CHAPTER 11

Content with Consent: SCC Emergency Arbitration in Investor-State Disputes

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§11.01 INTRODUCTION

In the volatile landscape of international investments, both investors and host states occasionally face unforeseen risks that necessitate swift legal action. Emergency arbitration offers a mechanism for obtaining interim relief even before a dispute formally reaches an arbitral tribunal. This form of arbitration is particularly appealing to investors involved in disputes with states, as it protects their investments from being at the mercy of state actions. By providing an immediate forum for addressing urgent issues, emergency arbitration enhances the effectiveness of international arbitration as a means of dispute resolution. This, in turn, strengthens the principles of fairness and justice within the international legal framework.

The mutual consent of the host state and the investor forms the basis for the jurisdiction of any arbitral tribunal. Consent is also crucial for an emergency arbitrator to consider when assessing an investor's application for interim relief in emergency arbitration proceedings. Among the various arbitration rules that facilitate such emergency proceedings are those of the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), and the SCC Arbitration Institute.

Notably, the SCC Rules offer a significant advantage for parties seeking urgent interim relief in investor-state disputes by presuming consent for emergency arbitration.[1] The presumed context reduces ambiguity regarding the availability of emergency

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1. The new Arbitration Rules of the SCC Arbitration Institute (SCC Rules), effective from 1 Jan. 2023, retain the same preamble as the previous version, which was in force since 1 Jan. 2017 ('the

arbitration compared to other rules. This means that there is no need to prove explicit consent to emergency arbitration from the parties involved, provided they have agreed to the SCC Rules. However, some states challenge their consent to emergency arbitration provisions introduced to the SCC Rules, arguing that they did not anticipate the introduction of the emergency arbitration mechanism into the SCC Rules when they signed investment treaties. Despite such arguments made by states, emergency arbitrators consistently regard the reference to the SCC Rules as a 'dynamic reference', automatically applying the latest version of these rules and appendices from the outset of the proceedings. Against this background, this chapter will focus on the emergency arbitration proceedings under the SCC Rules.[2]

Emergency arbitration offers several benefits to investors who seek interim relief in investment disputes. First, it provides a speedy and efficient way to address urgent matters that may otherwise cause irreparable harm or frustrate the enforcement of a future award. Emergency arbitrators are usually appointed within a few days and render their decisions within a few weeks, depending on the applicable rules and the complexity of the case. This contrasts with the lengthier process of constituting a full arbitral tribunal, which may take several months or even years. Second, emergency arbitration enhances the legitimacy and acceptability of the interim measures, as the parties can tailor the scope and nature of the relief sought, depending on their specific needs and circumstances. Third, emergency arbitration may deter the host state from taking further adverse actions against the investor or prompt the state to negotiate a settlement. By invoking emergency arbitration, the investor signals its seriousness and determination to pursue its claim and protect its rights. The host state may then reconsider its position and refrain from aggravating the situation or engage in good faith discussions with the investor to resolve the dispute amicably.

Against this background, this chapter outlines the requirements for emergency relief under the SCC Rules (section §11.02) and discusses the prima facie review standard used by emergency arbitrators (section §11.03). It then examines the extent of states' implied consent (section §11.04) and the criteria for admitting emergency applications (section §11.05). The chapter concludes by detailing the powers of the emergency arbitrator to issue interim measures under the SCC Rules (section §11.06). Overall, it assesses the effectiveness of emergency arbitration as an interim relief mechanism in investor-State disputes (section §11.07).

parties shall be deemed to have agreed that the following rules, or such amended rules, in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an emergency arbitrator, shall be applied unless otherwise agreed by the parties'). The 2007 version of the SCC Rules did not contain the same language.

2. The SCC jurisprudence discussed in this chapter can be accessed either in the public domain or through specialized legal databases.

§11.02 REQUIREMENTS FOR EMERGENCY ARBITRATION PROCEDURE IN INVESTOR-STATE DISPUTES

Emergency arbitration in investor-State disputes serves as an important mechanism in dispute resolution, analogous to interim relief under national procedural laws and standard arbitral proceedings. Emergency arbitration is a mechanism that 'allows a disputing party to apply for urgent interim relief before an arbitration tribunal has been formally constituted.'[3]

A distinctive requirement of emergency arbitration is the need to clearly demonstrate the necessity for immediate relief that cannot be delayed until an arbitral tribunal is constituted. In other words, applicants seeking interim relief from an emergency arbitrator must convincingly demonstrate that it is not feasible to delay relief until an interim award is made – or even until the arbitration tribunal is constituted. Consequently, emergency arbitration provides an essential short-term remedy for parties who cannot afford to wait for the formal constitution of an arbitral tribunal.

Although many international arbitral institutions have revised their rules to include emergency arbitration provisions,[4] only a select few offer investors the option to pursue interim relief through an investment arbitration context. Notably, the key frameworks governing investment arbitration – the ICSID Arbitration Rules[5] and the UNCITRAL Arbitration Rules – lack specific provisions for appointing an emergency arbitrator. In contrast, the SCC Rules, along with the 2017 SIAC Investment Arbitration Rules (SIAC Investment Rules)[6] and the ICC Rules,[7] do incorporate measures for appointing an emergency arbitrator applicable to disputes involving investors and states. However, the SIAC Investment Rules only apply if the parties explicitly agree to use the emergency arbitrator provisions.[8] Meanwhile, the emergency arbitrator provisions in the ICC Rules do not apply to investment arbitration proceedings at all.[9]

3. Lars Markert and Raeesa Rawal, Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?, Journal of International Arbitration, Vol. 37, Issue 1, 2020, p. 132, available at: https://doi.org/10.54648/joia2020005; Cameron Sim, Chapter 7, Emergency Arbitration Meets the Courts, in Stockholm Arbitration Yearbook 2023, pp. 96-98.
4. *See*, *e.g.*, Swiss Rules of International Arbitration (Swiss Rules), 2021, Art. 43 – Emergency relief; ICC Rules of Arbitration, 2021, Art. 29 – Emergency Arbitrator and Appendix V; the LCIA Arbitration Rules, 2020, adopted by the London Court of International Arbitration, Art. 9B – Emergency Arbitrator; the HKIAC Administered Arbitration Rules, 2018, adopted by Hong Kong International Arbitration Centre, Art. 23 – Interim Measures of Protection and Emergency Relief; the International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), 2021, adopted by the American Arbitration Association and its International Centre for Dispute Resolution, Art. 7 – Emergency Measures of Protection.
5. Note: Under the ICSID Rules, a party may seek provisional measures at any time after proceedings have been instituted. If the request is made before the tribunal has been constituted, the Secretary-General fixes a briefing schedule so that the tribunal may consider the request as soon as possible after constitution.
6. SIAC Investment Rules, Rule 27 – Interim and Emergency Interim Relief and Schedule 1 – Emergency Arbitrator.
7. ICC Rules of Arbitration, 2021, Art. 29 – Emergency Arbitrator and Appendix V.
8. SIAC Investment Rules, Schedule 1, para. 1.
9. ICC Rules, Art. 29(6)(c) ('The Emergency Arbitrator Provisions shall not apply if: […] c) the arbitration agreement upon which the application is based arises from a treaty').

Consequently, absent states' explicit consent, the SCC Rules are the only procedural framework available to investors seeking emergency relief.[10]

Under the SCC Rules, a party may apply for the appointment of an emergency arbitrator until the case is referred to an arbitral tribunal.[11] The emergency arbitrator possesses essentially the same powers to grant interim measures as a constituted arbitral tribunal, specifically 'any interim measures it deems appropriate'.[12]

Article 37 of the SCC Rules does not set out the specific requirements that must be satisfied in order to issue interim measures. Swedish law, which frequently serves as the *lex arbitri* set by the SCC Board's decision in emergency arbitration proceedings, also grants the authority to order interim measures.[13] However, neither the SCC Rules nor the Swedish Arbitration Act specify the conditions that must be met for such measures to be granted. Nevertheless, as pointed out by the emergency arbitrator hearing the application brought by Evrobalt LLC against Moldova under the SCC Rules: '[t]hese requirements are […] substantially uncontroversial, whether one applies Swedish law (as the law of the seat of the present Appendix II proceedings) or international law (as the law which governs the Treaty claims asserted by the Claimant). Articles 17-17A of the 2006 UNCITRAL Model Law on International Commercial Arbitration and Article 26 of the UNCITRAL Arbitration Rules 2010 helpfully codify these requirements'.[14]

Among the traditional requirements for granting interim relief, in addition to the criteria of necessity, urgency, and proportionality as outlined in Article 26 of the UNCITRAL Arbitration Rules 2010 cited in *Evrobalt v. Moldova*, the applicant seeking emergency relief must also demonstrate prima facie jurisdiction and a prima facie case on the merits. Emergency arbitrators generally apply these five requirements, which closely mirror those used in interim measure proceedings before domestic courts.[15]

10. SCC Rules, preamble.
11. SCC Rules, Appendix II, Art. 1(1).
12. SCC Rules, Appendix II, Art. 1(2), referring to Art. 37(1)-(3).
13. Swedish Arbitration Act, (The Swedish Code of Statutes (SFS) 1999:116, updated as per SFS 2018:1954, section 25(4).
14. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, para. 33, available at: https://jusmundi.com/fr/document/decision/en-evrobalt-llc-and-kompozit-llc-v-moldova-award-on-emergency-measures-monday-30th-may-2016 (cited further as '*Evrobalt LLC. v. Moldova*'). The claimant filed its application under the 2010 SCC Rules, whereby Art. 32 grants the arbitral tribunal the authority to issue interim measures.
15. *See, e.g.*, *Mohammed Munshi v. The State of Mongolia*, SCC Case No. 2018/007, Award on Emergency Measures, 5 Feb. 2018, para. 40, available at: https://jusmundi.com/fr/document/decision/en-mohammed-munshi-v-mongolia-award-on-emergency-measures-monday-5th-february-2018 (cited further as '*Munshi v. Mongolia*'); *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/130, Emergency Award on Interim Measures, 2 Aug. 2020 para. 77, available at: https://jusmundi.com/en/document/decision/en-avia-invest-v-republic-of-moldova-thursday-23rd-april-2020 (cited further as '*Komaksavia v. Moldova*'); *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/95, Emergency Award on Interim Measures, 14 Jun. 2016, paras 50, 72, 67-77 et seq., available at: https://jusmundi.com/fr/document/decision/en-kompozit-llc-v-republic-of-moldova-emergency-award-on-interim-measures-tuesday-14th-june-2016 (cited further as '*Kompozit v. Moldova*'); *Evrobalt v. Moldova*, para. 17, 33; *TSIKinvest LLC v. Republic of Moldova*, SCC Case No. EA 2014/053, Emergency Decision on Interim Measures, 29 Apr. 2014, paras 61-65 et seq., available at: https://jusmundi.com/fr/document/

First, emergency arbitrators shall be satisfied that they have prima facie jurisdiction.[16] This requirement means that the jurisdictional basis invoked by a party initiating emergency arbitration proceedings shall appear to be reasonably sound. This implies that an investor must meet the underlying treaty's criteria for the arbitral tribunal's jurisdiction over its case, including personal jurisdiction (*ratione personae*), subject-matter jurisdiction (*ratione materiae*), and temporal jurisdiction (*ratione temporis*).

Second, emergency arbitrators shall be satisfied that on a prima facie basis investors have a case, i.e., that on first sight, there is a reasonable possibility that they will succeed on the merits.[17]

Third, investors seeking emergency relief should demonstrate that the requested measures are necessary to prevent serious prejudice to their rights, which otherwise would be at risk of harm. If there is a risk of irreparable or imminent harm to investors or their investments if the sought measures are not granted, the necessity requirement is considered to be met. It is important to note in this context 'irreparable harm' (understood as implying non-compensation by an award of money) has a flexible meaning in international law and investment arbitration in particular.[18] The potential

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decision/en-tsikinvest-llc-v-republic-of-moldova-emergency-decision-tuesday-29th-april-2014 (cited further as '*TSIKinvest v. Moldova*'). Emergency arbitrators operating under other procedural rules applied similar conditions. *See, e.g.*, *Kosmos Energy Sao Tome and Principe v. ERHC Energy (BVI) Limited*, ICC Case No. 23177/TO, Order of Emergency Arbitrator, 13 Nov. 2017, para. 10.3, available at: https://jusmundi.com/en/document/decision/en-kosmos-energy-sao-tome-and-principe-v-erhc-energy-bvi-limited-order-of-emergency-arbitrator-monday-13th-november-2017; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 Sep. 2008, para. 45, available at: https://jusmundi.com/fr/document/decision/en-sergei-paushok-cjsc-golden-east-company-and-cjscvostokneftegaz-company-v-the-government-of-mongolia-order-on-interim-measures-tuesday-2nd-september-2008#decision_5525 (cited further as '*Paushok v. Mongolia*'); *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 Jul. 2017, para. 212, available at: https://jusmundi.com/en/document/decision/en-sergei-viktorovich-pugachev-v-the-russian-federation-interim-award-friday-7th-july-2017 (cited further as '*Pugachev v. Russia*').

16. *Komaksavia v. Moldova*, para. 64; *Munshi v. Mongolia*, para. 33; *Kompozit v. Moldova*, para. 50; *Evrobalt v. Moldova*, para. 17; *TSIKinvest v. Moldova*, para. 61.a.
17. *OAO Gazprom v. The Republic of Lithuania (I)*, SCC Case No. V125/2011, para. 79, available at: https://jusmundi.com/fr/document/decision/en-oao-gazprom-v-the-republic-of-lithuania-award-tuesday-31st-july-2012 (cited further as '*Gazprom v. Lithuania*'). *See also*, *Komaksavia v. Moldova*, para. 77; *Kompozit v. Moldova*, para. 72; *Evrobalt v. Moldova*, para. 33; *TSIKinvest v. Moldova*, para. 62.
18. Marc J. Goldstein, A Glance into History for the Emergency Arbitrator, Fordham International Law Journal, Vol. 40, Issue 3, 2017, pp. 780-798, p. 788: 'An early (in relative terms) exponent of caution in adopting the common law notion of irreparable harm into an international customary principle governing arbitral provisional relief, Professor Caron in his 1986 survey (1) noted a mixed record of embrace and reluctance in the jurisprudence of the Iran-US Claims tribunal; (2) took note of the risk of oversimplification of the common law concept of irreparable harm (non-compensability by an award of money) in its adoption into international jurisprudence, which might overlook more nuanced aspects of the common law (such as the exception for money damages not easily or precisely measured) that cause injury to be seen as irreparable despite the possibility of a monetary award; (3) cautioned that assumptions about effective enforcement and execution of monetary judgments in common law courts may be inapplicable to international arbitral awards; and (4) maintained that an inflexible insistence that provisional relief may only be issued if the injury is not compensable by money might often

for monetary compensation from a future award on damages does not automatically negate the need for interim measures. In theory, although all losses might be compensable by an award on damages,[19] the possibility of future monetary compensation does not automatically imply that such compensation would adequately remedy the harm. Therefore, it does not eliminate the necessity for interim protection.[20]

Fourth, the measures sought in an emergency arbitration must be urgent, reflecting the inherent urgency of such proceedings as outlined in Appendix II of the SCC Rules.[21] This requirement implies that it would be impractical for an investor to wait for the constitution of an arbitral tribunal. Therefore, intervention by an emergency arbitrator is justified. Indeed, in twelve known SCC emergency arbitration proceedings reviewed by the author, the timeframe for these proceedings is notably short, varying from one to a maximum of two weeks.[22]

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be at odds with the fundamental purpose of arbitral provisional relief to preserve the rights of the parties up to the time of a final award'.

19. The requirement of 'harm not adequately reparable by an award of damages' is included in the UNCITRAL Model Law, Art. 17A 'Conditions for granting interim measures' ('the party requesting an interim measure […] shall satisfy the arbitral tribunal that: a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered […]'). The emergency arbitrator referred to this provision in the context of emergency arbitration proceedings under the SCC Rules in *Evrobalt v. Moldova*.
20. Gary Born, 'International Commercial Arbitration, Chapter 17: Provisional Relief in International Arbitration', 3rd ed., pp. 2601-2758, p. 2653: 'Most authorities have reasoned that the injury required for provisional measures is not "irreparable" harm in what is perceived to be the Anglo-American sense, but instead only a showing of grave, substantial, or serious injury. Thus, one award required a showing of "substantial" (but not necessarily "irreparable" as known in common law doctrine) prejudice for the requesting party.' Indeed, as another authority reasoned, '[t]he US definition of "irreparable harm" is a harm that cannot readily be compensated by an award of damages. If this standard were strictly applied, most commercial disputes arbitrated under the UNCITRAL Rules would not qualify for interim protection under Article 26, since the award of money damages can, at least in theory, rectify nearly all commercial losses'.
21. For instance, the SCC Board shall seek to appoint an emergency arbitrator within merely within twenty-four hours of receipt of the application, and the emergency arbitrator shall make any emergency decision no later than within five days once the Secretariat has referred the application to the emergency arbitrator. SCC Rules, Appendix II, Arts 4, 6 and 8.
22. In a chronological order: (1) *Gazprom v. Lithuania*, Application – 13 Jun. 2011, Order – 24 Jun. 2011; (2) *TSIKInvest v. Moldova*, Application – 23 Apr. 2014, arbitrator appointed on 24 Apr. 2014, Award – 29 Apr. 2014; (3) *GPF GP S.à.r.l v. Poland*, SCC Case No. 2014/168, available at: https://jusmundi.com/fr/document/decision/en-gpf-gp-s-a-r-l-v-poland-final-award-wednesday-29th-april-2020 (cited further as '*Griffin Group v. Poland*'), Application – 30 Dec. 2014, Award 6 Jan. 2015; (4) *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine (I)*, SCC Case No. EA 2015/002, available at: https://jusmundi.com/en/document/decision/en-jkx-oil-gas-plc-poltava-gas-b-v-and-poltava-petroleum-company-v-ukraine-resolution-of-the-kyiv-city-court-of-appeal-tuesday-17th-may-2016 (cited further as '*JKX Oil & Gas v. Ukraine*'), Application – 7 Jan. 2015, Award – 14 Jan. 2015; (5) *Evrobalt v. Moldova*, Application – 24 May 2016, arbitrator appointed on 25 May 2016, Award – 30 May 2016; (6) *Kompozit v. Moldova*, Application – 9 Jun. 2016, arbitrator appointed 10 Jun. 2016, Award – 14 Jun. 2016; (7) *Puma Energy Holdings SARL v. the Republic of Benin*, SCC Case No. EA 2017/092, Emergency Award, 8 Jun. 2017, available at: https://jusmundi.com/en/document/decision/en-puma-energy-holdings-sarl-v-the-republic-of-benin-monday-1st-january-2018 (cited further as '*Puma Energy v. Benin')* where the emergency arbitrator rendered an emergency award on 8 Jun. 2017, while the proceedings on the merits started on 1 Jan. 2018; (8) *Munshi v. Mongolia*, Application on 19 Jan. 2018, arbitrator 31 Jan. 2018, Award – 5 Feb. 2018; (9) *Zaza Okuashvili v. Georgia*, SCC Case No. V 2019/058, Partial Final Award on Jurisdiction and Admissibility, 31 Aug. 2022,

Finally, the measures sought should be proportional.[23] In this respect, the ICSID tribunal in *City Oriente v. Ecuado*r explained that the key factor for provisional measures is not solely preventing irreparable harm but ensuring that the harm prevented by such measures is substantially greater than any damage inflicted on the affected party as a result of interim measures.[24]

The above requirements pose a very high bar to be met by a party who seeks interim relief from an emergency arbitrator. Therefore, it is not surprising that emergency arbitrators operating under the SCC Rules only granted the requested emergency relief (in full or in part) in 60% of the decisions rendered to date in treaty-based investor-State-related emergency arbitrations.[25] The outcome of twelve known SCC emergency arbitration proceedings reviewed by the author[26] confirms these statistics, with only several emergency awards being rendered in favour of the investor.[27]

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available at: https://jusmundi.com/en/document/decision/en-zaza-okuashvili-v-georgia-ruling-of-the-emergency-arbitrator-tuesday-2nd-april-2019 (cited further as '*Okuashvili v. Georgia*'), Application – 22 Mar. 2019, Award – 2 Apr. 2019; (10) *State Development Corporation 'VEB.RF" v. Ukraine*, SCC Case No. 2019/113 and V2019/088, available at: https://jusmundi.com/en/document/decision/en-vnesheconombank-veb-v-ukraine-original-proceedings-wednesday-21st-august-2019 (cited further as '*VEB v. Ukraine*'), Application – 21 Aug. 2019, arbitrator appointment – 22 Aug. 2019, Award – 28 Aug. 2019; (11) *Komaksavia v. Moldova, Application* – 24 Jul. 2020, arbitrator appointed 27 Jul. 2020, Award – 2 Aug. 2020; (12) *Carlos Manuel de São Vicente v. Republic of Angola*, SCC, Decision in Interim Relief dated 16 Jun. 2021, available at https://jusmundi.com/fr/document/decision/en-carlos-manuel-de-sao-vicente-v-republic-of-angola-decision-on-interim-relief-wednesday-16th-june-2021#decision_16858 (cited further as '*Vicente v. Angola*'), proceedings lasted thirteen days resulting in the decision dated 16 Jun. 2021.

23. The same requirements are mirrored in the arbitral tribunals' decisions on interim measures. *See*, *e.g.*, *Lao Holdings N.V. v. The Government of the Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Second Application for Provisional Measures, 18 Mar. 2015, para. 16, available at https://jusmundi.com/en/document/decision/en-lao-holdings-n-v-v-lao-peoples-democratic-republic-i-decision-on-claimants-second-application-for-provisional-measures-wednesday-18th-march-2015#decision_1542 ('The elements the Claimant must establish to obtain Provisional Measures are the following: (i) prima facie jurisdiction, (ii) prima facie establishment of the right to the relief sought, (iii) urgency or (imminent danger of serious prejudice), (iv) necessity, and (v) proportionality.') (with further references).
24. *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, 13 May 2008, para. 72, available at: https://jusmundi.com/fr/document/decision/en-city-oriente-limited-v-republic-of-ecuador-and-empresa-estatal-petroleos-del-ecuador-petroecuador-i-decision-on-revocation-of-provisional-measures-and-other-procedural-matters-tuesday-13th-may-2008 (cited further as '*City Oriente v. Ecuador*').
25. Alexey Pirozhkin, 'Emergency Arbitrator's Decisions in Investment Treaty Disputes at the SCC' (2014-2019), SCC Practice Note, May 2020, p. 6, available at: https://sccarbitrationinstitute.se/sites/default/files/2022-11/emergency-arbitrators-decisions-in-investment-treaty-disputes-at-the-scc-2014-201.pdf; Anja Havedal Ipp, 'SCC Practice Note: Emergency Arbitrator Decisions Rendered' (2015-2016), pp. 11-14; Lotta Knapp, 'SCC Practice: Emergency Arbitrator Decisions Rendered' (2014).
26. *See supra* n. 23.
27. The requested measures were granted in full or partially in: *TSIKInvest v. Moldova*, Emergency Decision, Order, paras 1 and 2; *JKX Oil & Gas v. Ukraine* (Emergency Award, 14 Jun. 2015, available at: https://jusmundi.com/en/document/decision/uk-jkx-oil-gas-plc-poltava-gas-b-v-and-poltava-petroleum-company-v-ukraine-decision-of-pechersk-district-court-tuesday-9th-june-2015#decision_1504); *Kompozit v. Moldova*, paras 92-93; *Puma Energy v. Benin* (Emergency

§11.03 THE STANDARD OF A PRIMA FACIE REVIEW IN EMERGENCY ARBITRATION

Emergency arbitrators dealing with investor-State disputes follow the standard of a prima facie review as adopted in international law. The international law standard of a prima facie review originally stems from the jurisprudence of the International Court of Justice (ICJ). It was further reaffirmed by arbitral tribunals and emergency arbitrators. It is clear from the ICJ rulings and decisions of emergency arbitrators and arbitral tribunals that the standard of a prima facie review for the purpose of interim measures is considerably low, both as regards the requirement of prima facie jurisdiction and of a prima facie case on the merits.

The prima facie review standard was initially set out by the ICJ in the case of *Military and Paramilitary Activities in and against Nicaragua*. In this case, ICJ found that 'whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate [provisional measures], finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded'.[28]

As also explained by Judge Singh in the *Nuclear Tests* case, the reason for the limited threshold for the condition of prima facie jurisdiction is that, if the ICJ were to thoroughly investigate the possible basis for its jurisdiction beyond prima facie 'the Court is inevitably left no option but to proceed to the substance of the jurisdiction of the case to complete its process of adjudication which, in turn, is time-consuming and therefore comes into conflict with the urgency of the matter coupled with the prospect of irreparable damage to the rights of the parties. It is this situation which furnishes the "raison d'être" of interim relief'.[29]

The ad hoc UNCITRAL tribunal in *Paushok v. Mongolia* emphasised that, essentially, it only needs to decide that the claims made are not, on their face, frivolous or clearly beyond the tribunal's competence. Going further would necessitate a

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Award dated 8 Jun. 2017 is not public, reviewed by the Global Arbitration Review, 'Benin challenges emergency arbitrator decision', 10 Jul. 2017, available at: https://globalarbitratio nreview.com/article/benin-challenges-emergency-arbitrator-decision); *Okuashvili v. Georgia*, (award is not public, reviewed by the Global Arbitration Review, *see* Sebastian Perry, 'Georgian businessman gets emergency relief in Stockholm', 12 Apr. 2019, available at: https:// globalarbitrationreview.com/article/georgian-businessman-gets-emergency-relief-in-stockhol m); *VEB v. Ukraine*, para. 15; and *Komaksavia v. Moldova*, para. 130.

28. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 169, para. 24. *See also LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 Mar. 1999, I.C.J. Reports 1999, p. 9, para. 13; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Interim Protection, Order of 17 Aug. 1972, I.C.J. Reports 1972, p. 12, para. 20, in which the Court held that a decision on prima facie jurisdiction does not constitute a prejudgment of the question of whether this tribunal has jurisdiction to deal with the merits of the case.
29. *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 Jun. 1973, I.C.J. Reports 1973, p. 135, p. 146.

determination of the facts and, practically, a hearing on the merits of the case. Such a lengthy and complicated process would undermine the very purpose of interim measures.[30]

The emergency arbitrator in *Evrobalt v. Moldova* and *Kompozit v. Moldova* concluded with regard to the prima facie jurisdiction review that they simply need to consider whether a reasonable case demonstrating that the emergency arbitrator has jurisdiction over the subject matter of the dispute has been made.[31] For that matter, the emergency arbitrator only needs to 'be satisfied that the jurisdictional basis invoked by [an investor] appears to be reasonably sound' on a prima facie basis, in 'circumstances where [an arbitral tribunal] is yet to pronounce it'.[32] This has also been confirmed by the emergency arbitrator in *Komaksavia v. Moldova*, where he stated that he is not required to delve into the merits of the dispute. Instead, an emergency arbitrator must review the submitted documentation to determine whether the investor's case is prima facie covered by the BIT.[33] Establishing prima facie jurisdiction requires more than just the state's prima facie consent to emergency arbitration procedures. There must also be prima facie jurisdiction under the relevant treaty, which includes meeting the conditions of *ratione personae*, *ratione materiae*, and *ratione temporis* jurisdictions.[34] Essentially, in the context of emergency arbitration, the emergency arbitrator only needs to decide that the claims made are not, on their face, obviously outside its jurisdiction. Given the urgent nature of emergency arbitration, emergency arbitrators are not expected to delve into jurisdictional issues as deeply as an arbitral tribunal would before rendering a final award. Their scrutiny should be limited to 'a manifest lack of jurisdiction', similar to the interim relief proceedings before the national courts.[35]

30. *Paushok v. Mongolia*, para. 55.
31. *Evrobalt v. Moldova*, paras 17-18; *Kompozit v. Moldova*, paras 48-50. *See also*, *Victor Pey Casado, Président Allende Fondation v. République du Chili*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 Sep. 2001, para. 8, available at: https://jusmundi.com/en/document/other/en-victor-pey-casado-and-president-allende-foundation-v-republic-of-chile-introductory-note-tuesday-25th-september-2001#other_document_6620.
32. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, para. 17. *See also Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/130, Emergency Award on Interim Measures, 2 Aug. 2020, paras 64-65.
33. *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/130, Emergency Award on Interim Measures, 2 Aug. 2020, para. 65.
34. Although the standard of review is low, it did not prevent emergency arbitrators to deal with complex jurisdictional issues. For example, in *Munshi v. Mongolia*, the investor's dual nationality (UK and Australian passports) did not trigger major issues and the application under the Mongolia-UK BIT was partially granted. Similarly, in *Okuashvili v. Georgia*, the SCC emergency arbitrator was satisfied that there was *prima facie* jurisdiction notwithstanding the fact that the claimant was a dual national of the UK and Georgia and granted interim relief against Georgia under the UK-Georgia BIT. *See* Global Arbitration Review, Sebastian Perry 'Georgian businessman gets emergency relief in Stockholm', 12 Apr. 2019, available at: https://globalarbitrationreview.com/article/georgian-businessman-gets-emergency-relief-in-stockholm.
35. Rania Alnaber, 'Emergency Arbitration: Mere Innovation or Vast Improvement', in William W. Park (ed.), Arbitration International, Oxford University Press 2019, Volume 35 Issue 4, pp. 441-472, at p. 450.

Such an approach is well illustrated by two emergency arbitration proceedings previously initiated by dual nationals under the SCC Rules. In *Munshi v. Mongolia*, the SCC emergency arbitrator was satisfied that the claimant, Mr Mohammed Munshi, established prima facie jurisdiction under the Mongolia-UK BIT by merely submitting his passport as a UK citizen (together with his Australian passport).[36] In *Okuashvili v. Georgia*, the SCC emergency arbitrator was satisfied there was prima facie jurisdiction under the UK-Georgia BIT and granted the interim relief requested against Georgia by a UK-Georgian dual national, Mr Zaza Okuashvili.[37] In these cases, emergency arbitrators dealing with applications for interim relief from dual nationals did not broaden the limited scope of the jurisdictional inquiry typically conducted during emergency proceedings. They maintained a focused and restricted examination of the personal jurisdiction, consistent with the nature and purpose of emergency arbitration.

However, in *Vicente v. Angola*,[38] the emergency arbitrator refused to hear the emergency application brought under the Angola-Portugal BIT and the SCC Rules based on the lack of prima facie jurisdiction. The emergency arbitrator concluded that issues regarding the interpretation of the said treaty and whether it could be interpreted as a broad consent of the host state to resolve disputes with investors that the investor submitted 'to any other [not ICSID or UNCITRAL] arbitration institution or in compliance with any other arbitration rules'[39] should be comprehensively analysed, emphasising that the prima facie standard is relevant only to the factual aspects of the application for emergency relief, not to the interpretation of the treaty itself.

It is important to note that even if the emergency arbitrator accepts jurisdiction on a prima facie basis, this determination has little impact on the arbitral tribunal's own assessment of jurisdiction. In *Komaksavia v. Moldova*, the emergency arbitrator was satisfied that the claimant made 'an investment in the Republic of Moldova for purposes of the BIT, by acquiring a shareholding in the locally incorporated entity.[40] Nevertheless, the tribunal later unanimously dismissed Komaksavia's claims on the basis of lack of jurisdiction *ratione materiae* under the BIT.[41]

As for the establishment of a prima facie case on the merits, it appears that the emergency arbitrator likewise does not need to go into details of the merits if they are 'satisfied that the Claimant has provided evidence sufficient to determine that it has established at least a prima facie case on the merits'.[42] In the very first known emergency arbitration proceedings of *Gazprom v. Lithuania*, the emergency arbitrator

36. *Munshi v. Mongolia*, paras 29 and 33.
37. Global Arbitration Review, Sebastian Perry 'Georgian businessman gets emergency relief in Stockholm', 12 Apr. 2019, available at: https://globalarbitrationreview.com/article/georgian-businessman-gets-emergency-relief-in-stockholm.
38. The author has been part of the team representing Mr. Vicente. All opinions are the ones of the author.
39. Angola-Portugal BIT 2008, Art. 11(1)(e), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/101/angola---portugal-bit-2008-.
40. *Komasksavia v. Moldova*, para. 19, paras 24-25.
41. *Komasksavia v. Moldova*, Final Award, 3 Aug. 2022, available at: https://jusmundi.com/en/document/decision/en-komaksavia-airport-invest-ltd-v-republic-of-moldova-final-award-wednesday-3rd-august-2022#decision_26589, para. 200.
42. *Komaksavia. v. Moldova*, para. 100.

denied the investor's request for relief due to a perceived lack of urgency. However, he noted that the evidence presented by the claimant suggested a reasonable possibility of success on the merits, seemingly without engaging in the analysis of the said evidence.[43]

Legal commentators further note that in light of the early stage of the case and the limited time frames for both deciding the case and for the duration of the measure if granted, most emergency arbitrators seem to apply a relatively low threshold for determining the reasonable likelihood of success on the merits of the case.[44] The level of merits review in the emergency arbitrator procedure should not be so high as to conflict with its purpose and nature. By definition, 'prima facie' means 'at first sight' or 'on first appearance but subject to further evidence or information'. The prima facie test should maintain a low threshold, serving merely to prevent frivolous or vexatious claims that are 'manifestly without merit'.[45]

In *TSIKinvest v. Moldova*, the emergency arbitrator determined that the claimant need not show a likelihood of success on the merits but merely a reasonable possibility of succeeding.[46] Therefore, in order to satisfy the requirements of the emergency arbitrator's prima facie case on the merits, the claimant must 'demonstrate that, prima facie, there is a reasonable possibility to succeed on the merits'[47] or, in other terms, that 'it has a reasonable chance to succeed on the merits, or that there is at least a serious issue to be tried'.[48]

Furthermore, the SCC Rules require that an emergency arbitrator shall render his or her decision on interim measures no later than five days from the date the application was referred to the emergency arbitrator.[49] It would virtually be impossible for an emergency arbitrator to delve into in-depth jurisdiction and merits analysis within the time allocated by the rules. Emergency awards rendered by SCC emergency arbitrators have devoted one paragraph[50] or, at most, a couple of paragraphs to the issues of prima facie jurisdiction and a prima facie case on the merits.[51] Case law based on the SCC Rules thus seem to suggest that the emergency arbitrator is neither expected nor required to conduct an in-depth analysis of jurisdiction and the merits of the case.

43. *Gazprom v. Lithuania*, para. 79.
44. Patricia Louise Shaughnessy, 'Chapter 32: The Emergency Arbitrator', in Patricia Louise Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, Kluwer Law International, 2017, p. 346.
45. Kyongwha Chung, Prima Facie Case on the Merits in Emergency Arbitrator Procedure, Kluwer Arbitration Blog, 8 Sep. 2017, available at: https://arbitrationblog.kluwerarbitration.com/2017/09/08/prima-facie-case-merits-emergency-arbitrator-procedure/.
46. *TSIKinvest v. Moldova*, para. 54.
47. *Kompozit v. Moldova*, para. 74.
48. *Smart King Ltd. v. Season Smart Limited, Yueting Jia*, HKIAC Case No. A18176, Award of Emergency Arbitrator, 25 Oct. 2018, para. 86, available at: https://jusmundi.com/en/document/decision/en-smart-king-ltd-v-season-smart-limited-yueting-jia-award-of-emergency-arbitrator-thursday-25th-october-2018.
49. SCC Rules, Appendix II, Art. 8(2).
50. TSIKinvest v. Moldova, para. 61.
51. Komaksavia. v. Moldova, paras 64-66; Evrobalt v. Moldova, paras 17-19; Munshi v. Mongolia, paras 32-33.

Such analysis shall instead be undertaken by the arbitral tribunal appointed in the course of the arbitration proceedings.

§11.04 CONSENT TO THE EMERGENCY ARBITRATION PROCEDURE UNDER THE SCC RULES

When states conclude investment treaties that include dispute resolution mechanisms, they create a framework that allows disputes between a contracting party and an investor from another contracting party to be resolved through investor-state arbitration. This arrangement effectively serves as a standing offer by the host state to engage in arbitration and empowers investors to initiate arbitration in the event of a dispute. This chapter explores whether such an offer includes emergency arbitration and examines the nature and extent of such consent.

[A] Implied Consent to Emergency Arbitration When the Parties Chose to Arbitrate under the SCC Rules

The SCC Rules offer a distinct advantage to the parties in investor-State disputes by implying consent to the emergency arbitration mechanism. Unlike the SIAC Investment Rules and the ICC Rules, which require explicit consent from all parties to be applicable, the SCC Rules assume consent once parties opt for arbitration under these rules. Consequently, if parties select the SCC Rules, they are automatically considered to have consented to the version of the rules effective at the time when they file an application for an emergency arbitrator. The current 2023 version of the SCC Rules includes specific provisions for appointing an emergency arbitrator and applies to investment treaty disputes without necessitating separate state consent for emergency proceedings.

According to the preamble of the SCC Rules, the parties shall be deemed to have agreed that the applicable rules are those in force on the date of the commencement of the arbitration, or the filing of the application for the appointment of an emergency arbitrator unless otherwise agreed by the parties. In accordance with this provision, emergency arbitrators have systematically confirmed that the reference to the SCC Rules implies the application of the version of the SCC Rules, including the appendices, in force as of the date on which the proceedings commenced.[52]

52. *TSIKinvest LLC v. Republic of Moldova*, SCC Case No. EA 2014/053, Emergency Decision on Interim Measures, 29 Apr. 2014, para. 3; *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case No. 2020/130, Emergency Award on Interim Measures, 2 Aug. 2020, para. 63; *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, para. 29; *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/95, Emergency Award on Interim Measures, 14 Jun. 2016, paras 46-47. In *Munshi v. Mongolia*, the emergency arbitrator did not even address the issue of the version of the applicable rules or the applicability of appendices, but took for granted the application of the 2017 SCC Rules, *see Mohammed Munshi v. The State of Mongolia,* SCC Case No. 2018/007, Award on Emergency Measures, 5 Feb. 2018.

In particular, in *Evrobalt v. Moldova*, the emergency arbitrator held that the state's standing offer to arbitrate shall be construed as implying a '*dynamic reference*' to the arbitral rules in force on the date of the commencement of the proceedings.[53] He further pointed out that '[a]t the time they signed the Treaty in 1998, and when they came to ratify it thereafter, the Contracting Parties would have known that the SCC Rules had been reissued several times in the past. If they so wished, it would have been straightforward to freeze the applicable version of the SCC Rules by inserting a few words in Article 10(2)(b). This they did not do'.[54]

In *Munshi v. Mongolia*, the emergency arbitrator did not even address the issue of the version of the applicable rules or the applicability of appendices but took for granted the application of the 2017 SCC Rules.[55] Other decisions of the emergency arbitrators operating under the SCC Rules further confirm that the consent of the host state to emergency proceedings is implied.[56]

[B] Consent to Emergency Arbitration under the SCC Rules When the Applicable Treaty Does Not Contain an Explicit Reference to These Rules

Investors seeking emergency relief under the SCC Rules might face difficulties when the applicable investment treaty does not specifically and unambiguously provide for SCC arbitration. Based on the limited case law that is publicly available so far, it seems that emergency arbitrators are hesitant to conflate the state's readiness to arbitrate as expressed in the underlying treaty with their readiness for emergency proceedings. This assumption particularly holds true when the underlying treaty is subject to interpretation and cannot be construed as an unequivocal offer to arbitrate under the specific set of procedural rules.

For instance, in one of the most recent (known) SCC emergency arbitration proceedings in investor-state disputes, the emergency arbitrator refused to hear an application submitted by Carlos Manuel de São Vicente against Angola under the Portugal-Angola BIT and the SCC Rules.[57] In his application, the investor requested to be released from what he claimed to be unjust pre-trial detention in Angola or relaxation of his detention regime, allowing him to receive medical treatment and

53. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, para. 30.
54. *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, 30 May 2016, para. 30.
55. *Mohammed Munshi v. The State of Mongolia*, SCC Case No. 2018/007, Award on Emergency Measures, 5 Feb. 2018.
56. *TSIKinvest v. Moldova*, para. 3; *Komaksavia v. Moldova*, para. 63; *Evrobalt v. Moldova*, para. 29; *Kompozit v. Moldova*, paras 46-47.
57. The emergency arbitrator's Decision on Interim Relief was rendered on 16 Jun. 2021. It is not yet been made public. For an overview of the case, *see* Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021, available at: https://globalarbitrationreview.com/jailed-businessman-fails-in-emergency-claim-against-angola.

access to his legal counsel without surveillance or interference from the authorities.[58] He also asked for the removal of a freeze on his investments in Angola's hospitality sector, citing mismanagement as the reason that could have led to the destruction of their value.[59]

In contrast with the decisions cited above, where the underlying treaties explicitly provided for the applicability of the SCC Rules to the disputes between investors and States, the dispute resolution clause in the Portugal-Angola BIT does not include an explicit reference to the SCC Rules. Instead, it contains an open-ended offer to arbitrate 'in compliance with any other arbitration rules'.[60] More specifically, Article 11(2) of the Angola-Portugal BIT allows investors to submit disputes with the host state to local courts, UNCITRAL or ICSID arbitration, or 'in compliance with any other arbitration rules'.[61]

This provision could be construed as a standing offer of the host state to arbitrate which allows the investor to submit the dispute against the host state to any arbitration institution. Since Article 11(2)(e) of the Angola-Portugal BIT does not contain any limitation regarding the investor's choice of the arbitration institution or the arbitration rules, it allows the investor to submit his dispute to the SCC under the SCC Rules. Nevertheless, the emergency arbitrator hearing the investor's emergency application in the *Vicente v. Angola* case concluded that she lacked jurisdiction because neither the BIT in question nor Angola's investment law provided for jurisdiction for SCC emergency arbitration.[62]

It appears that on a prima facie basis, the emergency arbitrator was not convinced that the broadly worded dispute resolution clause of the Angola-Portugal BIT embodied Angola's consent to emergency arbitration and, in particular, emergency arbitration under the SCC Rules.[63] Thus, in *Vicente v. Angola*, the emergency arbitrator applied a rather strict test for assessing jurisdiction.

A prevailing view in investment arbitration, as first expressed by the *Amco v. Indonesia* ICSID arbitral tribunal in 1983, is that the state's offer to arbitrate is not to be 'construed restrictively, nor, as a matter of fact, broadly or liberally'.[64] This conclusion

58. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.
59. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.
60. Angola-Portugal BIT 2008, Art. 11(2)(e), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5675/download.
61. Angola-Portugal BIT 2008, Art. 11(2)(e), ('[i]f the dispute cannot be resolved in accordance with the provisions of paragraph 1 of this article, […], the investor may, at his request, submit the dispute: […] e) To any other arbitration institution or in compliance with any other arbitration rules'), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5675/download.
62. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.
63. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.
64. *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 Sep. 1983, para. 14, available at: https://jusmundi.com/fr/document/decision/en-amco-asia-corporation-and-others-v-republic-of-indonesia-decision-on-jurisdiction-sunday-25th-september-1983 (cited further as '*Amco v. Indonesia*').

is often quoted with approval by subsequent investment tribunals.[65] The ad hoc UNCITRAL tribunal in *Ethyl v. Canada* further considered that the sole basis for jurisdiction is the parties' consent to arbitration, which an investor expresses by the very act of commencing it.[66] The consent of the host state usually takes the form of a standing offer in an investment treaty which is accepted by the investor by filing a claim against the host state.[67] The *Garanti Koza v. Turkmenistan* tribunal further explained that there is no basis in the Vienna Convention on the Law of Treaties (VCLT) for imposing a requirement that the state's consent to arbitration must be 'clear and unambiguous'.[68]

In *Vicente v. Angola*, although the investor demonstrated consent to arbitration by filing an emergency application and the host state's consent to arbitration was clear under the Angola-Portugal BIT, the emergency arbitrator appears to question specific type of arbitration agreed upon by the parties and whether it included emergency arbitration proceedings.[69]

In principle, the powers of an emergency arbitrator to grant interim relief under the SCC Rules are equivalent to those of the arbitral tribunal. However, there is room for debate on whether consent to the emergency arbitration, as implied under the SCC Rules, can be inferred from a treaty that does not explicitly incorporate the SCC Rules, such as through the operation of an MFN clause. In contrast with emergency arbitration, in usual arbitral proceedings, it may be permissible to imply such consent based on an MFN clause. Lack of clarity on the applicability of broad treaty interpretations in emergency proceedings thus potentially suggests that more complex treaty interpretations might be more appropriate outside of the context of the expedited review in emergency arbitration.

For instance, in *Okuashvili v. Georgia*, although the underlying UK-Georgia BIT provided only for arbitration at ICSID,[70] the consent to SCC arbitration was invoked through the most-favoured-nation (MFN) clause in the Georgia-UK BIT[71] by reliance on the Georgia-Belgium-Luxembourg Economic Union BIT.[72] The emergency arbitrator

65. *See, e.g., ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 Jul. 2013, para. 383, available at: https://jusmundi.com/en/document/decision/en-st-ad-gmbh-v-the-republic-of-bulgaria-award-on-jurisdiction-thursday-18th-july-2013.
66. *Ethyl v. Canada*, ad hoc arbitration, Award on Jurisdiction, 24 Jun. 1998, para. 59, available at https://jusmundi.com/en/document/decision/en-ethyl-corporation-v-the-government-of-canada-award-on-jurisdiction-wednesday-24th-june-1998 (cited further as '*Ethyl v. Canada*').
67. *See, e.g., American Manufacturing & Trading INC v. Republic of Zaire*, ICSID, Award, 21 Feb. 1997, para. 5.23, available at https://jusmundi.com/en/document/decision/en-american-manufacturing-trading-inc-v-republic-of-zaire-award-friday-21st-february-1997.
68. *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 Jul. 2013, para. 22, available at: https://jusmundi.com/fr/document/decision/en-garanti-koza-llp-v-turkmenistan-decision-on-the-objection-to-jurisdiction-for-lack-of-consent-wednesday-3rd-july-2013 (cited further as '*Garanti Koza v. Turkmenistan*').
69. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.
70. Global Arbitration Review, 'Georgian businessman gets emergency relief in Stockholm', 12 Apr. 2019.
71. Exhibit CLA-119, UK-Georgia BIT 1995, Art. 3.
72. BLEU (Belgium-Luxembourg Economic Union) – Georgia BIT 1993, Art. 10(3).

was satisfied, under these circumstances, that there was prima facie jurisdiction under the SCC Rules to order the interim measures requested by the investor.[73] In other words, an investor successfully[74] replaced a particular arbitration forum with another based on a different treaty.[75] In *Okuashvili v. Georgia*, along with three other non-SCC cases,[76] the arbitral tribunal recognised that an MFN clause could be invoked to initiate proceedings before a forum not explicitly specified in the underlying treaty. As explained above, the emergency arbitrator in *Vicente v. Angola* took a different approach, requiring unequivocal consent to the SCC Rules.

In any event, as discussed above, the applicable test is that of a prima facie assessment. While some emergency arbitrators might not delve into treaty interpretation on an issue of consent in emergency proceedings, seemingly satisfied that the mere acceptance of the application by the arbitral institution is enough, others might be more stringent in establishing their jurisdiction to decide on the emergency application.

§11.05 ADMISSIBILITY OF THE EMERGENCY ARBITRATION UNDER THE SCC RULES

Typically, investment treaties stipulate specific conditions that must be satisfied before initiating investment proceedings. These conditions often require the disputing parties to engage in negotiations for a specified period to amicably resolve their differences, during which they must refrain from starting formal arbitration proceedings. This period is known as a 'cooling off period'.[77] If these conditions are not met, a claim may be deemed inadmissible. Consequently, an important question arises: Are these same preconditions applicable to emergency applications under the SCC Rules? Such applications are often filed by investors on an urgent basis, sometimes immediately after a formal 'trigger letter' has been issued to the host state.

73. *Okuashvili v. Georgia*.
74. However, the affirmative answer was accompanied by a dissenting opinion of Professor Rolf Knieper finding that the MFN clause did not contain an explicit agreement that consent to an arbitral system as well as to arbitral rules could be displaced by the MFN provision. For discussion on same, *see* Mark Mangan, 'Substantive Protections: MFN, in The Guide to Investment Treaty Protection and Enforcement', Mark Mangan and Noah Rubins (eds), 2nd ed., 2023, Global Arbitration Review – Law Business Research, pp. 198-199.
75. *Okuashvili v. Georgia*.
76. *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 Jul. 2013, available at https://jusmundi.com/fr/document/decision/en-garanti-koza-llp-v-turkmenistan-decision-on-the-objection-to-jurisdiction-for-lack-of-consent-wednesday-3rd-july-2013, *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Partial Award (Jurisdiction and Liability), 5 Feb. 2021, available at https://jusmundi.com/en/document/decision/en-venezuela-us-s-r-l-v-bolivarian-republic-of-venezuela-partial-award-jurisdiction-and-liability-friday-5th-february-2021; and *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 Jul. 2018, available at https://jusmundi.com/en/document/decision/en-krederi-ltd-v-ukraine-none-currently-available-monday-21st-july-2014.
77. The duration of the cooling-off period may vary, the most common being six months.

Article 7 of Appendix II of the SCC Rules acknowledges the urgent nature of emergency proceedings.[78] On this point, arbitrators in emergency proceedings under the SCC Rules seem to agree that the pendency of the cooling-off period does not bar an emergency arbitrator from deciding on interim measures by such an arbitrator.[79] This position seems practically justified and sound, as any alternative approach would contradict the very purpose of the emergency proceedings.

For instance, in *TSIKinvest v. Moldova*, the emergency arbitrator held that 'it would be procedurally unfair to Claimant and contrary to the purpose of the Emergency Arbitrator procedure to apply the Cooling-Off Period to the appointment of an Emergency Arbitrator or to an emergency decision on interim measures to be made by the Emergency Arbitrator, not least since Claimant seems to be facing a serious risk of suffering irreparable harm before the expiry of the Cooling-Off Period if interim measures are not granted.'[80]

Moreover, when the application of the cooling-off period provided in the treaty would, in any event, be 'manifestly futile', emergency arbitrators have also considered that the cooling-off period was not applicable, in accordance with established case law and the view of legal commentators.[81] For instance, the emergency arbitrator in *Kompozit v. Moldova* considered that, due to the respondent state's refusal to engage in settlement discussions, the cooling-off period was not applicable, and the claimant could refer the dispute to arbitration without having to wait until the expiration of the period.[82] In this respect, the emergency arbitrator laid specific emphasis on the language used by the treaty that the parties in dispute will try to resolve their disputes amicably '"as far as possible", which implies that when the parties are not able to resolve the dispute amicably, then the investor is entitled to submit the dispute to arbitration'.[83]

78. SCC Rules, Appendix II, Art. 7 ('Article 23 of the Arbitration Rules shall apply to the emergency proceedings, taking into account the urgency inherent in such proceedings.').
79. Alexey Pirozhkin, 'Emergency Arbitrator's Decisions in Investment Treaty Disputes at the SCC (2014-2019)', SCC Practice Note, May 2020; *TSIKinvest v. Moldova*, para. 66; *Evrobalt v. Moldova*, para. 22. *See also* in *Puma Energy Holdings SARL v. the Republic of Benin*, SCC Case No. EA 2017/092, Emergency Award, 8 Jun. 2017 (not public), where the emergency arbitrator rendered an emergency award on 8 Jun. 2017, while the proceedings on the merits started on 1 Jan. 2018. The emergency arbitrator's decision was reported by the Global Arbitration Review. For an analysis of the award, *see* Global Arbitration Review, Alison Ross, 'Swedish emergency arbitrator halts enforcement of Benin court judgment', 13 Jun. 2017, available at: https://globalarbitrationreview.com/article/swedish-emergency-arbitrator-halts-enforcement-of-benin-court-judgment. *See also*, IA Reported, Jarrod Hepburn, 'Analysis: Stockholm arbitrator finds emergency measures justified against Benin where entire investment faces extinguishment due to alleged denial of justice', 14 Jun. 2017, available at: https://www.iareporter.com/articles/analysis-stockholm-arbitrator-finds-emergency-measures-justified-against-benin-where-entire-investment-faces-extinguishment-due-to-alleged-denial-of-justice/.
80. *TSIKinvest v. Moldova*, para. 66.
81. *Evrobalt v. Moldova*, para. 22; *Kompozit v. Moldova*, paras 55-56.
82. *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/95, Emergency Award on Interim Measures, 14 Jun. 2016, paras 55-56.
83. *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/95, Emergency Award on Interim Measures, 14 Jun. 2016, para. 55.

Nevertheless, particularly in some of the earlier SCC emergency arbitration proceedings involving investor-state disputes, respondent states have tried to limit the enforcement of emergency arbitrators' awards. They argued that investors had not adhered to the cooling-off periods mandated by the underlying investment treaties when submitting their applications. For instance, Ukraine made such an argument in the enforcement proceedings initiated by UK- and Dutch-based investors JKX Oil & Gas, Poltava Gas B.V., and Poltava Petroleum Company following a favourable decision from the emergency arbitrator in January 2015.[84] The state, however, did not participate in the emergency proceedings.[85]

In conclusion, while investment treaties typically impose a mandatory negotiation phase before formal arbitration can commence, it is evident from the analysis of SCC case law that such requirements do not apply uniformly to emergency proceedings. This exemption is clearly justified by the urgent and potentially irreversible harm that the emergency measures aim to prevent. Reviewed jurisprudence under the SCC Rules further endorses a pragmatic approach where emergency arbitrators may waive the cooling-off period to promptly address significant risks to investors and their investments, ensuring that emergency arbitration procedure under the SCC Rules is efficient and responsive.

§11.06 THE EMERGENCY ARBITRATOR'S POWER TO ORDER INTERIM MEASURES UNDER THE SCC RULES

Article 1(2) of Annex II of the SCC Rules provides that '[t]he powers of the Emergency Arbitrator shall be those set out in Article 37(1)-(3) of the Arbitration Rules'. In other words, under the SCC Rules, an emergency arbitrator has the same powers to grant interim relief before the case is referred to an arbitral tribunal as the arbitral tribunal itself would have.

Article 37 of the SCC Rules provides that the Arbitral Tribunal may, at the request of a party, 'grant any interim measures it deems appropriate' and order that the party requesting the interim measure is provided appropriate security.[86] As the emergency arbitrator noted in *Munshi v. Mongolia*, Article 37 of the SCC Rules calls for a broad interpretation. If the intention had been to restrict the interim measures to specific types, the SCC Rules would have set out a list of specific interim measures that a tribunal or emergency arbitrator could grant. Instead, the use of the word 'any' in the rules suggests that the intention is to afford both arbitral tribunals and emergency

84. *JKX Oil & Gas plc*, *Poltava Gas B.V.* and *Poltava Petroleum Company v. Ukraine* (I), SCC Case No. EA 2015/002, available at: https://jusmundi.com/en/document/decision/en-jkx-oil-gas-plc-poltava-gas-b-v-and-poltava-petroleum-company-v-ukraine-emergency-award-wednesday-14th-january-2015 (the emergency award is not public, but discussed in the available resolutions of the Ukrainian courts, in Ukrainian).
85. Global Arbitration Review, Sebastian Perry, 'SCC emergency award enforced against Ukraine', 13 Jun. 2016, available at: https://globalarbitrationreview.com/article/scc-emergency-award-enforced-against-ukraine.
86. SCC Rules, Art. 37 (1).

arbitrators' wide discretion to grant interim measures as the case demands.[87] The arbitral tribunal and the emergency arbitrator have therefore broad discretion as to the type of interim measures they can order.

The emergency arbitrator also has broad discretion as to the form in which the interim measures shall be ordered. As it stems from Article 37(3) of the SCC Rules, the 'interim measure shall take the form of an order or an award'. In practice, since the introduction of the emergency arbitration proceedings in the 2010 SCC Rules,[88] the SCC emergency arbitrators have systematically rendered their decisions in the form of '*award*' or '*emergency award*'.[89] However, perhaps the first known emergency arbitrator's decision in the investment arbitration context took the form of an 'Order on Interim Measures'. It was issued on 24 June 2011 in the emergency arbitrator proceedings in *Gazprom v. Lithuania* conducted immediately prior to the main proceedings.[90] In a few other instances, emergency arbitrators have issued 'decisions' rather than 'awards'.[91] It is disputable whether a particular form of an emergency arbitrator's decision has a practical effect on its enforcement. For instance, two known enforcement proceedings initiated by investors after they received interim measures granted in their favour by the SCC emergency arbitrators dealt with both 'Emergency Arbitrator Decision on Interim Measures' granted in *VEB v. Ukraine* and with 'Emergency Award' rendered in *JKX Oil & Gas v. Ukraine*. Both were eventually dismissed in Ukraine following a thorough consideration by several local courts, including the Supreme Court of Ukraine, which refused to enforce them.[92]

The scope of the emergency arbitrator's powers under the SCC Rules is sufficiently wide to enable the emergency arbitrator to grant any measures that might be sought by investors, provided that the requirements for such measures are met. Emergency arbitrators have consistently ruled that emergency relief is justified when the health or life of individuals, the safety of their properties, or the viability of a business is at risk – particularly in situations where there is a threat of assets being subjected to state-enforced sale or cancellation. Such circumstances are considered to potentially cause irreparable damage, warranting the urgent and necessary measures being sought. This justifies the issuance of emergency relief, as will be discussed in more detail below.

87. *Munshi v. Mongolia*, para. 39.
88. The prior to the 2010 version of the SCC Rules, in force as of January 2007, did not contain emergency arbitration provisions. In January 2010, the SCC introduced into its Rules Appendix II, which provided for emergency arbitration.
89. For the publicly available awards, *see*, *e.g.*: *Komaksavia v. Moldova*; *Munshi v. Mongolia*; *Kompozit v. Moldova*; *Evrobalt v. Moldova*; *TSIKInvest v. Moldova*.
90. *Gazprom v. Lithuania*, para. 278.
91. For instance, emergency arbitrators issued 'decisions' in *VEB v. Ukraine*, *Vicente v. Angola*, *TSIKInvest v. Moldova.*
92. *JKX Oil & Gas v. Ukraine*, Decision of the Supreme Court of Ukraine dated 19 Sep. 2018, available at: https://jusmundi.com/en/document/decision/uk-jkx-oil-gas-plc-poltava-gas-b-v-and-poltava-petroleum-company-v-ukraine-postanova-verkhovnogo-sudu-ukrayini-wednesday-19th-september-2018#decision_2410; *VEB v. Ukraine*, Judgment of the Supreme Court of Ukraine – 14 Jan. 2021, available at: https://jusmundi.com/en/document/decision/en-vnesheconombank-veb-v-ukraine-original-proceedings-wednesday-21st-august-2019.

[A] Measures Adopted by Emergency Arbitrators to Protect Investments

Investment arbitration often deals with measures to protect assets and investments from adverse administrative or judicial actions by host states, such as stays of enforcement of local administrative or court decisions, prohibitions on the forced sale of property by auction, and other provisional measures to safeguard investments pending resolution of disputes. The following case law demonstrates the outcomes of a few emergency proceedings that are of practical significance.

In *VEB v. Ukraine*, Vneshekonombank (VEB), a Russian state-owned development bank, faced significant challenges in its investment in Prominvestbank, a Ukrainian commercial bank. The dispute arose from Ukraine's alleged expropriation and interference with VEB's investment, leading to arbitration under the 1998 Russian Federation-Ukraine BIT.[93] An emergency arbitrator awarded interim conservatory measures requested by the claimant to protect its investment in Ukraine. These measures were intended to prevent Ukraine from enforcing specific administrative decisions that could undermine VEB's investment during the arbitration process.[94] However, the enforcement of this emergency award in Ukraine proved contentious. The Kyiv Court of Appeal initially refused enforcement, citing public policy concerns and procedural issues, but the Supreme Court later overruled this, emphasising the dynamic application of SCC Rules and Ukraine's opportunity to present its case despite procedural constraints.[95]

In *JKX Oil & Gas and Poltava v. Ukraine*, investors faced similar challenges at the enforcement stage. The Dutch and English investors initiated arbitration proceedings against Ukraine on 7 January 2015, citing violations of the Energy Charter Treaty and Ukraine's bilateral investment treaties with the UK and the Netherlands due to a law enacted by Ukraine that increased gas royalties from 28% to 55%. An emergency arbitrator was appointed under the 2010 SCC Rules on 8 January 2015, and on 14 January 2015, he ordered Ukraine not to collect royalties exceeding the previous rate of 28%. In the main arbitration proceedings, JKX claimed compensation for losses amounting to USD 270 million.[96] Although it appears that the increase of gas royalties could have been compensated by an award on damages, the emergency arbitrator nevertheless was satisfied that the investors' application for emergency relief was

93. Russian Federation-Ukraine BIT, 1998, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2859/russian-federation---ukraine-bit-1998-.
94. *VEB v. Ukraine*, Partial Award on Preliminary Objections (Case No. V2019/088) dated 31 Jan. 2021 discusses in para. 16 of the Emergency Arbitrator Decision on Interim Measures dated 28 Aug. 2019.
95. *VEB v. Ukraine*, Decision of the Kyiv Court of Appeal dated 15 Sep. 2020 and Judgment of the Supreme Court of Ukraine dated 14 Jan. 2021, available at: https://jusmundi.com/en/document/decision/en-vnesheconombank-veb-v-ukraine-original-proceedings-wednesday-21st-august-2019.
96. Kluwer Arbitration Blog, Yaroslav Petrov, 'JKX vs. Ukraine: An Update on the Enforcement of Emergency Arbitrator's Award', 12 Aug. 2016, available at: https://arbitrationblog.kluwerarbitration.com/2016/08/12/jkx-vs-ukraine-an-update-on-the-enforcement-of-emergency-arbitrators-award/; Global Arbitration Review, Sebastian Perry, 'SCC emergency award enforced against Ukraine', 13 Jun. 2016, available at: https://globalarbitrationreview.com/article/scc-emergency-award-enforced-against-ukraine.

sufficiently substantiated and complied with the requirements of urgency, proportionality, and necessity.

In *Komaksavia v. Moldova*, investment arbitration was initiated by Komaksavia Airport Invest Ltd., a Cyprus-incorporated company, against the Republic of Moldova under the 2007 Cyprus-Moldova BIT. The dispute arose in relation to Komaksavia's alleged investment into the Moldovan entity Avia Invest SRL, an operator of the forty-nine-year concession contract concluded in 2013 with Moldova's Public Property Agency to modernise and operate the Chisinau International Airport.[97] In 2016, Komaksavia acquired a controlling shareholding (95%) in Avia Invest, 'thereby making an investment in the Republic of Moldova for purposes of the BIT'.[98] The core of the conflict arose when in July 2020 Moldova's Public Property Agency terminated the concession contract due to alleged breaches by Avia Invest.[99] In response to Moldova's actions, Komaksavia sought emergency interim measures to prevent the termination of the concession and to safeguard its investment during the arbitration proceedings. The SCC emergency arbitrator granted these interim measures in August 2020, ordering Moldova to refrain from any actions that would affect Komaksavia's rights under the concession agreement. This included prohibiting the enforcement of administrative decisions that could jeopardise the investor's interests.

In *Puma Energy Holding v. Benin*, an SCC emergency arbitrator stayed the enforcement of a Benin court judgement which represented a clear danger of effectively extinguishing the commercial operations of Puma Benin. The emergency arbitrator relied on the *Perenco v. Ecuador* tribunal's view that an award of provisional measures is justified where a business faces the risk of being complete cessation. Consequently, the emergency arbitrator ordered Benin to refrain from any action that could threaten the *status quo* pending the determination of Puma's investment claims against Benin.

In *Kompozit v. Moldova*,[100] the arbitrator emphasised that monetary compensation alone does not suffice to prevent irreparable harm, echoing the flexible interpretation of 'irreparable harm' adopted by the Paushok tribunal. The tribunal recognised that monetary compensation might not adequately capture the real value of the shares at the time of their cancellation.[101] Accordingly, the emergency arbitrator ordered Moldova to refrain from implementing the National Bank's decision to cancel the shares, acknowledging that such interim measures were necessary to preserve the claimants' rights pending arbitration.

Similarly, in *TSKInvest v. Moldova*, interim relief was granted under comparable circumstances. However, in *Evrobalt v. Moldova*, despite a similar factual background,

97. *Komasksavia v. Moldova*, paras 20-23.
98. *Komasksavia v. Moldova*, para. 19, paras 24-25.
99. *Komasksavia v. Moldova*, paras 38-39 et seq.
100. Note: That case involved the Moldovan National Bank's decision that Kompozit, together with nineteen other shareholders of Agroindbank, the country's largest commercial bank, had acted in concert and acquired a substantial shareholding without its prior permission. As a result, the National Bank suspended the shareholders' rights and required them to dispose of the shares within a three-month period, failing which the shares would be cancelled after this period.
101. *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/95, Emergency Award on Interim Measures, 14 Jun. 2016, para. 88.

the application for interim measures was dismissed, highlighting the case-by-case nature of emergency decisions.

In *Paushok v. Mongolia*, the tribunal ordered Mongolia to refrain from seizing or obtaining a lien on the claimants' assets, allowing the claimants to continue their ordinary business operations. This decision further underscores the necessity of interim measures to maintain the status quo and prevent irreparable harm, even when future monetary compensation is possible.

From the decisions in the above-mentioned emergency arbitrations, it follows that the potential for monetary compensation does not negate the necessity of interim measures in international investment arbitration. Preserving the actual value and operational status of investments is paramount to ensure that claimants do not suffer irreparable harm that cannot be remedied by financial compensation in future awards. Emergency arbitrators are advised to take this into account when rendering their decisions.

[B] Measures Adopted by Emergency Arbitrators to Safeguard Investors' Rights

Another group of interim measures in international investment arbitration aims at ensuring that the *status quo* is maintained and that disputes are not aggravated while substantive claims are being adjudicated.[102] These measures serve a critical function in preserving the balance between the parties and protecting the integrity of the arbitral process. In the context of emergency arbitration, interim measures play a crucial role by preventing parties from taking actions that could disrupt the status quo or exacerbate the dispute. This helps protect investments from immediate threats.

In *Gazprom v. Lithuania*, Gazprom initiated the emergency arbitration proceedings in June 2011 in an attempt to preserve its right to resort to arbitration pursuant to the SCC Rules, aiming to have its dispute settled by an arbitral tribunal that would be constituted later.[103] The emergency arbitrator, however, declined to grant the relief sought by Gazprom due to a lack of urgency.[104]

Maintaining the *status quo* is often a challenging endeavour, particularly when ongoing investigations or administrative actions predate the initiation of arbitration proceedings. In such instances, these actions are considered part of the status quo and may not be halted by interim measures. The case of *Pugachev v. Russia* exemplifies this complexity. In *Pugachev*, the arbitrator declined to issue interim measures to stop an ongoing investigation into the investor because the investigation predated the arbitration and was thus deemed part of the *status quo*.[105] This decision underscores the

102. Similar requests were made in emergency arbitration proceedings related to investment treaty disputes in 2014-2019, which outcomes are confidential. Alexey Pirozhkin, 'Emergency Arbitrator's Decisions in Investment Treaty Disputes at the SCC (2014-2019)', SCC Practice Note, May 2020, p. 9.
103. *Gazprom v. Lithuania*, para. 78.
104. *Gazprom v. Lithuania*, para. 79.
105. *Pugachev v. Russia*, para. 283.

nuanced nature of interim measures and the need for emergency arbitrators to carefully consider the historical context of the actions in question.

In addition to preserving the status quo, tribunals have also issued interim measures to ensure the safety of investors and their access to legal counsel. Ensuring access to legal representation is fundamental to maintaining the procedural fairness of arbitration proceedings. Without adequate legal counsel, an investor might be unable to effectively present their case, potentially skewing the arbitration process in favour of the host state.

The investor's ability to pursue their claim is jeopardized even more in situations where the physical safety and freedom of key individuals involved in the arbitration are at risk. For instance, in *Igor Boyko v. Ukraine*, the tribunal responded to the application of the incarcerated investor by ordering Ukraine to '*take immediate measures to protect, and to refrain from taking* […] *any measures that could endanger the health, life, physical safety, and psychological integrity of the Claimant*'.[106] *Boyko v. Ukraine* is a good example of how arbitration tribunals can intervene to ensure that the physical and psychological well-being of investors is not compromised during the arbitration process.[107] The tribunal recognised that the claimant's ability to participate in the arbitration and manage his investments was severely hampered by his detention. By ordering immediate protective measures, the tribunal aimed to mitigate these risks and maintain the integrity of the arbitration proceedings.

In *Hydro v. Albania*, the tribunal ordered the respondent to release the claimant's key individuals and suspended investigation into them, confirming that the arrest of the central persons involved in the arbitration from the claimants' side would prevent them from effectively managing the claimants' businesses and fully participating in the arbitration. In *Border Timbers v. Zimbabwe*,[108] the arbitral tribunal granted the claimant interim measures and ordered to immediately take all necessary measures to protect the life and safety of the claimants. It is noteworthy that the latter case demonstrates that tribunals are, in general, though not as a rule, willing to intervene decisively when the lives and safety of investors are at risk, thereby ensuring that the arbitration can proceed without endangering the participants.

Such an approach can also be seen in *Perenco v. Ecuador*, where the tribunal directed Ecuador to refrain from instituting or pursuing any action against the claimant or its officers and employees in connection with the subject of the arbitration. This order was essential to ensure that the claimant and its associates were not subjected to

106. *Igor Boyko v. Ukraine*, PCA Case No. 2017-23, Procedural Order No. 3 on Claimant's Application for Emergency Relief, 3 Dec. 2017, available at https://jusmundi.com/en/document/decision/en-igor-boyko-v-ukraine-saturday-1st-december-2018 (cited further as '*Boyko v. Ukraine*').

107. *Boyko v. Ukraine*, PCA Case No. 2017-23, Procedural Order No. 3 on Claimant's Application for Emergency Relief, 3 Dec. 2017.

108. *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 5 (Provisional Measures), 3 Apr. 2013, available at https://jusmundi.com/fr/document/decision/en-border-timbers-limited-timber-products-international-private-limited-and-hangani-development-co-private-limited-v-republic-of-zimbabwe-procedural-order-no-5-provisional-measures-wednesday-3rd-april-2013, para. 65.

retaliatory actions that could hinder their participation in the arbitration. By ordering Ecuador to refrain from any actions against the claimant and its personnel, the tribunal aimed to prevent any form of harassment or intimidation that could disrupt the arbitration.

However, there are opposite decisions with regard to investors and their rights, such as *Munshi v. Mongolia* and *Vicente v. Angola*, rendered by the emergency arbitrators in two recent emergency proceedings under the SCC Rules.

In *Munshi v. Mongolia*, the claimant sought interim measures for his release from detention, which had been ordered by Mongolian authorities on fraud charges related to his investment in the mining sector. The emergency arbitrator, however, did not grant the request for release, determining that the detention did not constitute irreparable harm that could not be compensated by monetary damages, disagreeing with the claimant, who argued that his detention severely hampered his ability to manage his investment and participate in the arbitration. The emergency arbitrator was of the view that the potential harm could be addressed through monetary compensation.[109] It seems that in this case, the emergency arbitrator had to strike a balance between ensuring the procedural integrity of the arbitration and respecting the host state's judicial processes.

A comparable outcome was seen in *Vicente v. Angola*, where the emergency arbitrator dealt with a request for interim measures related to the detention of the claimant, who faced serious charges in Angola. The emergency arbitrator issued a decision on 16 June 2021 rejecting the request by Angolan-Portuguese dual national Carlos Manuel de São Vicente on the basis that neither the BIT in question nor Angola's investment law provided jurisdiction for SCC emergency arbitration. Based on a prima facie assessment of the evidence, the emergency arbitrator expressed 'severe doubts' about the urgency of the request for interim relief, questioning whether it necessitated immediate action or could wait until a tribunal in the main proceeding was formed. The arbitrator emphasised that for an application to qualify as urgent in emergency arbitration, the remedy sought must be something that cannot be deferred until the arbitral tribunal is constituted.[110]

Whether these two decisions represent the correct approach remains debatable, particularly regarding the limits of emergency arbitrators' powers to address human rights issues.

Finally, interim reliefs aimed at safeguarding investors' rights might also take the form of an order to refrain from publicising details of criminal investigations, such as

109. The arbitral tribunal took a similar view in *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, 6 Apr. 2018, available at https://jusmundi.com/en/document/decision/en-dawood-rawat-v-republic-of-mauritius-award-on-jurisdiction-friday-6th-april-2018. In this case, the tribunal denied the investor's application for interim measures, stating that Should Rawat ultimately prove that Mauritius has taken retaliatory actions against him or Iris's family in violation of the France-Mauritius BIT, any harm proven will be reparable via the monetary damages he claims.' *See Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Order Regarding Claimant's and Respondent's Request for Interim Measures, 11 Jan. 2017, para. 129.

110. Global Arbitration Review, Cosmo Sanderson, 'Jailed businessman fails in emergency claim against Angola', 21 Jun. 2021.

seen in *Teinver v. Argentina*. In this case, the tribunal found that a press conference by Argentinian authorities revealing the details of the arbitration, the criminal complaints and the allegations made therein amounted to an aggravation of the dispute and threatened the claimants' right to the preservation of the *status quo*.

As seen, there is a wide range of possible measures that could be justified by the particularities of specific facts underlying the emergency application for interim relief. What has not yet been seen, however, is an emergency application initiated by a host state to preserve its rights. Such a scenario cannot be completely ruled out, as host states may also face a situation where they would need to safeguard their rights, for instance, in case of an imminent ecological threat posed by the activity carried out by an investor.

§11.07 CONCLUSION

The effectiveness of emergency arbitration is evident in its ability to provide swift and decisive interim relief. By granting such measures, emergency arbitrators can prevent the investor from suffering irreparable harm and ensure that the *status quo* is preserved, thereby protecting the parties' interests during the arbitration process.

This is evidenced by successful applications in several known emergency arbitrator proceedings under the SCC Rules, as discussed in this chapter. Notable cases include *TSIKInvest v. Moldova*, *JKX Oil & Gas v. Ukraine*, *Kompozit v. Moldova*, *Puma Energy v. Benin*, *Okuashvili v. Georgia*, *VEB v. Ukraine*, and *Komaksavia v. Moldova*, where emergency arbitrators awarded the relief sought either partially or in full.

The powers conferred upon emergency arbitrators under the SCC Rules are broad, enabling them to grant any interim measures they deem appropriate. This broad discretion is similar to that of fully constituted arbitral tribunals, ensuring that emergency arbitrators can address the urgent needs of the parties effectively. The abundant case law discussed in this chapter confirms that emergency arbitrators typically do not doubt their authority to make decisions, as long as they are satisfied that the conditions for an emergency application have been met. Although not explicitly required by Appendix II of the SCC Rules governing emergency arbitration, the requirement of urgency has proven to be one of the most challenging aspects, often leading to the dismissal of an emergency application if it is not clearly demonstrated. For example, in cases like *Gazprom v. Lithuania*, *Evrobalt v. Moldova*, and *Vicente v. Angola*, the emergency arbitrators expressed concerns that the urgency claimed did not justify immediate action, as the measures sought could wait until the constitution of the arbitral tribunal.

From the case law reviewed above, when parties opt for arbitration under the SCC Rules, their consent to emergency arbitration is implicitly presumed. The author shares the prevailing opinion that the dynamic reference to any version of the SCC Rules means that the latest version of these rules applies unless the parties have explicitly agreed otherwise. Such a mechanism simplifies the process, allowing for a streamlined approach to obtaining interim relief under the SCC Rules, which is crucial

in preventing irreparable harm and maintaining the *status quo* until an arbitral tribunal can be constituted.

Moreover, the standard for prima facie review of the emergency arbitrator's jurisdiction is intentionally low. A similar standard of review applies to assessing the prospects of success of a case on the merits. This is a welcome interpretation as it ensures that urgent matters can be addressed expeditiously without requiring a detailed examination of complex jurisdictional issues, such as dual nationality of investors or the merits. Emergency arbitrators need only be satisfied that there is a reasonable basis for jurisdiction and a prima facie case on the merits, facilitating the swift decision-making that is essential in circumstances of emergency.

Despite these established principles, several aspects of emergency arbitration in investor-State disputes remain unclear. Particularly, there is inconsistency in how emergency arbitrators interpret consent and jurisdiction, especially when the relevant treaties do not explicitly reference the SCC Rules or contain broad arbitration clauses. This variability challenges predictability and uniformity in emergency arbitration decisions, which could affect parties' confidence in the process.

Furthermore, the concept of irreparable harm in international law, a prerequisite for emergency relief, is notably broad and applied inconsistently by emergency arbitrators.

Demonstrating that an investor or investment would suffer irreparable harm if emergency relief was denied is challenging, especially given the short timeframe allowed for emergency proceedings under the SCC Rules because, arguably, any damage could ultimately be compensated through an award on damages. Therefore, the author recommends that emergency arbitrators should exercise particularly careful judgment when assessing the requirement of irreparable harm in emergency proceedings.

The emergency arbitrator's ability to address human rights concerns, such as the detention of investors, also remains a contentious issue. The different outcomes in cases like *Munshi v. Mongolia* and *Vicente v. Angola* add to the significance of the ongoing debate regarding the extent to which emergency arbitrators can and should intervene in matters involving allegations of human rights violations.

Finally, the possibility for states to utilise the provisions on emergency arbitration, potentially in cases involving ecological impacts or human rights violations, is untested. The scope and limitations of states using this mechanism have yet to be fully explored and understood, as there are no known instances to date of states lodging emergency applications against investors to date.

In conclusion, while emergency arbitration under the SCC Rules has demonstrated its value in providing swift and effective interim relief, its broader applicability and the authority of emergency arbitrators, particularly concerning human rights and state utilisation, is uncertain. In order to achieve certainty, it will be crucial to continue the ongoing development of international arbitration norms and adapt existing frameworks to better accommodate the needs of both states and investors.