measures intreated for, and the cases most frequently relied upon by the international tribunals.

Prof. Kryvoi & Dr Philippov:

Procedural efficiency: For the first time, this study explores the procedural efficiency of decisions on provisional measures, including the average number of days it takes for the tribunals to issue their decisions. It also shows how the choice of arbitration rules, the party making a request, and various other procedural factors affect the length of proceedings. It further investigates tribunals' decisions on costs, and some of the most recent trends, including the increasing use of the "most provisional" decisions on provisional measures by ICSID tribunals, and recent amendments to the ICSID and ICSID Additional Facility Rules.

Most recent trends: Compared to the findings of the 2019 Report, respondent states have become increasingly willing to file requests for provisional measures, and much more likely to obtain a positive decision from tribunals. The study found no drastic changes in the types of the provisional measures requested by the parties, or the criteria applied by tribunals, except for an increase in the number of requests for the security for costs, and an increase in importance of the criterion of proportionality.

They noted that they hope to update the study on a bi-annual basis to contribute to reflecting and anticipating developments in the field of investor-state arbitration.

Ms. Anne-Marie Doernenburg:

1. **With respect to the statistics you present, you note that tribunals are slightly more likely to grant (or partially grant) provisional measures when there is a hearing. Is there a difference between in-person and virtual hearings?**

2. **Also, you state that tribunals ordinarily issue their decision within 57 to 58 days after a hearing (both for remote or in- person hearings), which would exceed the 30-day deadline in the new ICSID and ICSID AF Arbitration Rules. Do you find**

the new "soft" deadline (Arbitration Rule 12) to be appropriate/useful, considering that certain decisions will regularly take more time?

3. **Finally, on your point below, do you think that the increase in the number of publicly available decisions on provisional measures will help reduce the time for tribunals to issue their decisions on similar questions of law?**

To these interesting queries raised, **Mr. Philippov** replied on behalf of both authors:

1. Their statistics show that in cases involving in-person hearings, tribunals request in 25% of cases, partially granted them in 29% of cases, and rejected them in 46%. They also noted that their statistics for cases engaging remote hearings did not differ significantly – 26% granted, 22% partially granted, 54% rejected, and the only difference being that the tribunals rejected slightly more cases heard virtually. They also found no visible explanation for this difference. However, Mr. Philippov reiterated that it is also significant that the statistics for in-person hearings are much more representative (52 decisions, compared to 23 decisions to remote hearings).

2. The new deadline should hopefully improve statistics for ICSID and ICSID AF tribunals. On average, statistics are even worse for them; they take 68-69 days after their hearings to issue their decisions (57-58 days statistics are for all tribunals). In addition, some types of requests (especially the ones related to the safety of investors) are more urgent than the others (such as security of costs). However, he and Prof. Kryvoi believed that the indicative deadline would assist the parties and tribunals in making the proceedings more efficient. The new provision would create certain expectations for the parties and tribunals. At the very least, it could compel the tribunals to explain their failure to comply with the deadlines. Mr. Philippov emphasized that they will study this in the next iteration of their study.

3. Mr. Philippov stated that while tribunals do not (and indeed should not) treat earlier decisions as legal precedents, they often use them as points of reference when making their decisions. While referring to Chart 3 of their study[2] , he goes on to show how tribunals regularly refer to earlier decisions (with *Occidental v. Ecuador*[3] decision being tribunals' favourite) and other authorities, such as their study published in 2019[4]. While some disagreements persist with regards to the meaning of the criterion of "necessity", the parties that request provisional measures rarely dispute the fact that they need to show that the requested measures are urgent, necessary, and proportional. The opposing parties rarely argue that the tribunal has no authority to issue provisional measures (which was the case in the first decision on provisional measures in *Holiday Inns v Morocco*[5], and some of the other early decisions on provisional measures). The authors hope that their study, which summarises existing practice and makes it more

[2] David Goldberg, Prof. Yarik Kryvoi and Mr. Ivan Philippov, '2023 Empirical Study: Provisional Measures in investor-state arbitration,' BIICL White & Case, (London, 2022).
[3] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, awarded on (5th October 2012).
[4] David Goldberg, Prof. Yarik Kryvoi and Mr. Ivan Philippov, '2019 Empirical Study: Provisional Measures in investor-state arbitration,' BIICL White & Case, (London, 2019).
[5] *Holiday Inns S.A. and Others v. Morocco* ICSID Case No. ARB /72/1, the decision on jurisdiction rendered on (12th May 1974).

accessible to both parties and tribunals, will lead to an even higher degree of uniformity in the field and aid tribunals in issuing their decisions within a shorter period.

Mr. Daniel Pakpahan:

Mr. Pakpahan mentioned that his attention was caught by the section of the study regarding the award of costs in a decision based on provisional measures (p. 15 of the Report). He referred to how out of five cases involving such an award of costs (out of 160 analyzed decisions), none appear to provide reasons on the allocation of costs, apart from stating the tribunal's "discretion" on the most appropriate costs order (Rizzani de Eccher Kuwait[6]).

He continued to state that the ICSID Arbitration Rules 2022[7] suggest that the tribunal may make an interim decision on costs at any time, on its initiative, or at a party's request, and that it shall ensure that all the decisions on costs are reasoned and are part of the award. (Rule 52 paragraphs (3) and (4))[8].

Mr. Pakpahan also noted that the ICSID Rules do not distinguish between interim and final awards requiring that "decisions on costs be reasoned", as reflected in LCIA Rule 28.4[9].

1. **Do you think that this "standard" duty to give reasons in the award of costs, including in interim decisions, will change the trend of costs awarded in the decision on provisional measures?**

   For example, I took a cursory glance into the five cases mentioned in the report, and I did not find any mention that the party requested the arbitrator(s) to make a decision on costs in the provisional measures stage.

2. **Should such a request, if made, be reflected in the decision? Is this likely to affect the time needed to issue such a decision?**

Mr. Philippov, on his and **Prof. Kryvoi's** behalf, replied to an interesting proposition raised by **Mr. Pakpahan** by stating how the question raised is an interesting one in the light of five decisions made under ICSID rules 2006[10], (*Kazmin[11], Rizzani[12] and Dirk Herzig[13]*), ICC 2017[14]

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[6] *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, final award on (15th December 2022).
[7] *ICSID Convention, Regulations, and Rules*, International Centre for Settlement of Investment Disputes, (2022, Washington D.C)
[8] *ICSID Convention, Regulations, and Rules*, International Centre for Settlement of Investment Disputes, (2022, Washington D.C)
[9] London Court of International Arbitration Rules, (effective 1st October 2020), available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>
[10] *ICSID Convention, Regulations and Rules*, International Centre for Settlement of Investment Disputes (Washington D.C, 2006).
[11] *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, decision awarded on (14th October 2020).
[12] *See* n. 8
[13] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35, procedural order rendered on (16th November 2020).
[14] *Rules of Arbitration of the International Chamber of Commerce*, International Chamber of Commerce (in force as of 1st March 2017)

(*SL Mining*[15]) and SCC 2017[16] (*Komaksavia*[17]) rules. They state how, on the one hand, the 2006 ICSID Rules and 2017 ICC Emergency Arbitration Rules[18] do not provide detailed guidance as to how to exercise their discretion to order costs; the 2017 version of SCC Emergency Arbitration rules include slightly more detailed provisions for the issue, requiring the emergency arbitrators to do this, "having regard to the outcome of the case, each party's contribution to efficiency and expeditiousness of the arbitration and any other relevant circumstances."

"As you correctly noted, none of these five tribunals explained their decisions on costs, although this could be sometimes inferred from the tribunal's decision on parties' requests: (i) grant the parties' requests in *Kazmin* and *SL Mining*, and order the losing party to pay the costs of the proceedings; or (ii) dismiss both parties requests or only partially grant a party's request, and order each party to bear their own costs in *Rizzani* (referring to the tribunal's discretion) and *Komaksavia*. The decision in *Dirk Herzig* is the most interesting one as tribunal there both granted respondent's request for security for costs (later reversing it in another decision) and ordered parties to pay their own costs. In most of these cases parties expressly requested tribunals to make an order on costs as part of their request for provisional measures (*see* paras. 12-15 in *Kazmin*, para. 54 in *SL Mining*, para. 73 in *Komaksavia*, para. 47 in *Rizzani*).

It would be interesting to see how new ICSID Rules' requirement for all decisions on costs to reasoned will influence future decisions on provisional measures. In our opinion, it could only further encourage tribunals to postpone their decision on costs to later stage of the proceedings, as they already did in 155/160 of publicly available decisions, out of fear of making any prejudicial statements regarding the parties' procedural conduct / not looking impartial."

Dr. Eva Litina:

1. **As the past three years have seen a significant revision of the ICSID and ICSID Additional Facility (ICSID AF) arbitration rules, on which you provide a very helpful comparative table, I was wondering how this reform will influence the tribunals as compared to the previous practice. The report mentions that there is no publicly available practice under the new ICSID Rules, but I would be curious on your insights.**

Prof. Kryvoi, in responding to **Dr. Litina**'s query, thanked her for raising such an important point. He stated that to the best of their knowledge, there are still no publicly available decisions based on provisional measures under ICSID Rules 2022[19]. According to Prof. Kryvoi, the query and comment raised made sense, as these decisions could only be applied from July 2022 onwards.

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[15] *SL Mining v. Republic of Sierra Leone,* ICSID Case no. ARB/24708/TO

[16] *Arbitration Rules of the Stockholm Chamber of Commerce,* Stockholm Chamber of Commerce (in force as of 1st January 2017).

[17] *Komaksavia Airport Invest v Moldova*, SCC EA 2020/130, emergency award on interim measures rendered on (2nd August 2020).

[18] *Article 29, Rules of International Chamber of Commerce,* International Chamber of Commerce (in force as of 1st March 2017) & APPENDIX V: EMERGENCY ARBITRATOR RULES, *Rules of International Chamber of Commerce,* International Chamber of Commerce (in force as of 1st March 2017).

[19] *ICSID Convention, Regulations and Rules*, International Centre for Settlement of Investment Disputes (Washington D.C, 2022).

In responding further, Prof. Yarik stated that he and Ivan contemplated the following major likely variations in practice governed by the new edition of the Rules:

- **Increase in the number of requests for security for costs**
  The states will likely feel empowered by the dedicated provision granting such security and frequently request it. However, it is unlikely to increase in proportion of granted requests as the standard for granting such requests remains the same. The new provision mostly summarises existing practice. This provision would preclude parties from arguing that the tribunals cannot order security for costs. While tribunals usually dismissed this argument, claimants raised it in most cases.

- **Increase in number of requests for the revision of decisions on provisional measures**
  The new requirement for parties "disclose any material change in the circumstances upon which the tribunal requested provisional measures" will likely encourage parties to request tribunals to revise their decisions. Moreover, the parties can use this obligation to disclose any material change in the circumstances to file an additional request to revise the decision on provisional measures each time they make such disclosure.

- **Higher consistency in tribunals practice**
  While *urgency, necessity, and proportionality* are undoubtedly the most popular criteria for granting provisional measures, they were used in 63%, 60.5 %, and 38% of cases, respectively. Tribunals are now even more likely to rely on these criteria in their decisions (except for the decisions on security for costs) and pay particular attention to the criterion of proportionality, further contributing to their increasing importance.

Prof. Kryvoi backed up this statement through referring to the 2023 study[20] in which the proportionality criterion applied in 38% of cases, in comparison to 30.5% of the cases evaluated in the 2019 study.[21]

He concluded the reply to the interesting comments and queries raised by **Dr. Litina** that hopefully, the revision of the rules would also lead to an increase in the number of publicly available requests for provisional measures, which would allow us to reflect it in the new iterations of our study.

Dr. Piotr Wilinski:

1. **You noticed that - when compared to your 2019 study - there is a rise of applications for security for costs which now are the fourth most sought provisional measures (p.19 of the Report).**

   It seems that the tribunal continues to be reluctant on granting such a measure, but (i) did the trend change since the 2019 study and (ii) what is the current success rate? For some reason I could not find one of your very useful charts that corresponds to this question.

[20] David Goldberg, Prof. Yarik Kryvoi and Mr. Ivan Philippov, '2023 Empirical Study: Provisional Measures in investor-state arbitration,' BIICL White & Case, (London, 2022).
[21] David Goldberg, Prof. Yarik Kryvoi and Mr. Ivan Philippov, '2019 Empirical Study: Provisional Measures in investor-state arbitration,' BIICL White & Case, (London, 2019).

In response to Eva's question, you also noticed that the increase in numbers of application will likely continue taking into account an express ICSID 2022 rule for granting such a measure.

2. **Do you think introduction of this rule will have an effect on non-ICSID procedures (and granting of security for costs)? For example, that this rule will be taken as a point of reference or that more express rules will be introduced. You do mention that lack of an express provision under the UNCITRAL Rules 2010 (p.22 of the Report) did not prevent the tribunals to consider their powers to grant such a measure, however, one may wonder if that is an area where certain institutions may wish to distinguish themselves (one way or another).**

Mr. Philippov, on his and **Professor Kryvoi's** behalf, replied to these questions raised by **Dr. Wilinski,** by stating how there have been significant changes since 2019. He goes on to state how, at the time of their study, only two out of more than 20 tribunals dealt with requests for security for costs granted such request- *RSM v. Saint Lucia*[22] (2 decisions on this issue) and *Garcia Armas v Venezuela*[23]), which was roughly 12-13 % of the cases.

Since then, a total number of 8 tribunals have dealt with this issue in 10 decisions on provisional measures (there were two sets of decisions in *Kazmin*[24] and *Dirk Herzig*[25]). Tribunals granted requests for security of costs in both *Kazmin*[26] and *Dirk Herzig*[27], reversing its second ruling on provisional measures. This puts it at roughly 20% of recent cases; not very high, but slightly higher than before.

They continued to elaborate on how most of the decisions granting security for costs were made under ICSID Rules (we believe that *Garcia Armas*[28] is the only exception), but this does not seem to be of much difference for the tribunals, with both ICSID and UNCITRAL tribunals interchangeably referring to practice under different sets of rules. The inclusion of a dedicated set for costs provisions in the new ICSID Rules[29] may result in some divergence in practice for the tribunals, with both ICSID and UNCITRAL tribunals interchangeably referring to practice under different rules. The inclusion of dedicated provisions on security for costs only further reinforced their authority to grant this type of provisional measures.

Mark Kantor:

1. **Did you come to any views about party compliance with a tribunal's provisional measures? My non-empirical impression has been that tribunals are reluctant to order measures they cannot easily enforce. Your thoughts?**

Mr. Philippov, on his and **Prof. Kryvoi Kryvoi's** behalf, answered queries raised by **Mr. Kantor** by firstly expressing their thanks to him for raising an important question on an

[22] *RSM Production Corporation v Saint Lucia*, ICSID Case No. ARB/12/10
[23] *Manual Garcià et al v. Bolivarian Republic of Venezuela,* PCA Case No. 2016-08
[24] *See* n. 13
[25] *See* n. 15
[26] See n. 13
[27] *See* n. 15
[28] *See* n.38
[29] *ICSID Convention, Regulations and Rules*, International Centre for Settlement of Investment Disputes (Washington D.C, 2022).

important area by affirming how difficult it is to track this issue as provisional measures are rarely addressed in tribunals award (which usually just list them in the procedural summary of the case), or raised in procedural summary in courts.

They also highlighted a problem with compliance with how provisional measures are rarely mentioned in final awards, likely indicating that parties usually comply with the tribunals' orders and recommendations.

"Nova Group v. Romania is an interesting case study showing how such non-compliance with tribunals' decision on provisional measures can happen. There, tribunal recommended respondent to withdraw the transmission of European Arrest Warrant and associated request for extradition submitted to the Home Office of the United Kingdom, and refrain from reissuing or transmitting this or any other European Arrest Warrant or other request for extradition of one of claimant's beneficiaries until the Final Award in this case is rendered (PO 7 dated 29 Mar. 2017). Respondent was unhappy with this outcome and unsuccessfully attempted to request tribunal to reconsider its decision (PO 8 dated 18 Apr. 2017). Respondent, however, did not withdraw the extradition proceedings in English courts, which ruled that claimant's beneficiary should be extradited to Romania (judgments of Westminster Magistrate Court dated 13 Apr. 2018, and of High Court dated 20 Oct. 2020). I understand that extradition proceedings are still ongoing, and claimant's beneficiary has not been extradited from the UK yet."

Mr. Earvin Delgado:

1. **Given that the 2022 ICSID Rules do not have the same provisions as the 2006 version of the Rules which provided that tribunals should issue provisional measures "after giving each party an opportunity of presenting its observations", I was wondering if the trend of "medidas provisionalísimas" or the "most provisional measures" by ICSID tribunals will have more positive or more negative implications in future cases.**

Prof. Kryvoi, in response to the question posed by the Young-OGEMID Regional Rapporteur, noted that the authors of the report expected that the increased flexibility offered by 2022 ICSID Rules[30] could result in increased number of decisions deemed "most provisional" or "interim".

They also hoped such an increase would not have significant negative implications. Therefore, they think that tribunals will avoid issuing decisions on provisional measures before both parties can present their observations on the request. However, one can imagine exceptional situations when acting quickly (exchange of submissions or a hearing) is necessary.

Ms. Victoria Barausova:

1. **In the report you mention that decisions on costs are often postponed to the end of the proceedings. Do you have any information about the extent to which unsuccessful applications for provisional measures were expressly featured in tribunals' reasoning on costs allocation at the end?**

[30] *ICSID Convention, Regulations and Rules*, International Centre for Settlement of Investment Disputes (Washington D.C, 2022).

In response, **Professor Kryvoi** and **Mr. Philippov** explained that this was not currently considered an issue as the study was primarily discussing decision making measures and not the subsequent decisions of tribunals. They did however note that this was something they would be taking on board when compiling their next update, together with the analysis of whether subsequent awards give any information about parties' compliance with the decisions on provisional measure.

Dr. Deyan Draguiev:

I would like to add to the discussion my personal gratitude that you have come up with this very valuable study on the topic. The metrics and statistics on ICSID provisional measures, and provisional measures in arbitration in general, is something so useful and has been missing from the landscape. It is a basis for some important inferences.

Conclusion

Prof. S.I Strong brought the hot topic discussion to a conclusion on the third and final day. She congratulated and thanked Prof. Kryvoi and Mr. Philippov for their efforts in compiling the report and to all the participants who raised insightful questions, deeming it an interesting discussion.