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Procedural Situations as Self-Standing Rights Justifying the Adoption of Provisional Measures: Insights from Klesch Group v. Germany

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On 23 July 2024, an ICSID arbitral tribunal in the case *Klesch Group v. Germany* issued a decision on provisional measures directing the respondent State to refrain from collecting certain windfall profits tax in order to protect the exclusivity of the ICSID arbitral proceedings and the *status quo* between the parties. This post will summarize and comment on the decision rendered by the Tribunal.

Background

The dispute brought by the Claimant, an energy company, concerns alleged breaches of Article 10 (paragraphs 1, 3, 7 and 12) and/or Article 13 of the Energy Charter Treaty ("ECT") following the adoption by Germany of the Annual Tax Law 2022. Article 40 of this Law implements EU Regulation 1854/2022, which was adopted following the Russian invasion of Ukraine as a response to significant price increases in the electricity market. The Regulation introduced, among other actions, a windfall profits tax (the "solidarity contribution"). With this measure, the EU targeted energy companies that profited from the crisis, with the aim of raising funds to alleviate the cost of high energy prices for consumers.

Certain energy companies, dissatisfied with the reduction in profits caused by the tax, challenged the regulation before the European Court of Justice on various grounds. In October, the Klesch Group and its subsidiaries decided to follow suit and initiate international arbitration proceedings, filing one claim against the EU and two claims against Germany and Denmark, countries where Klesch's oil refineries are subject to the windfall profits taxes. The plaintiffs are primarily seeking declaratory relief, and damages only if the defendants forcefully enforce the tax.

In its decision of 23 July 2024, the Tribunal prohibited Germany from claiming or enforcing the solidarity contribution on revenues above the ceiling price for the year 2022 against Heide Refinery GmbH, a subsidiary of the Klesch Group and a second claimant in the case.

The Decision on Provisional Measures

In their request for interim measures dated 6 June 2024, the Claimants argued that the subject matter of this arbitration is whether the Respondent is entitled under international law to impose a payment obligation on the Claimants. They claimed that the arbitration would be seriously prejudiced if they were required to pay the German solidarity contribution (in the amount of EUR 47.2 million) by 31 July 2024, being subject to financial and criminal sanctions in the event of non-compliance. The applicants therefore requested that the defendant be temporarily enjoined from enforcing measures to collect the tax.

In reaching its decision, the Tribunal applied the usual "test" for the issuance of provisional measures under Article 47 of the ICSID Convention and Rule 47 of the ICSID 2022 Arbitration Rules.

In its decision, in particular, the Tribunal had to assess the existence of a "right" to be protected by interim measures, which was strongly contested by the Respondent. In their application, the Claimants argued that the requested interim measures were necessary to prevent serious harm to their substantive rights under Article 10 of the ECT; their procedural right to preserve the procedural integrity and exclusivity of the arbitration; and their procedural right to maintain the *status quo* and not to have this dispute aggravated. The Tribunal considered sufficient to find that the measures requested were necessary to protect the Claimants' procedural rights.

The Exclusivity of ICSID Proceedings

ICSID caselaw includes, among the rights that fall within the scope of provisional measures, the right embedded in Article 26 of the Convention, establishing the exclusivity of ICSID jurisdiction to the exclusion of any other remedy. Indeed, ICSID arbitration was conceived as an (almost) autonomous and self-contained system which functions in an independent manner from domestic legal frameworks and political intervention by States. Therefore, arbitral tribunals have constantly reaffirmed that "the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision" (see Tokios Tokelés, par. 2), as it is confirmed also by the preparatory work of the Convention (par. 32).

In the case at stake, the Tribunal considered the claimant's request appropriate, since the domestic proceedings in Germany were brought between the same parties and concerned the same subject matter as the arbitration: this situation would create sufficient "irreparable harm" warranting the recommendation of provisional measures. In this sense, it appears that the arbitrators followed previous ICSID decisions (see, for example, Hydro, par. 2.6–2.19). Consequently, ICSID arbitrators have recurrently recommended the suspension of domestic proceedings likely to endanger ICISD tribunals' exclusive jurisdiction.

Maintenance of the Status Quo

Rule 47(1)(b) of the ICSID Arbitration Rules expressly empowers an arbitral tribunal to recommend provisional measures to "maintain or restore the *status quo* pending determination of

the dispute". This power is based on the principle that once a dispute has been submitted to arbitration, the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award, in compliance with the general obligation to conduct the arbitration proceeding in good faith (see Churchill Mining, par. 104). Non-aggravation orders would therefore be justified if there are "states of tension" between the parties that can generate a high level of conflict.

In the case at stake, the Respondent argued that such orders can be considered urgent and necessary only if a payment would definitely cripple the investors' business. Additionally, the Respondent submitted that provisional measures seeking to preserve the *status quo* should not be ordered where a party, if ultimately successful, would be adequately compensated by damages. According to the Tribunal, however, the Claimants ought not to be compelled to pay this solidarity contribution while the arbitration is pending and the Tribunal has not determined this issue, since the contribution is the very subject-matter of the arbitration, together with the legality of the Claimants' obligation to pay the same under the German Annual Tax Act 2022. The arbitrators, in addition, considered that if the investors are required to pay during the arbitration and then seek relief before German domestic courts, this could extend the parties' dispute or prejudice the execution of the award. Thus, the Tribunal found that provisional measures are necessary to preserve the *status quo* of the arbitration, as envisioned by Rule 47(1)(b) of the Arbitration Rules.

Concluding Remarks

With the overall increase in the number of investor-state arbitrations, requests for provisional measures have dramatically boosted. Disputing parties, indeed, consider the availability of effective interim relief vital to the ICSID arbitral process and, after almost 60 years of application of the ICSID Convention, a clear convergence can today be identified.

Indeed, the decision in *Klesch Group v. Germany* appears to follow the ICSID caselaw that consistently considered procedural situations as "self-standing" rights, capable of being protected by provisional measures because they are connected with disputed substantive rights or linked to the party's ability to plead its case and to obtain a fair decision (see Burlington, par. 60). Depending on the facts, therefore, ICSID tribunals have found that the preservation of the *status quo* or the integrity of the proceedings warrant a stay of domestic proceedings, also in criminal cases. However, it must be stressed that the mere existence of proceedings before another judicial body does not threaten the exclusivity of ICSID arbitration or the *status quo* between the parties. In order to constitute a threat, the other proceedings must relate to issues within the arbitral tribunal's competence and purport to decide those issues (see Uniper, par. 73). Suspension, however, is normally ordered only if an "obvious interest in the outcome of the […] proceedings" exists, and, thus, the domestic proceeding might affect the claims presented in the ICSID arbitration (see Millicom, par. 45).

In the case at stake, the Tribunal followed this reasoning and determined that the Respondent would not be disproportionately harmed by an order temporarily enjoining the collection of the tax. Additionally, practical considerations justified such a decision. Arbitrators considered indeed that this order would put the arbitration on the same footing as the proceedings between the Klesch Group and Denmark (pending before the same arbitral tribunal), where the State has voluntarily decided to put the collection of the solidarity contribution on hold pursuant to its own laws, finding

the effect of its decision equally desirable in the arbitration conducted against Germany.

The Tribunal's decision, suspending Klesch Group's tax obligation until the end of the arbitration, sets a significant precedent for other affected parties to potentially oppose payment of such windfall taxes (at least on a provisional basis). However, it remains for the Tribunal to decide on the merits whether Germany – and the other EU Member States who have applied windfall taxes pursuant to EU Regulation 1854/2022– can lawfully impose the solidarity contribution under international law.
