School of International Arbitration, Queen Mary,
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International Arbitration Case Law

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CARATUBE INTERNATIONAL OIL COMPANY LLP V. THE REPUBLIC OF KAZAKHSTAN (ICSID CASE NO. ARB/08/12) DECISION REGARDING CLAIMANT'S APPLICATION FOR PROVISIONAL MEASURES

Case Report by Bingen Amezaga[**]
Edited by Natasha Dupont[***]

A Decision rendered on July 31, 2010, under the USA- Kazakhstan bilateral investment treaty ("BIT") and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal:	Professor Dr. Karl-Heinz Böckstiegel (President), Dr. Gavan Griffith QC, Dr. Kamal Hossain.
Claimant's Counsel:	Ms. Judith Gill QC, Mr. Matthew Gearing, Mr. Jan K. Schaefer, Mr. Anthony Sinclair, Mr. Alexander Thavenot, Ms. Henrietta Jackson-Stops, ALLEN & OVERY LLP.
Defendant's Counsel:	Mr. Peter Wolrich, Mr. Geoffroy Lyonnet, Mr. Galileo Pozzoli, Ms. Gabriela Alvarez Avila, Mr. Askar Moukhitdinov, CURTIS, MALLET-PREVOST, COLT MOSLE LLP.

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1. Facts of the Case

The dispute on the merits of the case refers to the termination by the government of Kazakhstan ("Kazakhstan" or the "Respondent") of Contract no 954 ("the Contract") which granted rights to explore and exploit hydrocarbons in the Baianin District of the Aktobe region ("the contract area") in Kazakhstan.

The Contract, which was originally awarded to Consolidated Contractors Company SAL on 27 May 2002, was later transferred to Caratube International Oil Company LLP[1] ("CIOC" or the "Claimant") pursuant to an amendment dated 26 December 2002.

The Contract granted CIOC exclusive rights of prospection and exploration in the contract area for 5 years, with the possibility of extending this period two times for two years each and, in the event of a commercial discovery during the exploration period, the possibility of obtaining an exclusive license for the commercial exploitation of the oil fields for 25 years[2].

The Contract was extended for two more years according to an amendment of 27 July 2007. However, the Ministry of Energy and Mineral Resources of Kazakhstan ("the Ministry") decided to terminate the Contract by an Order dated January 30 2008. On 1 February 2008 the Ministry sent a communication to CIOC asking for the relinquishment of the contract area.

CIOC refused to leave the contractual area because it considered that the termination was not legally justified and was contrary to the Contract[3].

Moreover, according to CIOC, it was not possible to safely shut off some of the oil fields of the contract area because, due to their particular technical characteristics related with the pressure, there was a risk of damaging the technical conditions of the wells and provoking oil leakages that had caused irrecoverable damage to the environment.

Therefore CIOC kept the control of the contract area and continued extracting limited quantities of oil from the high pressure wells. CIOC also continued to commercialize

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[1] CIOC is a corporation constituted under the laws of Kazakhstan controlled by an US citizen, Mr. Devincci Salah Hourani who holds 92% of the shares; the remaining 8% belongs to Mr. Kassem Omar Abdallah, a Lebanese citizen.

[2] Decision, ¶ 2, p. 32, quoting Claimant's Amended Request for provisional measures, ¶ 7.

[3] Decision, p. 37 quoting Claimant's Amended Request for provisional measures, ¶¶ 25-29.

this residual production because, according to the explanations provided, it did not have the capacity to store any more oil since their reserves were already full[4].

When CIOC failed to comply with the orders of the Kazakhstan government to stop the activity and abandon the oil fields, Kazakhstan initiated civil and criminal proceedings against CIOC, its managers and shareholders, based on the illegal exploitation (exploitation without license) of the contract area.

Claimant asserted that there has been "*a series of protracted, intrusive and burdensome investigations into the affairs of Claimant conducted by various authorities, including the finance police, state prosecutors, the police force, secret services and the tax authorities*" and further stated that *"Claimant's principal shareholder and his family, as well as senior management and employees of Claimant, have also been subjected to personal threats and intimidation*"[5].

On 16 June 2008, Claimant initiated arbitration proceedings against Kazakhstan before ICSID alleging several breaches of the BIT between the USA and Kazakhstan, and seeking compensation for the economic and moral damages suffered.

Claimant presented its first demand for provisional measures to the Arbitral tribunal on 14 April 2009[6].

On 16 April 2009 (the same day of the first session of the Arbitral Tribunal), and 17 April 2009, the agents of the Kazakhstan's Committee of National Security ("KNB") raided Claimant's offices in the cities of Aktobe and Almaty and in the Caratube oil field[7]. During these operations, the authorities of Kazakhstan interrogated CIOC's employees and seized a great volume of Claimant's documents and files, including computers and hard drives, as well as the corporate seals of the company.

On 29 April 2009, Claimant presented an amended request for provisional measures to the Arbitral Tribunal based on the most recent incidents[8].

Taking into account the developments reported by Claimant and his Amended Request for Provisional Measures, the Arbitral Tribunal decided to hold a Hearing to discuss the

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[4] Decision, p. 37 quoting Claimant's Amended Request for provisional measures, ¶ 26.
[5] Decision, p. 7, quoting Claimant's Request for arbitration, ¶ 3.
[6] Decision, ¶ 15.
[7] Decision, ¶19.
[8] Decision, ¶ 22 and ¶ 54.

Provisional Measures in London on 30 July 2009[9]. The Arbitral Tribunal also requested that Respondent present its reply to the request of the Claimant.

During May and July 2009 Claimant denounced new disturbing events against CIOC or its employees, in particular, with reference to the seizure and confiscation of the travel and identity documents of two CIOC's Palestinian overseas workers[10], and regarding the decision of the Kazakh Prosecutor's Office to confiscate all the properties of Mr. Hussam Hourani, the Director of CIOC[11].

The Arbitral Tribunal rendered its Decision on provisional measures the 31st July 2009.

2. The Provisional Measures requested by CIOC (Decision, ¶ 54)

(a) that within 30 days of the date of the Tribunal's order, representatives of Kazakhstan meet with representatives of CIOC at the Contract Area in order to discuss and agree upon the orderly hand-over of the Contract Area;

(b) that within 120 days of the date of the Tribunal's order, or within such other period as the parties may agree, and without prejudice to the parties' claims in this arbitration, Kazakhstan accepts CIOC's relinquishment of the field at Kazakhstan's own expense and risk;

(c) that Kazakhstan takes measures to ensure the preservation of all documents, files, computer disks and all other materials taken from CIOC's offices in Aktobe and Almaty and from the Caratube oilfield since 16 April 2009 and that all such materials, including the corporate seals, are returned to CIOC care of its solicitors, Allen & Overy LLP, within 5 days of the Tribunal's order;

(d) that, in order to avoid an unnecessary aggravation of the dispute, Kazakhstan and all departments, agencies, emanations and other persons for which it is legally responsible stop immediately any harassment of the employees, directors and owners of CIOC, including their families;

(e) that Kazakhstan desists from any conduct which violates the parties' duties of good faith and equality in this arbitration;

(f) that Kazakhstan refrain from taking any other measures in relation to CIOC that

[9] Decision, ¶ 26 on the letter of the Arbitral Tribunal to the parties of 4 May 2009.
[10] Decision, ¶ 28, quoting Claimant's letter of 19 May 2009.
[11] Decision, ¶ 44 quoting Claimant's letter of 6 July 2009.

would aggravate the present dispute; and

(g) that for the duration of these arbitration proceedings, the Kazakh authorities do not act upon any existing criminal complaints against CIOC or file any new complaints arising out of CIOC's continued occupation of the field and activities after 1 February 2008."[12]

3. Legal Issues Discussed in the Decision

(a) Recommendations and not orders (¶ 67)

The Arbitral Tribunal specified that according to Rule 39 of the ICSID Arbitration Rules, the ICSID tribunals are not allowed to order provisional measures but they can only make recommendations.

(b) Mentions in the request for provisional measures(¶ 68)

The Decision recalled that the party requesting provisional measures *"must specify the three aspects mentioned in the last sentence of Rule 39(1)"*. These aspects are: (a) the rights to be preserved, (b) the measures the recommendations of which is requested, and (c) the circumstances that require such measures.

The Arbitral Tribunal considered that these aspects were dealt with in detail by the Parties in the present case.

(c) Relevance of the decisions of other Tribunals (¶¶ 69-74)

The Arbitral Tribunal stated that it considered having a very specific task of: *"applying the relevant provisions of the ICSID Convention and Arbitration Rules and of arriving at the proper meaning to be given to the particular provisions in the context of the present dispute on provisional measures"*.

Nevertheless, the Arbitral Tribunal interpreted that the word "*including*" in the wording of article 32 of the Vienna Convention on the Law of Treaties indicates that beyond the "*preparatory work*" and the "*circumstances of its conclusion*", other supplementary means of interpretation are possible. Therefore, the Arbitral Tribunal expressed that it could

[12] Decision, ¶ 54.

make use of the decisions of other arbitral tribunals as "*supplementary means of interpretation in the sense of Article 32 of the Vienna Convention on the Law of Treaties*"[13].

In any case, the Arbitral Tribunal clarified that the decisions of other tribunals were not binding on the Tribunal.

(d) Burden of proof (¶ 75)

The Arbitral Tribunal affirmed that notwithstanding the fact that it had certain discretion to decide whether it should recommend provisional measures, the burden of proof is on the party which requests the measures.

(e) Equality of arms / Access to evidence (¶¶ 99-104)

The issue of the procedural equality of the parties arose from the Claimant's request (c), to protect and recover the documents of CIOC which were been seized from its offices by Respondent.

The Arbitral tribunal highlighted the *"particular importance of procedural equality between the parties in an arbitration proceeding and that all parties can use and rely on the same evidence"*[14].

However, the Arbitral Tribunal recalled the undertakings assumed by Respondent with respect to the documents and information seized from Claimant:

> *- All documents taken by Respondent shall be preserved by Respondent,*
> *- Respondent will grant to representatives of Claimant access to all documents to which Claimant requests access,*
> *- The Representatives of Claimant may copy any such documents,*
> *- Representatives of Claimant may take such copies out of Kazakhstan to London.*

In light of the above, the Arbitral Tribunal concluded that it was not necessary to issue further recommendations in this regard.

[13] Decision, ¶ 71.
[14] Decision, ¶ 100.

(f) Parties' obligation to conduct the procedure in good faith (¶¶ 117-120)

When deciding the request (d), the Arbitral Tribunal affirmed that the parties have an obligation to conduct the procedure in good faith.

The Arbitral Tribunal reminded Respondent of the basic procedural duties of the parties to an ICSID arbitration in view of the measures taken by several of its authorities after the commencement of the arbitral proceedings—in particular the raid of Claimant's offices and the seizure of documents the same day the Tribunal held the first session.

At the end, the Arbitral Tribunal did not expressly make the recommendations requested under (d) to (f), but stated for the record that *"the Parties have an obligation to conduct the procedure in good faith and […] this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other Party"* [15].

(g) Preservation of the status quo and no aggravation of the dispute (¶ 127)

There was a discussion between the Parties about whether the threat of "*irreparable harm*" was a necessary requirement to recommend provisional measures[16] or if it was sufficient that the requested measures were directed to preserve the *status quo* of the Party[17].

When dealing with request (f), The Arbitral Tribunal noted that it agreed with the Tribunal in the case *Burlington*, which held that *"the right to preserve the status quo and of not to aggravate the dispute was well established since the case Electricity Company of Sofia and Bulgaria"*[18].

(h) Sovereign rights and international responsibility of States (¶ 118)

The Arbitral Tribunal pointed out that even if the States had the sovereign right to apply and enforce their laws inside their territories, States are also bound by international law. "*No state may rely on its national law as a justification to breach its duties under public international law"*[19].

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[15] Decision, ¶ 120.
[16] Decision, ¶ 51 quoting Hearing tr. ¶¶ 50-53.
[17] Decision, ¶ 60 quoting Claimant's Closing statements on the Hearing.
[18] Decision, ¶ 127 referring to *Burlington v. Ecuador*, Procedural Order n° 1, ¶ 62.
[19] Decision, ¶ 118.

The Arbitral Tribunal further recalled that the procedural duties arising from the ICSID Convention and the reference thereto in the relevant BIT are part of international law.

(i) Attribution (¶ 118)

The Arbitral Tribunal affirmed the principle of attribution according to which the States are responsible under international law for the acts of all its organs and institutions.

(j) Criminal investigations and provisional measures (¶¶ 134-139)

The Arbitral Tribunal held that criminal investigations and connected State measures adopted required a special consideration. The Tribunal also acknowledged that the right to implement and enforce its national law on its own territory was "*one of the most obvious and undisputed parts of the sovereign rights of the States"*[20].

Nevertheless, the Arbitral Tribunal considered that the language of article 47 of ICSID Convention and Rule 39 authorizing the Tribunal to recommend provisional measures is very broad and *"does not give any indication that any specific state action must be excluded from the scope of possible provisional measures"*[21].

The Arbitral Tribunal expressed its disagreement with the *"strict approach which seems to have been taken by the Tribunal in the SGS decision"*[22]. Instead, the Tribunal followed the approach taken in *Tokios Tokelés*[23] and concluded that *"this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings"*.

Nonetheless, the Arbitral Tribunal also agreed with the Tribunal in *Tokios Tokelés* that it was necessary to overcome a particularly high threshold before an ICSID tribunal could recommend provisional measures on criminal investigations conducted by a State[24]. In the present case,this threshold was not overcome.

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[20] Decision, ¶ 135.

[21] Decision, ¶ 136.

[22] Decision, ¶ 136, referring to *SGS v. Pakistan* Procedural Order no 2, of 16 October 2002. In this case, the Tribunal considered that it could not *"enjoin a State from conducting the normal process of criminal, administrative and civil justice within its own territory*".

[23] Decision, ¶ 136, referring to *Tokios Tokelés v. Ukraine* Procedural Orders nos 1 and 3.

[24] Decision, ¶137, referring to *Tokios Tokelés v. Ukraine*, Procedural Order no 3, ¶¶ 12-13.

(k) A threatened right that should be preserved (¶ 139)

Regarding request (g), the Arbitral Tribunal decided that the Respondent did not prove that its right to continue the ICSID arbitration was threatened by the criminal investigation.

(l) Claims for damages in the merits (¶ 139)

The Arbitral Tribunal recognized that of the ongoing criminal proceedings by Kazakhstan could potentially affect Claimant's substantive rights. However, the Arbitral Tribunal held that the future connected damages caused "*may be claimed, examined and decided later in this case in the procedure on the merits"*, as the Claimant did not request specific performance but monetary compensation.

(m) Duty to not prejudge on the merits (¶ 139)

Because Claimant was seeking compensation related to the alleged conduct of the Respondent, the Arbitral Tribunal noted that if it were to recommend provisional measures directed to stop the criminal proceedings it could have pre-decide the claim on damages.

This same fact showed that there was no urgency to adopt provisional measures.

4. Decision

The Arbitral Tribunal declined Claimant's request for provisional measures.

Regarding the requests (a) and (b), the Arbitral Tribunal noted that the meeting requested in (a) has already been held, and that Parties were in negotiations to find an agreement on handing-over of the contract area. Therefore the Arbitral Tribunal found that there was no need to recommend these measures.

Regarding Claimant's request (c), the Arbitral Tribunal, recalled the undertakings assumed by Respondent and held that it was not necessary to issue any further recommendation.

Regarding Claimant's requests (d), (e) and (f), the Arbitral Tribunal confirmed that the Parties have an obligation to conduct the procedure in good faith. This obligation included a duty to avoid any unnecessary aggravation of the dispute and harassment of

the other Party.

Finally, regarding request (g), the Arbitral Tribunal did not recommend provisional measures concerning the criminal investigation conducted by Respondent, but specified that this was without prejudice to any connected damages claim that the Claimant could raise on the merits.