

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

Emilio Agustín Maffezini
Claimant

v.

Kingdom of Spain
Respondent

ICSID Case No. ARB/97/7

PROCEDURAL ORDER N° 2

1. The Kingdom of Spain, the Respondent in this arbitration proceeding, by document dated 3 July 1998, has filed an application for provisional measures. The Claimant by document dated 6 August 1999, requests the Tribunal to dismiss such application.
2. Specifically, the Respondent has requested the Tribunal to require the Claimant to post a guaranty, bond or similar instrument in the amount of the costs expected to be incurred by the Respondent in defending against this action.
3. The Respondent alleges that the claim is worthless and the Claimant's accusations groundless. Accordingly, the Respondent argues, the Claimant will lose this action and should, therefore, be required to reimburse the Respondent for all its costs and expenses incurred in defending against this claim.

4. Provisional measures have been ordered by previous ICSID tribunals [See for example, *Holiday Inns et al. v. Morocco* (ICSID Case No. ARB/72/1), and *MINE v. Guinea* (ICSID Case No. ARB/84/4).] However, the Tribunal has not found any ICSID case where provisional measures were ordered requiring the posting of a guaranty or bond to cover the costs and expenses to be incurred in the future by one of the parties.

5. Of course, the lack of precedent is not necessarily determinative of our competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances.

6. The issue of provisional measures is covered by both the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* and the *Rules of Procedure for Arbitration Proceedings* [Arbitration Rules.]

7. Article 47 of the Convention states;

Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party.

While Rule 39(1) states that

At any time during the proceedings 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.

8. Thus, it is clear that an arbitral tribunal has the authority to recommend provisional measures.¹

¹ The Tribunal notes that the parties did not reserve the right to access national judicial or other authorities for the imposition of provisional remedies as required under Rule 39(5). Accordingly, they have relinquished this right.

9. While there is a semantic difference between the word ‘recommend’ as used in Rule 39 and the word ‘order’ as used elsewhere in the Rules to describe the Tribunal’s ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word “dictación”. The Tribunal does not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order.’

10. 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.

11. We now turn to the Arbitration Rules and the language of the Convention to determine whether the provisional measures sought by the Respondent are capable of being ordered by the Tribunal.

12. Rule 39(1) specifies that a party may request

‘ . . . provisional measures for the preservation of its rights. . . . ’

13. The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.

14. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property.

15. However, in the instant case, we are unable to see what present rights are intended to be preserved. The Respondent alleges that it may be difficult or impossible for it to obtain reimbursement of its legal costs and expenses, *if the Claimant does not prevail and if the Tribunal orders the payment of additional costs and expenses to be paid by the Claimant.*

16. This claim contains several hypothetical situations.

17. One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses it will incur.

18. Obviously, at this point in the proceedings the Tribunal is unable to answer either of these two questions. These must remain, at least for the time being, as hypothetical issues concerning future events. While hypothetical issues are stimulating and academically challenging, they are beyond the ken of an arbitral tribunal determining real issues of fact and law.

19. Respondent alleges that the Claimant's claim is totally without merit, forcing the Respondent to spend unnecessary money on the costs and expenses incurred in defending against the Claimant's claim.

20. Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.

21. A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature.

22. We now turn to the final question before the Tribunal on this issue of provisional measures.

23. Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.

24. In this case, the subject matter in dispute relates to an investment in Spain by an Argentine investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case.

25. It is clear that these are two separate issues. The issue of provisional measures is unrelated to the facts of the dispute before the Tribunal.

26. In this case, after review of the Respondent's and Claimant's briefs, the oral arguments, as well as our review of the applicable law, we find that the Respondent has failed to demonstrate that the imposition of an order for provisional measures is warranted.

27. Accordingly, the Arbitral Tribunal hereby ORDERS the Respondent's application for provisional measures DISMISSED.

Francisco Orrego Vicuña
President of the Tribunal

Date: October 28, 1999.