Annex LA-13

modify or revoke them.\footnote{See also Note D to Arbitration Rule 39 of 1968, 1 ICSID Reports 100; History, Vol. II, p. 814. See also 
Tokios Tokeles v. Ukraine, Procedural Order No. 1, 1 July 2003, para. 5.} 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.

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

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

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.\footnote{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.}

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”.\footnote{City Oriente v. Ecuador, Decision on Revocation of Provisional Measures, 13 May 2008, paras. 1, 78, 95, 96.}

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.\footnote{This passage contained in the First Edition of this Commentary is quoted with approval in Biwater Gaujv. Tanzania, Procedural Order No. 1, 31 March 2006, para. 68.}
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.\(^{100}\)

In *Tanzania Electric v. ITPL*, 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.\(^{101}\)

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.\(^{102}\)

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.\(^{104}\)

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.\(^{106}\)

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105 *Biwater Gauff v. Tanzania*, Procedural Order No. 1, 31 March 2006, para. 30. See also paras. 33, 44–54, 60.
the particular case, the Tribunal concluded that the requirements of necessity and urgency were met, for the following reasons:

[T]he former because of the potential need for the evidence in question, and the latter because there is a need for such evidence to be preserved before the proceedings progress any further (e.g. to enable each party properly to plead their respective cases). 69

The Tribunal in Saipem v. Bangladesh confirmed that Art. 47 requires "that the requested measure be both necessary and urgent". It found that pending litigation for the encashment of a warranty bond meant that these conditions were met. On the other hand, there was no necessity and urgency with respect to the return of a retention money. 70

The Tribunal in Occidental v. Ecuador also recalled the well-established rule that provisional measures should only be granted in situations of necessity and urgency to avoid irreparable harm. 71 The Occidental Tribunal relied mainly on the case law of the International Court of Justice and cited the Aegean Sea Continental Shelf case for the premise that a provisional measure is necessary where the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked". 72 The Tribunal mentioned another ICJ precedent, the Passage through the Great Belt case, 73 for the proposition that "a measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is given". The Tribunal also referred to the Maffezini case for its elaboration of the meaning of an "existing right", 74 or a right existing at the time of the request, and concluded that,

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. 75

The Occidental Tribunal added that the mere possibility of future harm was not sufficient:

Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather they are meant to protect the requesting party from imminent harm. 76

The Tribunal was convinced that in the case before it there was no risk of irreparable or imminent harm which could justify the request for provisional measures sought by the Claimants. 77

107 Ibid., para. 86.
110 Aegean Sea Continental Shelf Case (Greece v. Turkey), Order, 11 September 1976, ICJ Reports 1976, p. 11.
111 Case concerning Passage through the Great Belt (Finland v. Denmark), Order, 29 July 1991, ICJ Reports 1991, p. 17.
114 Ibid., para. 89.
115 Ibid., paras. 87-91.