

**THIRD COMMISSION**

**Provisional measures**

**Rapporteur :** Lord Collins of Mapesbury

**FINAL RESOLUTION**

*The Institute of International Law,*

*Considering* that a broad comparison of the law and practice of international and national courts and tribunals indicates that the availability of provisional and protective measures (“provisional measures”) is a consistent element of that law and practice,

*Considering* that the law and practice of national courts are sufficiently uniform so as to give rise to general principles of law within the meaning of Article 38, paragraph (1), letter (c), of the Statute of the International Court of Justice,

*Considering* that the adoption of principles relating to the grant of provisional measures would contribute to the development of international law and national law,

*Adopts* the following guiding principles:

1. It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the *status quo* pending determination of disputes or to preserve the ability to grant final effective relief.<sup>1</sup>

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<sup>1</sup> There may be independent purposes of provisional measures that are expressly provided for in relevant instruments, such as the prevention of serious harm to the marine environment under Article 290, paragraph (1), of the United Nations Convention on the Law of the Sea or the prevention of damage to fish stocks under Article 31, paragraph (2), of the Agreement on Implementation of the Law of the Sea Convention with respect to straddling and highly migratory fish stocks, adopted on 4 August 1995.

2. Provisional measures are available if the applicant for such measures can show that: (a) there is a *prima facie* case on the merits; (b) there is a real risk that irreparable injury will be caused to the rights in dispute before final judgment; (c) the risk of injury to the applicant outweighs the risk of injury to the respondent; and (d) the measures are proportionate to the risks.
3. In cases of special urgency an order may be made without hearing the respondent (*ex parte*), but the respondent is entitled to be notified promptly and to object to the order.
4. International courts and tribunals may make orders aimed at preventing the aggravation of the dispute.
5. In national legal systems an applicant for provisional measures is in principle liable to compensate the party against whom the measures are ordered if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court may order an undertaking or bond or other security to secure the respondent's right to compensation if it is ultimately decided that the order should not have been made.
6. An order for provisional measures made by an international or national court or tribunal is binding. It is subject to modification or discharge by the court or tribunal which made it.
7. An international or national court or tribunal may make such orders if it has *prima facie* jurisdiction over the merits.
8. A national court may make orders for provisional measures in relation to assets or acts within its territory even if a court in another country has jurisdiction over the merits. Such provisional measures may be ordered provided that they do not infringe upon the exclusive jurisdiction of foreign courts.
9. Where provisional measures are ordered by a national court with jurisdiction over the merits and the party to whom the order is addressed has been given notice of the order prior to enforcement, courts of other States should recognize such order and where possible lend their cooperation to enforce it.
10. In commercial arbitration proceedings, an application may be made to the courts of the State of the seat of the tribunal or the court of any other State in support of the effectiveness of provisional measures ordered in such proceedings.
11. These guiding principles are subject to particular provisions contained in the constituent instruments of international courts and tribunals, or in national law, as the case may be.