

Emergency Arbitration in Investment Treaty Disputes

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Abstract

The emergency arbitrator is a person appointed to grant emergency relief pending the constitution of an arbitral tribunal. Numerous arbitral institutions started introducing an emergency arbitrator procedure in order to provide a more effective system for the protection and preservation of the parties' rights. However, the ICSID Convention and the UNCITRAL Rules on Arbitration, which are the most common rules used in investment treaties, do not recognize the emergency arbitrator procedure. Furthermore, the ICC Arbitration Rules preclude the emergency arbitrator procedure in investment treaty disputes. By contrast, the SCC allows the application of its emergency arbitrator rules in investment treaty disputes. In fact, there have been three cases in which investors used the SCC Rules to seek emergency relief. This paper evaluates the propriety of the emergency arbitrator procedure in investment treaty disputes. It discusses possible objections by state entities, which are less likely to be the beneficiaries of the emergency arbitrator procedure, and concludes that the procedure is not inconsistent with the features of investment treaty disputes and hence should be introduced in investment treaty arbitration.

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I. INTRODUCTION

Interim and conservatory measures (collectively referred to as “emergency measures”) are necessary to protect and preserve the rights of parties in an arbitration.¹ When a party is in need of emergency measures, it has the option of waiting for the constitution of an arbitral tribunal or resorting to a national court. However, there are risks that in the time necessary for the constitution of a tribunal, the party may incur irreparable damage, and the appropriate court for resolving the issue might be the home court of the respondent. Emergency arbitration was introduced to fill this gap.²

An emergency arbitrator is a person appointed to grant emergency relief pending the constitution of an arbitral tribunal. Recently, numerous arbitral institutions have started developing an emergency arbitrator procedure in order to protect and preserve the rights of parties in circumstances where urgent relief is requested. The recent³ concept of an

¹ “Interim” or “provisional” measures are measures granted before the issuance of the final award in order to protect a party’s right during the pending proceedings. “Conservatory” measures are granted in the form of an interim or a final award for the purpose of protecting or conserving particular rights of parties. *See* Gary Born, *International Commercial Arbitration* 2428 (2d ed. 2014).

² The new rules on emergency arbitrator do not prevent parties from seeking interim measures from the court of the seat of arbitration. For instance, Article 29(7) of the ICC Rules and Article 32(5) of the SCC Rules make this clear.

³ The primitive forms of emergency arbitrator procedure are the International Chamber of Commerce Rules for Pre-Arbitral Referee Procedure (“ICC Pre-Arbitral Referee Rules”) in 1990, the American Arbitration Association (“AAA”)’s Optional Rules for Emergency Measures of Protection published in 1999, and the Netherlands Arbitration Institute (“NAI”) Summary Arbitral Proceedings rules introduced in 2001. *See generally* Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 *J. Int’l Arb.* 337, 338 (2010); Kassi Tallent, *Emergency Relief Pending Arbitration in the U.S. Context*, in *Interim and Emergency Relief in International Arbitration* 287 (Diora Ziyaeva ed., 2015).

emergency arbitrator was first introduced by the International Center for Dispute Resolution (“ICDR”) in 2006,⁴ which was followed by the International Institute for Conflict Prevention and Resolution (“CPR”) in 2009.⁵ Similarly, the Stockholm Chamber of Commerce (“SCC”)⁶ and the Singapore International Arbitration Centre (“SIAC”)⁷ introduced emergency arbitration in 2010, the Australian Centre for International Commercial Arbitration (“ACICA”)⁸ in 2011,⁸ the International Chamber of Commerce (“ICC”)⁹ and the Swiss Chambers’ Arbitration Institution¹⁰ in 2012, the Hong Kong International Arbitration Centre (“HKIAC”)¹¹ in 2013, the Japan Commercial Arbitration Association (“JCAA”),¹² the London Court of International Arbitration (“LCIA”)¹³ and the World Intellectual Property Organization (“WIPO”)¹⁴ in 2014, and the China International Economic and Trade Arbitration Commission (“CIETAC”) in 2015. The

⁴ Article 37 of ICDR Rules introduces emergency arbitration. However, the ICDR International Arbitration Rules introduced Emergency Measures of Protection in its Amended Rules Article 6 in 2014.

⁵ Accelerated Rule 9 of the CPR Global Rules for Accelerated Commercial Arbitration. Rule 14.5 of the CPR Rules for Non-Administered Arbitration provides for introduces emergency arbitrator procedure.

⁶ SCC Arbitration Rules (“SCC Rules”), Appendix II.

⁷ SIAC Arbitration Rules (“SIAC Rules”), Art. 26.2.

⁸ ACICA Arbitration Rules (“ACICA Rules”), Schedule 2.

⁹ ICC Arbitration Rules (“ICC Rules”), Art. 29 and App. V.

¹⁰ Swiss Rules of International Arbitration, Art. 43.

¹¹ HKIAC Arbitration Rules (“HKIAC Rules”), Schedule 4.

¹² JCAA Arbitration Rules (“JCAA Rules”), Chapter 5, section 2.

¹³ LCIA Arbitration Rules (“LCIA Rules”), Art. 9B.

¹⁴ WIPO Arbitration Rules (“WIPO Rules”), Art. 49.

increasing number of institutions introducing the emergency arbitrator procedure demonstrates the wide perception of a gap in the existing system and the need for a remedy to fill it.

In the arena of investment treaty disputes, however, emergency arbitration is not yet well known. Unlike many private arbitration rules, the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention”) and the 1976, 2010, and 2013 arbitration rules of the United Nations Commission on International Trade Law (collectively referred to as the “UNCITRAL Rules”), the two most popular dispute settlement mechanisms used in investment treaties, do not provide for or at least have not yet introduced the emergency arbitrator procedure. Considering the differences between commercial and investment treaty disputes, the ICC decided not to apply its rules on emergency arbitration to investment treaty disputes.¹⁵ By contrast, the SCC does not recognize the difference between commercial and investment treaty disputes in applying its rules on the emergency arbitrator procedure. In fact, there have been three recent investment treaty cases where investors used the SCC Rules to seek emergency measures. Since the SCC Rules are available to many bilateral investment treaties (“BITs”) and the multilateral Energy Charter Treaty (“ECT”),¹⁶ the use of the SCC Rules for emergency relief is expected to increase in the future.

¹⁵ Article 29(5) of the ICC Rules precludes the application of the rules on emergency arbitrator procedures to investment treaty disputes. *See infra* IV.A. for detailed discussion.

¹⁶ Arbitration Institute of the Stockholm Chamber of Commerce, *Report on Investment Treaty Disputes*, <http://www.sccinstitute.com/dispute-resolution/investment-disputes/> (last visited April 20, 2016).

The different attitude of arbitral institutions towards application of the emergency arbitrator procedure in investment treaty disputes raises the question of whether emergency arbitration is suited for investment treaty arbitration. Is the distinction between commercial arbitration and investment treaty arbitration so huge to preclude emergency arbitration from investment treaty disputes? What are the features of investment treaty arbitration that make the difference? Does not the urgent need for emergency relief remain unchanged in investment treaty disputes? The question of the propriety of emergency arbitration in investment treaty disputes has not yet been debated heavily among scholars, but since growing number of investors started seeking emergency relief in the dispute against states, the issue compels attention. Against this background, this paper evaluates the possible objections to emergency arbitration in investment treaty disputes.

Chapter 2 proceeds with the existing mechanism of emergency arbitrator procedure in the context of commercial arbitration. In discussing the general features of emergency arbitration, the focus is on the purpose, the procedures, and the legal issues surrounding the enforcement of the decision rendered by the emergency arbitrator. Chapter 3 discusses the factual and procedural background of recent decisions by emergency arbitrators pursuant to the SCC Rules in investment treaty disputes. Chapter 4 examines possible objections to the introduction of emergency arbitration in investment treaty disputes. Some of the objections are the actual defenses raised by state parties in the recent emergency arbitration cases against state entities. It is important to look into the actual defenses by state parties in a real case to understand the concerns in introducing emergency arbitrator procedure in investment treaty disputes.

II. EMERGENCY ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION

Before delving into the discussion on whether to introduce emergency arbitration in investment treaty disputes, it is noteworthy to understand the features of the existing emergency arbitrator procedure adopted by private arbitral institutions. This chapter discusses the general aspects of emergency arbitration, focusing on the scope of application, the procedure, the requirements and the enforcement of emergency decisions. In doing so, examples will be mostly drawn from the SCC Rules (and sometimes from the ICC Rules) as these are the two rules of private arbitral institutions that are included in investment treaties.¹⁷

A. Introduction

The introduction of the new procedures on emergency arbitration was driven by demand in the business community. Before the introduction of emergency arbitration, parties could either wait until the constitution of an arbitral tribunal or file for a provisional measure before a national court. However, both of these options have several drawbacks. First, the time necessary for the constitution of an arbitral tribunal may take up to several months. Secondly, the recourse to national courts is not consistent with parties' intention to resort to arbitration, in particular when the appropriate court is the home jurisdiction of the respondent.¹⁸ Thirdly, the court where the request for interim relief is filed might not

¹⁷ However, as discussed in detail *infra* IV.A., Article 29(5) of the ICC Rules implicitly preclude the application of the ICC Rules to investment treaty disputes.

¹⁸ See Fabio Santacrose, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 Arb. Int'l 284 (2015).

have the expertise required for a particular dispute.¹⁹ Emergency arbitration was launched to overcome these problems.

B. Scope of Application

The issue of the scope of application relates to whether the new rules on emergency arbitration are retroactive or prospective. Some arbitral institutions state that the new emergency arbitration rules are applicable to all arbitrations commenced after the effective date of the new rules. This means that although the new rules were not in force at the time of entering into an arbitration agreement, the arbitration commenced after the effective date of the new rules on emergency arbitration would still be subject to those rules. The SCC is an example of this approach.²⁰ Hence, arbitrations commenced after January 1, 2010, the effective date of the new emergency arbitration rules of the SCC, are subject to the new rules no matter when the arbitration agreement was concluded. On the other hand, there are arbitral institutions that only chose to apply the new rules for emergency arbitration to the cases of which arbitration agreements were entered into after the effective date of the new rules. The ICC is an example of such approach.²¹ The ICC Rules on emergency arbitrator procedure do not apply to contracts concluded before January 1, 2012, the effective date of the new ICC Rules, unless the parties agree otherwise.

¹⁹ *Id.*

²⁰ Other examples are the SIAC, the Swiss Chambers' Arbitration Institution, the JCAA and the ACICA.

²¹ Also, the SIAC, the HKIAC and the LCIA follow the same approach as the ICC.

The rules on emergency arbitration can be either opt-out or opt-in. There are some arbitral institutions that adopt an opt-out approach to ensure the availability of the procedure to parties.²² For instance, under the SCC Rules, which adopts an opt-out approach, it is deemed that parties who agree to the SCC Rules have opted to include rules on emergency arbitrator procedure and parties need to opt-out of the rules should they wish to do so.²³

C. Procedure

Most major arbitral institutions have a similar procedure on emergency arbitration. Emergency arbitrator procedure is initiated by filing a request for the appointment of an emergency arbitrator. The application can be submitted “irrespective of whether the party making the application has already submitted its Request for Arbitration,”²⁴ but prior to the “transmission of the file to the arbitral tribunal.”²⁵ In contrast to some court proceedings, *ex parte* requests are not allowed in the emergency arbitrator procedure. Hence, the arbitral institution, which receives the request, should notify the counterparty of the application.²⁶ At the same time, the arbitral institution proceeds to appoint an emergency arbitrator within a short period of time. For instance, the SCC Rules require that the appointment should be within “24 hours of receipt of the application for the

²² Shaughnessy, *supra* note 3, at 350.

²³ See Foreword to the 2010 SCC Rules.

²⁴ ICC Rules, Art. 29(1); SCC Rules, Art. 32(4), App. II Art. 1(1).

²⁵ ICC Rules, Art. 29(1); SCC Rules, Art. 32(4), App. II Art. 1(1).

²⁶ ICC Rules, Art. 29(1), App. II Art. 1(5); SCC Rules, Art. 32(4), App. II Art. 3.

appointment of an emergency arbitrator,”²⁷ whereas the ICC Rules state that an emergency arbitrator should be appointed “within as short a time as possible, normally within two days.”²⁸ However, arbitral institutions can decide not to appoint an emergency arbitrator should it determine that the institution “manifestly lacks jurisdiction.”²⁹ The authority to determine *prima facie* jurisdiction lies with arbitral institutions.³⁰

The place of arbitration agreed upon by the parties becomes the seat of the emergency proceedings.³¹ Absent such agreement, arbitral institutions step in to decide the seat of the emergency proceedings.³² The decision should consider whether the law of the seat permits such emergency proceedings.³³

Arbitral rules on challenging arbitrators may also apply to emergency arbitrators.³⁴ However, considering the urgent nature of emergency arbitration, the procedure is expedited. For example, the SCC requires a challenge of an emergency arbitrator to be

²⁷ SCC Rules, Art. 32(4), App. II Art. 4(1).

²⁸ ICC Rules, Art. 29(1), App. 2(1).

²⁹ SCC Rules, Art. 32(4), App. II Art. 4(2).

³⁰ Shaughnessy, *supra* note 3, at 342.

³¹ SCC Rules, Art. 32(4), App. II Art. 5.

³² SCC Rules, Art. 32(4), App. II Art. 5; ICC Rules, Art. 29(1), App. V Art. 4(1).

³³ Shaughnessy, *supra* note 3, at 342.

³⁴ ICC Rules, Art. 29(1), App. II Art. 3; SCC Rules, Art. 32(4), App. II Art. 4(3).

“made within 24 hours from when the circumstances giving rise to the challenge to an emergency arbitrator became known to the party.”³⁵

Due to the urgent nature of the process, the emergency arbitrator sets a procedural timetable for the proceedings “within as short a time as possible.”³⁶ While the emergency arbitrator ensures the fair representation of parties, some arbitration rules allow the emergency arbitrator to render a decision even if the counterparty failed to respond or appear at a hearing.³⁷ Some arbitral institutions, (such as ICC, LCIA and SCC), set a short time limit for emergency arbitrators to make a decision, ranging from five to twenty days from the receipt of the file.³⁸

Arbitral institutions have different rules for the form of emergency decisions. Depending on the institution’s rules, the emergency arbitrator has the choice of rendering its decision in the form of an order or an award. The decision has a binding effect on the parties upon its delivery, but not over the subsequent arbitral tribunal.³⁹ Hence, an arbitral tribunal constituted at a later stage may issue a decision to modify the prior emergency decision.

³⁵ SCC Rules, Art. 32(4), App. II Art. 4(3).

³⁶ ICC Rules, Art. 29(1), App. II Art. 5(1); SCC Rules, Art. 32(4), App. II Art. 7. The ICC Rules require the emergency arbitrator to establish a procedural timetable “normally within two days from the transmission of the file to the emergency arbitrator,” whereas the SCC Rules require the emergency arbitrator to take into account the “urgency inherent in such proceedings.”

³⁷ SCC Rules, Art. 30(2).

³⁸ See Charlie Caher & John MacMillan, *Emergency Arbitration: The Default Option for Pre-Arbitral Relief?*, International Comparative Legal Guides (July 24, 2015), <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/01-emergency-arbitration-the-default-option-for-pre-arbitral-relief>.

³⁹ SCC Rules, Art. 32(4), App. II Art. 9(1).

The emergency arbitrator can amend or revoke the decision “upon a request by a party.”⁴⁰ Under some institutional rules (such as the SCC, SIAC and HKIAC Rules), the emergency decision ceases to exist when a case has not been referred to an arbitral tribunal (either a request for arbitration is not filed or the arbitral tribunal is not constituted).⁴¹ However, under other institutional rules (such as the LCIA Rules), the decision does not automatically cease to exist.⁴²

D. Requirements for Emergency Arbitration

Many institution’s rules on emergency arbitration do not state the requirements in detail. Rather, they allow broad discretion for an emergency arbitrator so that the emergency arbitrator can have flexibility in granting the measure. Unlike other institutional rules, the ACICA states the elements to be satisfied as follows:

Before the Emergency Arbitrator orders or awards any Emergency Interim Measure, the party requesting it shall satisfy the Emergency Arbitrator that:

- a) irreparable harm is likely to result if the Emergency Interim Measure is not ordered;
- b) such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if the Emergency Interim Measure is granted; and
- c) there is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not

⁴⁰ SCC Rules, Art. 32(4), App. II Art. 32(5).

⁴¹ Caher & John MacMillan, *supra* note 38.

⁴² LCIA Rules, Art. 9.9.

affect the liberty of decision of the Arbitral Tribunal in making any subsequent determination.⁴³

Similarly, Ali Yeşilirmak enlists (i) *locus standi* to request an emergency measure, (ii) *prima facie* establishment of the right for the measure, (iii) urgency or emergency, and (iv) the existence of immediate damage or irreparable loss as the requirements to grant emergency relief.⁴⁴

E. Enforcement of Emergency Decisions

Should a court enforce an emergency decision as a final and binding award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) regardless of its form? Would the designation “award” convert a decision having the nature of an order into an award? Assuming that the “emergency award” is considered as an award under the New York Convention, how would the finality requirement of the New York Convention be satisfied?

These issues are related to the question of whether the emergency arbitrator is considered an arbitrator when only the decision rendered by an arbitrator is enforceable. If the emergency arbitrator is not an arbitrator, then the decisions of the emergency arbitrator are “contractual” rather than “jurisdictional.”⁴⁵ A French court, in *Société Nationale des*

⁴³ ACICA Rules, Schedule 1, Art. 3.5.

⁴⁴ See Ali Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, 2005), at paras. 4-58, 4-59.

⁴⁵ See Baruch Baigel, *The Emergency Arbitrator Procedure Under the 2012 ICC Rules: A Juridical Analysis*, 31 J. Int'l Arb. 1, 15 (2014)

Petroles du Congo v. Republique du Congo,⁴⁶ where the order issued by pre-arbitral referee appointed pursuant to the ICC Pre-Arbitral Referee Rules was challenged, decided that the referee was not an arbitrator and his decision was only a contractual one. However, as many commentators criticize, the title is not a determinative factor in deciding the nature of the emergency arbitrator and the decision rendered by the arbitrator.⁴⁷

There are several scholars who view the emergency decision as final and enforceable under the New York Convention. According to them, it can be said that the emergency decision is final “in respect to the issues which it addresses.”⁴⁸ When the rules of arbitral institutions state that emergency arbitration is binding upon the parties, the decision is final “as to the provisional matter at issue and as to the parties.”⁴⁹

This enforceability issue was considerably debated with regard to the interim measures rendered by arbitral tribunals. Gary Born argues that the “better view is that provisional measures should be and are enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards.”⁵⁰ Albert van den Berg

⁴⁶ *Société Nationale des Petroles du Congo v. Republique du Congo*, Cour d’appel [CA][Court of Appeal] Paris, 1^e ch., section C, Judgment, April 29, 2003, unofficial English translation in Emmanuel Gaillard & Phillippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20 Arb. Int’l 13, 32-37 (2004).

⁴⁷ Yeşilirmak, *supra* note 44, at para. 4-74; Amir Ghaffari & Emmylou Walters, *The Emergency Arbitrator: The Dawn of a New Age?*, 30 Arb. Int’l 153, 163 (2014).

⁴⁸ Yeşilirmak, *supra* note 44, at para. 4-77.

⁴⁹ Shaughnessy, *supra* note 3, at 345.

⁵⁰ Born, *supra* note 1, at 2515.

supports this view, as he considers that enforceability of provisional measures “greatly enhance[s] the effectiveness of international arbitration.”⁵¹ Lars Heuman also agrees with the enforceability of provisional measures “[i]f the determination refers to a specific issue severable and independent from the substantive issue to be decided later.”⁵² Considering that enforceability does not depend on nomenclature but on the content of the decision, U.S. courts held in several cases that interim measures have sufficient finality for the purpose of protecting the final award.⁵³

Instead of trying to “enforce” the emergency decision from a national court, parties might seek the same interim relief from the court of the appropriate jurisdiction. The parties in *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Others*⁵⁴ previously sought and obtained emergency relief under the SIAC Rules, but later filed for an interim relief before the Bombay High Court.⁵⁵ The court granted interim relief similar to the one granted by the emergency arbitrator.

⁵¹ Albert Jan van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* 29 (1999).

⁵² Lars Heuman, *Arbitration Law in Sweden: Practice and Procedure* 334 (2003).

⁵³ For instance, *see* *Arrowhead Global Solutions v. Datapath Inc.*, 166 Fed. Appx. 39, 44 (4th Cir. 2006); *Yahoo Inc. v. Microsoft Corporation*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013); *Chinmax Medical Systems Inc. v. Alere San Diego Inc.*, No. 10cv2467, 2011 WL 2135350 (S.D. Cal. 2011); Anne Marie Whitesell et al., *Emergency Relief in International Arbitration*, in *Interim and Emergency Relief in International Arbitration* 311, 325 (Diora Ziyaeva ed., 2015).

⁵⁴ *See* *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Others*, Arbitration Petition No. 1062/2012, High Court of Bombay, India, January 22, 2014.

⁵⁵ *See* Paata Simsive, *Indirect Enforceability of Emergency Arbitrator’s Orders*, Kluwer Arbitration Blog (April 15, 2015), <http://kluwarbitrationblog.com/2015/04/15/indirect-enforceability-of-emergency-arbitrators-orders/>.

There are several mechanisms within the arbitral proceedings to secure compliance with emergency decisions. First, some arbitral rules require the parties to undertake to comply with the decision. For instance, Article 29(2) of the ICC Rules provides that “[t]he parties undertake to comply with any order made by the emergency arbitrator.” The failure to do so constitutes breach of contract, which leads to the obligation to pay damages.⁵⁶ Secondly, some rules empower the subsequently constituted arbitral tribunal to consider non-compliance with an emergency decision in its final award, including reallocation of costs. Article 29(4) of the ICC Rules is a good example.⁵⁷ Lastly, the subsequent tribunal may draw negative inference from non-compliance.⁵⁸ One commentator views that emergency arbitrators are empowered to draw negative inferences even though no provision exists in the rules.⁵⁹ In practice, the party who obtained an emergency decision may seek the same measure in the form of interim relief from the subsequent tribunal.

III. RECENT DECISIONS BY EMERGENCY ARBITRATORS IN INVESTMENT TREATY DISPUTES

Since the introduction of the recent form of emergency arbitrator procedure, there have been three cases where investors sought an emergency relief in investment treaty disputes. All of them were initiated under the SCC Rules. In this chapter, the factual and

⁵⁶ Ghaffari & Walters, *supra* note 47, at 164.

⁵⁷ Article 29

4) The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

⁵⁸ Shaughnessy, *supra* note 3, at 346; Ghaffari & Walters, *supra* note 47, at 165.

⁵⁹ Shaughnessy, *supra* note 3, at 346.

procedural backgrounds of the cases are discussed in detail to find out some of the concerns that a state party may have with emergency arbitration.

A. TSIKInvest LLC v. Moldova

The first case ever decided by an emergency arbitrator in an investment treaty dispute was brought by a Russian investor, TSIKInvest LLC (“TSIK”) against the Republic of Moldova. The dispute arose from TSIK’s investment in BC Victoriabank SA (the “Bank”). In March 2012, TSIK acquired 4.16 percentage holding in the Bank, which was approved by the National Bank of Moldova (“NBM”) on August 9, 2012.⁶⁰ However, in later 2013, NBM alleged that TSIK breached the national laws on the ownership of banks by acting in concert with several other investors and by jointly acquiring 10.43 percentage shares in the Bank with them without NBM’s permission.⁶¹ Subsequently, on February 5, 2014, the NBM issued decision No. 19 of the Administrative Council of NBM (“Decision 19”) by which the NBM decided to block the voting rights of TSIK, Maxpower Invest Limited, Westex Management Limited and Folignor CC (collectively referred to as “the Decision 19 Investors”) and to enforce divestment of their substantial share in the Bank within three months from the issuance of the decision.⁶²

On March 31, 2014, TSIK sent a notice of dispute to Moldova pursuant to Article 10 of the Treaty between the Government of the Russian Federation and the Government of the

⁶⁰ TSIKInvest LLC v. The Republic of Moldova, Emergency Arbitration No. EA (2014/053), Award, April 29, 2014, para. 14, <http://www.italaw.com/sites/default/files/case-documents/italaw4219.pdf> [hereinafter *TSIK Award*].

⁶¹ *Id.*, para. 17.

⁶² *Id.*

Republic of Moldova on the Promotion and the Reciprocal Protection of Investments, signed on March 17, 1998 (the “Moldova-Russia BIT”).⁶³

On April 23, 2014, when the six-month cooling-off period had not yet lapsed, TSIK initiated an emergency arbitration under the SCC Rules to request a stay of Decision 19 pending the resolution of the dispute.⁶⁴ The day after the filing, a Swedish arbitrator, Kaj Hobér, was appointed as the emergency arbitrator.⁶⁵ Under the provisional timetable set forth by the arbitrator, the respondent state was to have filed its response by April 25, 2014, but it did not.⁶⁶

The emergency arbitrator decided that although the term “interim measures”⁶⁷ is not defined by the SCC Rules, it “may construe those words as broadly as may be appropriate in the particular instances.”⁶⁸ Consequently, the emergency arbitrator concluded that “the

⁶³ *Id.*, para. 20; Article 10 of the Moldova-Russia BIT prescribes that:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party, which arose in relation to an investment, including disputes regarding the amount, conditions or procedure for the payment of compensation under Article 6 of this Treaty, or procedure for the payment of compensation under Article 6 of this Treaty, shall be subject to a written notice accompanied by detailed comments which the investor shall send to the Contracting Party, which is a party to the dispute. Parties to the dispute shall endeavor to resolve such a dispute by amicable means where possible.

2. If the dispute is not resolved in such a manner within six months from the date of the written notice referred to in paragraph 1 of this article, it shall be submitted for consideration to [...]

⁶⁴ TSIK Award, *supra* note 60, para. 2.

⁶⁵ *Id.*, para. 8.

⁶⁶ *Id.*, para. 9.

⁶⁷ Article 32(1) and Article 1(2) of Appendix II to the SCC Rules stipulate that the emergency arbitrator shall have the power to grant “interim measures.”

⁶⁸ TSIK Award, *supra* note 60, para. 48.

categorization ‘interim measures’ includes injunctions of all kinds.”⁶⁹ Since there is no mention of the applicable standard in the SCC Rules, the emergency arbitrator looked into the criteria under Swedish law, which was the law of the seat of the arbitration.⁷⁰ Referring to SCC Case No. 96/2011 and SCC Emergency Arbitration 170/2011, he held that the criteria are: (a) a “*prima facie* establishment of a case;” (b) “urgent need for the requested interim relief;” and (c) “irreparable harm, or serious or actual damage if the measure requested is not granted.”⁷¹

In the present case, (a) TSIK was required to demonstrate “not that its case is likely to succeed on the merits but only that there is reasonable possibility that it will so succeed.”⁷² After reviewing the documents provided by TSIK, the emergency arbitrator concluded that there was no concrete evidence to prove the allegation that TSIK acted in concert with the other Decision 19 investors.⁷³ (b) There was also an urgent need to stay Decision 19 since TSIK would be “unable to exercise its rights as a shareholder,” losing its voting rights and right to receive dividends.⁷⁴ Lastly, (c) TSIK would be “permanently deprived of its rights as a shareholder” and such damage would be “irrevocable even if

⁶⁹ *Id.*

⁷⁰ *Id.*, para. 52.

⁷¹ *Id.*, para. 53.

⁷² *Id.*, para. 54.

⁷³ *Id.*, para. 62.

⁷⁴ *Id.*, para. 55.

Decision 19 [was] eventually found to be flawed.”⁷⁵ In sum, according to the emergency arbitrator, all three requirements were met.

In addition, the emergency arbitrator decided that the cooling-off period did not prevent TSIK from filing the application. The reasons for this decision were that it would be: (a) “procedurally unfair to the Claimant;” and (b) “contrary to the purpose of the emergency arbitrator procedure to apply the cooling-off period to the appointment of an emergency arbitrator.”⁷⁶ TSIK also contended that the cooling-off period was inapplicable due to the effect of the most favored nation (“MFN”) clause in Article 3 of the Moldova-Russia BIT, and that the government of Moldova had failed to settle the case amicably.⁷⁷

Finally, on April 29, 2014, the emergency arbitrator ordered that Decision 19 be stayed pending the decision on the merits.⁷⁸

However, it was not until June 4, 2014, which is thirty days after the issuance of the emergency award, that TSIK filed its formal notice of arbitration.⁷⁹ According to Article 9(4)(iii) of the Appendix II to the SCC Rules, the emergency decision ceases to be binding if “arbitration is not commenced within 30 days from the date of the emergency

⁷⁵ *Id.*, para. 56.

⁷⁶ *Id.*, para. 66.

⁷⁷ *Id.*, para. 59.

⁷⁸ *Id.*, para. 67.

⁷⁹ See Jarrod Hepburn, *In-depth: Unpacking the Reasoning of the First SCC Emergency Arbitrator Ruling in a Russian Investment Treaty Claim*, Investment Arbitration Reporter (February 15, 2015), <https://www.iareporter.com/articles/in-depth-unpacking-the-reasoning-of-the-first-scc-emergency-arbitrator-ruling-in-a-russian-investment-treaty-claim/>.

decision.” It is unknown whether there was a new emergency decision around that time or whether the government of Moldova failed to honor the decision and seized the shares.⁸⁰ The case was eventually dropped in October 2014 due to TSIK’s failure to pay fees.⁸¹

B. Griffin Group v. Poland

The second instance of a foreign investor resorting to the emergency arbitrator procedure of the SCC Rules was initiated by a real estate enterprise in Luxembourg. Griffin Group, which invested in a plot of land in Poland in the form of usufruct rights, sought arbitration for the alleged expropriation of its rights to a historic former barracks site adjacent to Lazienki Park in central Warsaw.⁸² In 2011, the previous owner of the site had demolished the barracks. Subsequently, Warsaw city, in March 2012, initiated legal proceedings to cancel the previous owner’s usufruct rights to the land as the demolition allegedly was in violation of the city’s planning codes.⁸³ The site soon became available due to a mortgage default by the previous owner, and in December 2012, Griffin Group acquired the site, but was unsuccessful in challenging the domestic legal proceedings.⁸⁴ Consequently, in October 2013, Griffin Group filed a notice of dispute under the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See UNCTAD, *Investment Dispute Settlement – Griffin Group v. Poland*, Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/Details/614> (last visited April 21, 2016).

⁸³ See Jarrod Hepburn, *Poland Claims Round-Up: At Least a Dozen Investment Treaty Arbitrations*, Investment Arbitration Reporter (July 29, 2015), <http://www.iareporter.com/articles/poland-claims-round-up-at-least-a-dozen-investment-treaty-arbitrations/>.

⁸⁴ *Id.*

Agreement between the Government of the Belgium-Luxembourg Economic Union and the Government of Poland on the Encouragement and Reciprocal Protection of Investment of 1987 (“BLEU-Poland BIT”).⁸⁵ Finally, complying with the six-month cooling-off period in the BLEU-Poland BIT, in 2014, Griffin Group commenced arbitration.⁸⁶

Unlike the other two instances, in which investors resorted to the emergency arbitrator procedure prior to commencing arbitration, Griffin Group sought the procedure after filing for the request for arbitration.⁸⁷ The Griffin Group resorted to emergency arbitrator procedure in order to enjoin the effects of a local court judgment.⁸⁸ Also, the Griffin Group case differs from the other two cases in that it waited for the expiry of the six-month cooling-off period in the BIT.⁸⁹

However, the outcome of emergency arbitration was unfavorable to Griffin Group. Georgio Petrochilos, the emergency arbitrator appointed by the SCC, found that the

⁸⁵ *Id.*

⁸⁶ See Luke Peterson, *Investigation: New Details Emerge About Use of Emergency Arbitrators in Investment Treaty Cases*, Investment Arbitration Reporter (October 8, 2015), <http://www.iareporter.com/articles/investigation-new-details-emerge-about-use-of-emergency-arbitrators-in-investment-treaty-cases/>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

requirements for emergency relief were not met.⁹⁰ The case is still pending to be heard under the SCC Rules.⁹¹

C. JKX Oil & Gas plc v. Ukraine

The third emergency arbitration in an investment dispute was also initiated under the SCC Rules. On or around January 8, 2015, JKX Oil & Gas plc., a UK-based oil and gas exploration and production company, and its wholly owned Ukrainian and Dutch subsidiaries, namely Poltava Petroleum Company and Poltava Gas B.V. (collectively referred to as “JKX”), requested the appointment of an emergency arbitrator in relation to its investment in Ukraine.⁹² The filing for emergency arbitration came after giving notice of a potential arbitration under the ECT, but prior to the official filing of the requests for arbitration. On February 13, 2015, all three investors commenced an investment arbitration against Ukraine pursuant to the SCC Rules under the ECT.⁹³ Three days later,

⁹⁰ The decision of the emergency arbitrator is unpublished. For the summary of the decision, see Peterson, *supra* note 89.

⁹¹ UNCTAD, *supra* note 82.

⁹² The judgment of the Ukraine court on the enforcement of the emergency decision (“Kyiv Court Judgment”) reveals that the emergency arbitrator was appointed on January 9, 2015, available at <http://reyestr.court.gov.ua/Review/45009594>. Summary English translation of the judgment is found in Luke Peterson, *Investor Takes Emergency Arbitrator Award under Energy Charter Treaty to a Ukraine Court and Obtains Enforcement of Tax-Freeze Holdings*, Investment Arbitration Reporter, Investment Arbitration Reporter (June 29, 2015), <http://www.iareporter.com/articles/investor-takes-emergency-arbitrator-award-under-energy-charter-treaty-to-a-ukraine-court-and-obtains-enforcement-of-tax-freeze-holdings/>. Since the SCC Rules require an emergency arbitrator be appointed within 24 hours of receipt of the application for the appointment of an emergency arbitrator, it can be inferred that JKX filed its application on or around January 8, 2015.

⁹³ See Kyriaki Karadelis, *Ukraine Faces Trio of Claims over Gas Reforms*, Global Arbitration Review (February 16, 2015), <http://globalarbitrationreview.com/news/article/33551/ukraine-faces-trio-claims-gas-reforms/>.

on February 16, 2015, the parent UK-based company launched an investment arbitration pursuant to the UNCITRAL Rules under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments of 1993 (the “UK-Ukraine BIT”), and its two subsidiaries initiated investment arbitration using the Agreement on Promotion and Reciprocal Protection of Investment between the Kingdom of the Netherlands and Ukraine of 1994 (the “Netherlands-Ukraine BIT”) before the International Centre for Settlement of Investment Disputes (“ICSID”).⁹⁴ Since only the SCC Rules stipulate the provisions on the emergency arbitrator procedure, JKK sought appointment of an emergency arbitrator under the SCC Rules.

JKK’s claims primarily dealt with the rental fees that it had spent on gas and oil production since 2011.⁹⁵ In particular, the claims were based on a series of alleged discriminatory state actions, including legislation that raised royalties from 28 to 55 per cent;⁹⁶ regulations requiring private parties to buy gas exclusively from the state-owned entity Naftogaz; prohibition on repatriation of dividends; and restrictions on foreign cash transactions.⁹⁷

⁹⁴ See Olena Perepelynska, *Arbitrations Against Ukraine and its State Bodies in Post-Revolution Period*, CIS Arbitration Forum (May 13, 2015), <http://www.cisarbitration.com/2015/05/13/arbitrations-against-ukraine-and-its-state-bodies-in-post-revolution-period/>.

⁹⁵ *Id.*

⁹⁶ *Id.*; UNCTAD, *Investment Dispute Settlement - JKK Oil & Gas v. Ukraine*, Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/Details/661> (last visited April 21, 2016).

⁹⁷ Perepelynska, *supra* note 94.

On January 14, 2015, Rudolf Dolzer, who was appointed as the emergency arbitrator, decided in favor of JKX. It ordered Ukraine to “refrain from imposing royalties on the production of gas by JKX's Ukrainian subsidiary in excess of the rate of 28 percentage (as opposed to the 55 percentage rate that is currently applicable under Ukrainian law).”⁹⁸ The decision of the emergency arbitrator was released even though the three months cooling-off period under the ECT had not been complied. This issue was raised by the Ukrainian government later in domestic enforcement proceedings.⁹⁹ Although JKX emphasized the binding nature of the emergency decision in its announcement,¹⁰⁰ the Ukraine government refused to comply with the award. Consequently, JKX filed for the enforcement of the emergency decision before Pecherskyi District Court of Kyiv (“Kyiv Court”).¹⁰¹

On June 8, 2015, Kyiv Court granted the application to enforce the emergency decision (“Kyiv Court Judgment”).¹⁰² Kyiv Court treated the emergency decision the same as other

⁹⁸ The decision of the emergency arbitrator is not officially published. The summary of the decision could be inferred from Kyiv Court Judgment and the Press Release dated February 16, 2015 by JKX, available at <http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/JKX/12249847.html> [hereinafter *JKX Press Release dated February 16, 2015*].

⁹⁹ Peterson, *supra* note 91.

¹⁰⁰ JKX Press Release dated February 16, 2015, *supra* note 98.

¹⁰¹ See Dmytro Galagan, *Enforcement of the JKX Oil & Gas Emergency Arbitrator Award: A Sign of Pro-arbitration Stance in Ukraine?*, Kluwer Arbitration Blog (July 27, 2015), <http://kluwarbitrationblog.com/2015/07/27/enforcement-of-the-jkx-oil-gas-emergency-arbitrator-award-a-sign-of-pro-arbitration-stance-in-ukraine/>.

¹⁰² Kyiv Court Judgment, *supra* note 91; Peterson, *supra* note 91.

foreign arbitral awards; the court, without detailed reasoning, stated that the enforcement of an emergency decision is governed by the New York Convention.¹⁰³

During the proceeding, the Ukraine government raised several objections, such as: (i) that recourse to emergency arbitration should be prohibited because the ECT's three month cooling-off period had not expired; (ii) that Ukraine was deprived of due process by not being given due notice of the appointment of the arbitrator and emergency relief process, and hence, was deprived of the opportunity to present its case; (iii) that the SCC Rules did not include rules on an emergency arbitrator procedure at the time when Ukraine ratified the ECT in 1988; and (iv) that the award was contrary to "public order" (in the sense of "public policy"), because "it infringes on the state's authority to raise royalty taxes, and poses a threat of 'material deterioration of the state's economy.'"¹⁰⁴

Kyiv Court rejected all the objections raised by Ukraine. Firstly, the court decided that the three-month cooling-off period did not prevent JXX from resorting to emergency arbitration.¹⁰⁵ Secondly, the court found that there was no violation of due process in emergency arbitration proceeding. In its view, it was enough for the emergency arbitrator to request Ukraine's response by January 12, 2015 at 5 PM GMT, which is three days after the appointment of the emergency arbitrator.¹⁰⁶ However, there was no evaluation on the limited time allowed for Ukraine to respond. Thirdly, the court viewed that the

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

recourse to emergency arbitration was permissible pursuant to the SCC Rules applicable at the time of JKX's application for emergency arbitration.¹⁰⁷ Lastly, the court rejected the defense based on public order or public policy.¹⁰⁸ According to the court, the emergency arbitrator decision, which "aims to prevent damage to the applicant's interests and to prevent irreparable harm, does not set any other rules than those in force in Ukraine, and only concerns the applicants."¹⁰⁹

Ukraine appealed against the Kyiv Court's Judgment. While the appeal process was pending, JKX sought an interim award from the arbitral tribunal subsequently constituted under the UNCITRAL Rules. According to the announcement by JKX dated July 23, 2015, the tribunal issued an interim award, which had the same effect of "[limiting] the collection of rental fees on gas produced by JKX's Ukrainian subsidiary, Poltava Petroleum Company ... to a rate of 28 percentage."¹¹⁰ Three arbitral proceedings (i.e. the UNCITRAL proceeding filed by the parent company based on the UK-Ukraine BIT; the ICSID proceeding filed by the Dutch and Ukrainian subsidiaries under the Netherlands-Ukraine BIT; and the SCC proceeding filed by all three investors under the ECT) had

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ JKX, Press Release (July 23, 2015), <http://www.jkx.co.uk/~media/Files/J/JKX/press-release/2015/JKX%20International%20Arbitration%20Proceedings%20Interim%20Award%2023%2007%2015.pdf>.

been all consolidated into one UNCITRAL proceeding.¹¹¹ The UNCITRAL hearing is scheduled for July 2016.¹¹²

IV. PROPRIETY OF EMERGENCY ARBITRATION IN INVESTMENT TREATY DISPUTES

A. Introduction

The most commonly used arbitral rules in investment treaties are the ICSID Convention and its ancillary rules (collectively referred to as the “ICSID System”), the UNCITRAL Arbitration Rules, the ICC Rules and the SCC Rules. Out of these four sets of rules, only the SCC Rules recognize the application of emergency arbitration procedure in investment treaty disputes.

The ICC has adopted a contrasting approach: Article 29(5) of the ICC Rules excludes emergency arbitration from investment disputes. It states that the emergency arbitrator provisions “shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.”¹¹³ According to the ICC Commission Report, one of the purposes of Article 29(5) was to exclude investment treaty arbitration from the scope of emergency

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Article 29

5) Articles 29(1)-29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

arbitration.¹¹⁴ The ICC maintains that the investor and the host state are not signatories of the arbitration agreement formed by the state's standing offer through a treaty and the investor's acceptance contained in its notice of claim or request for arbitration.¹¹⁵ However, the reasons behind the exclusion of emergency arbitration are not publicly known.

Is the ICC's approach more appropriate than that of the SCC? Why did the ICC preclude investment treaty disputes from emergency arbitration? Does emergency arbitration infringe on the rights of state parties? What are the concerns that state parties might have as to the introduction of emergency arbitration, and how could they be addressed? In order to answer these questions, this chapter explores and analyzes a few issues that might pose challenges to the introduction of emergency arbitration in investment treaty disputes.

B. Interim Protection of Rights - a General Principle of Law?

Emergency arbitration essentially serves the same purpose as an interim or provisional measure granted by an arbitral tribunal or a national court, in that it is a procedure to grant emergency measures to protect and preserve a party's right. Before examining the propriety of adopting emergency arbitration in investment treaty disputes, it is necessary to first assess the importance of the interim protection of rights under international law.

¹¹⁴ See International Chamber of Commerce, *ICC Commission Report – States, State Entities and ICC Arbitration* 6 (2014), <http://www.iccwbo.org/Templates/StandardTemplate.aspx?id=2147499278> (last visited April 21, 2016).

¹¹⁵ *Id.*

This issue is inherently related to whether interim protection of rights is recognized as a general principle of law.

Many scholars and international jurisprudence recognize that the interim protection of rights is a general principle of law.¹¹⁶ The importance of provisional measures is recognized by both common and civil law systems.¹¹⁷ As José García summarizes, the “principle of non-aggravation” or the “general duty to abstain” is a “materialization of the general principle of procedural good faith,” which is applicable to all legal proceedings.¹¹⁸ Even before the conclusion of the ICJ Statute and the ICSID Convention, the Permanent Court of International Justice, in the *Electricity Company of Sofia and Bulgaria* case, decided that the parties are under an obligation:

[To] abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute.¹¹⁹

The principle of non-aggravation is also found in Article 33 of the General Act for the Pacific Settlement of International Disputes dated September 26, 1928,¹²⁰ which is an international treaty superseded by the 1945 United Nations Charter.¹²¹

¹¹⁶ See generally Lawrence Collins, Essays in International Litigation and the Conflict of Laws 10-11(1994)(Discussion on the interim protection of rights as a general principle of law).

¹¹⁷ *Id.*

¹¹⁸ See José Ángel Rueda-García, *Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations Against the Republic of Ecuador*, 6 Transnational Dispute Management 1, 25 (2009).

¹¹⁹ The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Order, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (December 5).

The principle of interim protection of rights is a common feature not only in national and international adjudication, but also in arbitration. Depending on their agreement, parties may resort to either arbitration or national courts for interim protection of their rights. The authority of arbitrators to decide provisional measures may derive either from *lex arbitri* or the arbitration agreement itself.¹²² Agreeing to arbitral rules, which include a reference to interim measures, by virtue of a contract, the parties are conferring jurisdiction on the arbitrators to order interim measures.¹²³

Arbitral practice has also confirmed that the principle of interim protection of rights or the principle of non-aggravation is a general principle of law. Recently, in *Víctor Pey Casado v. Chile*, an ICSID tribunal decided that:

It relates to the general principle, frequently affirmed in international case-law, whether judicial or arbitration proceedings are in question, according to which ‘each party to a case is obliged to abstain from every act or omission likely to aggravate the case or to render the execution of the judgment more difficult.’¹²⁴

¹²⁰ Article 33

3. The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

¹²¹ Rueda-García, *supra* note 118, at 27.

¹²² Christoph Schreuer et al., *The ICSID Convention – A Commentary* 757, 758 (2009).

¹²³ Collins, *supra* note 116, at 49.

¹²⁴ *Víctor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 25, 2001, at paras. 67-68 [hereinafter *Pey Casado v. Chile*].

In sum, the principle of interim protection of rights is recognized as a general principle of law. Taking into account the urgent nature and the importance of the interim protection of rights, it is necessary to extend the protection to the stage before the constitution of an arbitral tribunal. However, there could be some limitations in expanding the scope of interim protection of rights due to the sovereign character of a state party. Some of the possible objections to emergency arbitration by a state party are discussed in detail below.

C. Possible Objections to Emergency Arbitration in Investment Treaty Disputes

1. Jurisdiction

One of the objections to emergency arbitration in investment treaty disputes is related to jurisdictional defense. Opponents of emergency arbitrator procedure might argue that jurisdiction should be established for the emergency arbitrator to decide on a particular relief. However, unlike commercial arbitration, in investment treaty arbitration the jurisdictional objections are more detailed and the decision on jurisdiction alone could take up to several years. In fact, arbitral proceedings in investment treaty disputes are often bifurcated to decide jurisdictional defenses separately from the merits.

Faced with a similar problem, the ICSID Arbitration Rules prescribe, under Rule 39(2), that the tribunal shall give priority to a request for provisional measures. Giving priority to a request for provisional measures means that “it has to take precedence over any other issues pending before the tribunal,”¹²⁵ including jurisdictional objections. As Christoph

¹²⁵ Schreuer, *supra* note 122, at 771.

Schreuer notes, the urgency of the matter causes a tribunal to decide provisional measures before the issues on jurisdiction have been fully argued and decided.¹²⁶

The issue of jurisdiction has risen frequently before the ICJ and various investment arbitral tribunals. In the *Case concerning Pulp Mills on the River Uruguay*, the ICJ ruled that a *prima facie* showing of jurisdiction is sufficient to establish its power to decide on provisional measures.¹²⁷ Furthermore, an ICSID tribunal, in *Holiday Inns v. Morocco*, decided that “The Tribunal ... considers that it has jurisdiction to recommend provisional measures according to the terms of Art. 47.”¹²⁸

As briefly discussed in Chapter II, many private arbitral institutions provide that the institution can make a *prima facie* judgment on the jurisdiction of the case upon receipt of the request for emergency relief. Such provisions do not negate the fact that the authority to ultimately decide jurisdiction lies with the tribunal. This is true also in

¹²⁶ *Id.*

¹²⁷ *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order for the Request for the Indication of Provisional Measures, 2007 I.C.J. ¶24 (January 23), para. 24.

¹²⁸ *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, May 12, 1974, at 658; *Vacuum Salt v. Ghana*, ICSID Case No. ARB/92/1, Decision on Request for Provisional Measures, June 14, 1993; *Ceskoslovenska Obchodni Banka A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, at para. 9; *Pey Casado v. Chile*, *supra* note 124, at para. 4; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, October 16, 2002, at 391; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Procedural Measures, August 6, 2003, at para. 29; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, at para. 47 [hereinafter *Bayindir v. Pakistan*]; *Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, at paras. 2 and 20 [hereinafter *Biwater Gauff v. Tanzania*]; *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, at para. 55 [hereinafter *Occidental v. Ecuador*].

investment treaty arbitration. For instance, in *Vacuum Salt v. Ghana*, after ordering on provisional measures at an early stage of the proceedings,¹²⁹ the tribunal ultimately decided that there was no jurisdiction *ratione personae*.¹³⁰

It is not only in investment treaty disputes, but also in commercial disputes that the emergency arbitrator cannot defer its decision on emergency relief until a final determination on jurisdiction is made. Emergency relief, by its nature and purpose, requires an immediate decision. The rules of private arbitral institutions on emergency arbitration and decisions by international courts and tribunals demonstrate that, for a decision on provisional measures, which includes emergency decisions, only *prima facie* jurisdiction need be established over the case. Article 36(3) of the ICSID Convention provides that the Secretary-General shall register a request for arbitration unless the dispute is found to be manifestly outside the jurisdiction of the Center. This provision implies that the Secretary-General is given the power to recognize *prima facie* jurisdiction over a case.¹³¹ A similar provision, authorizing the Secretary-General to recognize *prima facie* jurisdiction upon receipt of emergency relief, could solve the issue on jurisdiction.

¹²⁹ *Vacuum Salt v. Ghana*, ICSID Case No. ARB/92/1, Decision on Provisional Measures, June 14, 1993.

¹³⁰ *Vacuum Salt v. Ghana*, ICSID Case No. ARB/92/1, Award, February 16, 1994.

¹³¹ See generally Charles Brower & Ronald Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings*, 6 ICSID Rev. – Foreign Int'l L. J. 455 (1991).

2. Principle of Sovereignty

The most salient difference between commercial and investment treaty arbitration is that one party to investment treaty disputes is a state with sovereign character. The sovereign character of a state party poses many challenges to emergency arbitrator procedure, distinguishing it from procedure in a commercial dispute. In this section, I will examine the challenges posed by the sovereign nature of a state party, which emerge at different stages of arbitral proceedings.

a) Legitimacy of Emergency Arbitrator

Firstly, a question as to the legitimacy of the emergency arbitrator can be raised. Since the emergency arbitrator, for the sake of time constraints, is not appointed by parties but by an arbitral institution, a state party can raise the issue of legitimacy of the emergency arbitrator. A state party might argue that an emergency arbitration is a direct infringement of the principle of sovereignty or state immunity. In examining this problem, two issues should be addressed: (i) whether the state has waived its immunity through an arbitration agreement with an investor; and (ii) whether emergency arbitration is covered by the arbitration agreement. In the first place, generally speaking, state immunity is waived when “a state enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction.”¹³² The

¹³² UN Convention on State Immunity, Article 17 (Effect of an arbitration agreement)

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;

“commercial transaction” includes “investment matters.”¹³³ Hence, when an arbitration agreement is concluded by the combination of a state’s standing offer in an investment treaty and the acceptance of an investor, it is deemed that the state has waived its immunity. In the second place, whether emergency arbitration is an arbitration is related to the issue of whether an emergency arbitrator is an arbitrator. An emergency decision is inherently judicial in nature.¹³⁴ Also, it is significant that the new rules on emergency arbitrator procedure are integrated into the main body of arbitration rules and not in a separate set of rules, like the ICC Pre-Arbitral Referee Rules.¹³⁵ Hence, by agreeing to a particular set of arbitration rules, it can be said that the state party has implicitly agreed to the rules on emergency arbitration, which are contained in the arbitration rules. In sum, it becomes hard to object to the legitimacy of emergency arbitrator based on the principle of state sovereignty and state immunity once a state party agrees to a set of arbitral rules which includes the rules on emergency arbitration.

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

¹³³ Annex to the Convention

With respect to article 17

The expression “commercial transaction” includes investment matters.

¹³⁴ Yeşilirmak, *supra* note 44, at para. 4-24.

¹³⁵ Shaughnessy, *supra* note 3, at 345.

b) Types of Emergency Measure

Secondly, the sovereign nature of a state party impacts “the manner in which a tribunal disposes of an application for interim measures.”¹³⁶ This might be true even with emergency measures. The purpose of provisional measures is, on the one hand, to avoid the aggravation of the dispute and, on the other hand, to preserve the integrity of the arbitral process.¹³⁷ Hence, in order to avoid the aggravation of the dispute, provisional measures are granted to preserve the right of a party and to maintain or restore the status quo; whereas to preserve the integrity of the arbitral process, provisional measures are sought to secure evidence and to facilitate the conduct of arbitral proceedings.¹³⁸ Among various types of provisional measures, requiring a state party to undertake specific performance or *restitutio in integrum* challenges state sovereignty.¹³⁹ Many arbitral tribunals in investment treaty disputes have recognized the impracticability of such a remedy.¹⁴⁰ Citing Friedman’s 1953 treatise on Expropriation on International Law that compelling a State to make restitution would “constitute in fact an intolerable

¹³⁶ Yves Fortier, *Interim Measures: An Arbitrator’s Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation – Investor-State Arbitration, June 16, 2008, http://www.arbitration-icca.org/media/4/01137866264927/media0122329529899201115_001.pdf.

¹³⁷ See Loretta Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 157, 158 (Christina Binder et al. eds., 2009).

¹³⁸ See Munir Maniruzzaman, *Protection in International Investment Arbitration: Challenge to State Sovereignty?*, in *Interim and Emergency Relief in International Arbitration* 183, 185-186 (Diora Ziyayeva ed., 2015); Schreuer, *supra* note 122, at 759.

¹³⁹ Maniruzzaman, *supra* note 138, at 194-196.

¹⁴⁰ See Stephen Schwebel, *Speculations on Specific Performance of a Contract between a State and a Foreign National*, in *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel*, 416-424 (1994); Oscar Schachter, *International Law in Theory and in Practice*, 178 *Collected Courses* 188-190 (1982).

interference in the internal sovereignty of States,” in *LIAMCO v. Libya*, the tribunal refused to grant specific performance as the appropriate remedy.¹⁴¹ Furthermore, tribunals took a similar position on specific performance in *BP v. Libya* and *CMS Gas Transmission v. Argentine*.¹⁴² In *Occidental v. Ecuador*, the tribunal paid attention to Article 35 of the ILC Articles of State Responsibility¹⁴³ and decided that “[s]pecific performance, even if possible, will nevertheless be refused if it imposes too heavy a burden on the party against whom it is directed.”¹⁴⁴ Finally, the tribunal decided that “provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State.”¹⁴⁵

Injunctive relief against a state party could pose a challenge to its sovereign nature. In order to prevent any controversy regarding the possibility of a particular emergency measure, investment treaties can explicitly provide for the types of measures not

¹⁴¹ *Libya American Oil Company (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1, 63 (1981).

¹⁴² *BP Exploration Company (Libya) Limited v. Libyan Arab Republic*, 52 I.L.R. 297, 354 (1974); *CMS Gas Transmission Company v. Argentine*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at 406.

¹⁴³ Article 35 Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation, which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of proportion to the benefits deriving from restitution instead of compensation

¹⁴⁴ *Occidental v. Ecuador*, *supra* note 128, at para. 82.

¹⁴⁵ *Id.*, at para. 93.

permitted, like Article 1134 of NAFTA Chapter 11, which states that an arbitral tribunal may not order attachment as a provisional measure.¹⁴⁶

c) Enforcement of Emergency Decisions

Lastly, the sovereign character of a state party can pose a challenge to the enforcement of the emergency decision. What is the form of the decision issued by the emergency arbitrator? Is the emergency decision binding on the parties? Does the emergency decision have the same effect as an arbitral award? Although there still remains the issue of enforcement of an emergency decision as discussed in Chapter II, the controversy as to the binding effect of an emergency decision is lessened when arbitral institutions expressly stipulate the form of the decision and its binding effect in their rules. This is the approach chosen by several private arbitral institutions. For instance, the SCC Rules state that the emergency decision could take the form of either an “order or an award” and the decision shall be binding on the parties.¹⁴⁷

However, the sovereign character of states complicates the issue of the binding nature of emergency measures. In examining whether emergency decisions should have a binding

¹⁴⁶ Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

¹⁴⁷ Article 32

(3) An interim measure shall take the form of an order or an award.

effect over the parties, it is important to look into the discussions behind the adoption of articles on interim measures in the ICJ Statute and the ICSID Convention, since it is highly likely that similar issues will arise when rules on emergency arbitration are adopted. Due to the sovereign character of states, introduction of interim measures faced objections from several states as to its binding effect. As Munir Maniruzzaman states, the sovereign character of a state party requires respect of the “state’s basic needs to exercise its sovereignty for its self-preservation.”¹⁴⁸ In the case of Article 41 of the ICJ Statute, which is the model of Article 47 of the ICSID Convention, after several rounds of discussions among nations, the term “indicate” was deliberately chosen, instead of the term “order,” when stating the court’s power to render provisional measures.¹⁴⁹ Likewise, drafting history of Article 47 of the ICSID Convention shows that disagreements existed as to the binding nature of provisional measures.¹⁵⁰ States initially agreed to the power of the ICSID tribunal to “prescribe” rather than “recommend” provisional measures.¹⁵¹ However, China objected to the binding nature of an “interim award,” and eventually the term “prescribe” was replaced with the term “recommend.”¹⁵² Considering the legislative history of both Article 41 of the ICJ Statute and Article 47 of the ICSID Convention, it is expected that states would object to the binding nature of the emergency decision as well.

¹⁴⁸ Maniruzzaman, *supra* note 138, at 186-187.

¹⁴⁹ Article 41

1. The Court shall have the power to indicate, if it considers that circumstance so require, any provisional measure which ought to be taken to preserve the respective rights of either party.

¹⁵⁰ Schreuer, *supra* note 122, at 764.

¹⁵¹ *Id.*

¹⁵² *Id.*

However, it is noteworthy that such legislative history ultimately has not deprived the decision on provisional measures of any binding effect. It is true that the decision on provisional measures might not enjoy the same legal effect as “the final judgment of a court in that State” since the decision is not an award under Articles 48-55 of the ICSID Convention.¹⁵³ However, the state will still be under the general obligation not to frustrate the object of the proceedings.¹⁵⁴ Also, the tribunal’s power to consider the parties’ conduct in making the award might have a *de facto* binding effect on the parties.¹⁵⁵

Despite the contextual limitation, international courts and investment tribunals developed a doctrine that provisional measures have a binding effect. Firstly, in *LaGrand* case, considering the object and purpose of Article 41 of the ICJ Statute, the court decided that:

The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Schreuer, *supra* note 122, at 764; *AGIP S.p.A. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/1, Award, November 30, 1979, at paras. 7-9 [hereinafter *AGIP v. Congo*].

indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.¹⁵⁶

Investment tribunals followed a similar approach. Despite the contextual difference between “recommendation” and “order” in the ICSID Convention, in *Maffezini v. Spain*, the tribunal ruled that its authority to rule on provisional measures was “no less binding than that of a final award” and concluded that it deemed “the word ‘recommend’ to be of equivalent value to the word ‘order.’”¹⁵⁷ The tribunal in *Pey Casado v. Chile* relied on the judgment of the ICJ in *LaGrand* case, and considered the *travaux préparatoires* of the ICSID Convention to decide that the provisional measures under Article 47 of the convention have binding effect.¹⁵⁸ Following the ruling in *Pey Casado v. Chile*, the tribunal, in *Tokios Tokelès v. Ukraine* suggested that despite the nomenclature, “recommendations” are deemed binding on the parties:

It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures ‘recommended’ by an ICSID tribunal are legally compulsory; they are in effect ‘ordered’ by the tribunal, and the parties are under a legal obligation to comply with them.¹⁵⁹

¹⁵⁶ *LaGrand Case* (Ger. v. U. S.), Judgment, 2001 I.C.J. (June 27), at para. 102 [hereinafter *LaGrand Case*].

¹⁵⁷ *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Provisional Measures (Procedural Order No. 2), October 28, 1999, at para. 9.

¹⁵⁸ *Pey Casado v. Chile*, *supra* note 124, paras. 18-26.

¹⁵⁹ *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, July 1, 2003, at para. 4.

Scholars are divided as to the compulsory nature of the decision on provisional measures. Based on the teleological criterion (object and purpose) of Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (“VCLT”), Pierre Lalive supports the view that provisional measures have a binding effect.¹⁶⁰ Orrego Vicuña, who was the rapporteur in the *Resolution* on the *Maffezini* case, also supports the compulsory nature of provisional measures.¹⁶¹ Hobér and Schreuer object to the compulsory nature based on a literal reading of Article 47 of the ICSID Convention.¹⁶² According to Article 31(1) of the VCLT, a treaty should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” The decisions of international courts and investment tribunals bring controversy among scholars since they seem to be not in conformity with the basic rules of treaty interpretation in international law. However, it is undeniable that the trend of international adjudication and arbitral practice is moving towards recognizing the compulsory nature of provisional measures. As the ICJ in *LaGrand* case decided,¹⁶³ the binding nature of provisional measures stems from the principle of good faith,¹⁶⁴ which is recognized as a general principle of law. In order to prevent another round of controversy surrounding the binding nature of emergency

¹⁶⁰ Professor Pierre Lalive who was the President of the tribunal in the *Pey Casado v. Chile* argued the compulsory nature of the provisional measures. *Pey Casado v. Chile*, *supra* note 124.

¹⁶¹ Orrego Vicuña, *La naturaleza vinculante de ordenens procesales en arbitraje internacional, in Liber Amicorum. Homenaje a la obra científica y académica de la profesora Tatiana B. de Maekelt* 185-207 (Víctor Hugo et al. eds., 2001); Rueda-García, *supra* note 118, at 28.

¹⁶² Kaj Hobér, *Interim Measures by Arbitrators, in International Arbitration 2006: Back to Basics?* 728 (Van den Berg ed., 2007); Schreuer, *supra* note 122, at 758.

¹⁶³ In *LaGrand Case*, the ICJ relied on *Electricity Company of Sofia and Bulgaria*, which recognized the principle of non-aggravation. *LaGrand Case*, *supra* note 156, para. 103.

¹⁶⁴ See Robert Kolb, *Note on the New International Case – Law Concerning the Binding Character of Provisional Measures*, 74 *Nordic J. Int'l Law* 612 (2005).

decisions, it is desirable to include a provision on the binding effect of emergency decisions.

As is the case in *JKX Oil & Gas plc. v. Ukraine*, in the case where a state party does not voluntarily undertake the emergency decision, an investor, who filed for the emergency relief, might bring the case to the domestic court of the state party for its enforcement. Since the decision was rendered in the form of an “award” rather than an order, the court of Ukraine ruled that the award was eligible under the New York Convention. However, based on the principle of sovereignty, national courts might refuse to enforce emergency decisions in a form other than an “award.” Is it permissible under international law for national courts to refuse the enforcement of emergency decisions? Schreuer notes that “to the extent that provisional measures give rise to a legal obligation such an obligation extends to the domestic courts of the State party concerned.”¹⁶⁵ An act of a judiciary is considered an act of that state under international law and hence the state party is responsible should its judiciary refuse to enforce the emergency decision.¹⁶⁶ Where an emergency decision conflicts with the municipal law of the state party, the state party cannot invoke its law to deny compliance with the provisional measure decided by the

¹⁶⁵ Schreuer, *supra* note 122, at 766.

¹⁶⁶ Article 4 of the International Law Commission’s Article on State Responsibility.

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

emergency arbitrator.¹⁶⁷ Furthermore, non-compliance with a provisional measure can be addressed by the subsequently constituted tribunal. As discussed in Chapter II, private arbitral institutions (*e.g.* Article 29(4) of the ICC Rules) empower subsequently constituted tribunals to consider non-compliance with an emergency decision in its final award. This applies also to investment treaty disputes. Several commentators hold that the tribunal would take into account the non-compliance of provisional measures when it comes to making a decision on the merits.¹⁶⁸ Indeed, in *AGIP v. Congo*, the tribunal in assessing the damages, took into account:

(c) that the Government did not comply with the decision of the Tribunal, dated 18 January 1979, as to the measures of preservation and as a consequence AGIP was unable to have access to a certain number of documents which could have assisted it in presenting its case.¹⁶⁹

3. Cooling-Off Period

Some commentators think that emergency arbitration is not suitable for investment disputes because it may undermine mandatory cooling-off period in investment treaties.¹⁷⁰ A cooling-off period refers to a period during which an investor has to engage

¹⁶⁷ Article 27 Internal Law and Observance of Treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

¹⁶⁸ See Paul Friedland, *Provisional Measures and ICSID Arbitration*, 2 *Arb. Int'l* 335, 337 (1986); Arshad Masood, *Provisional Measures of Protection in Arbitration under the World Bank Convention*, 1 *Delhi Law Review* 138, 146 (1972).

¹⁶⁹ *AGIP v. Congo*, *supra* note 155, para. 42.

¹⁷⁰ See Jonathan Lim & Dharshini Prasad, *A Brief Overview of the Draft SIAC Investment*

in consultation or amicable negotiation before disputes are submitted to arbitration. Provisions for cooling-off periods are more common in investment treaties than commercial arbitration agreements.

This issue was raised in *JKX Oil & Gas plc v. Ukraine*. Respondent state raised the issue that the investor failed to abide by the cooling-off provision in the ECT. However, the emergency arbitrator did not view the cooling-off provision as a hurdle in deciding on the emergency relief. The emergency arbitrator's decision seems more plausible for the following reasons:

Firstly, it is not the mere *existence* of a cooling-off clause, but the *interpretation* of the nature of a cooling-off period that might have an impact on the application for emergency arbitration. Arbitral tribunals' decisions on the nature of a cooling-off period are divergent. On one hand, several tribunals view the cooling-off period as "procedural and directory in nature, rather than jurisdictional and mandatory."¹⁷¹ Hence, "the notice requirement does not constitute a prerequisite to jurisdiction"¹⁷² and "[n]on-compliance with the six month period, therefore, does not preclude" the tribunal from proceeding.¹⁷³

For instance, in *SGS v. Pakistan*, the tribunal decided that:

Arbitration Rules 2016, March 12, 2016, Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/2016/03/12/a-brief-overview-of-the-draft-siac-investment-arbitration-rules-2016/>.

¹⁷¹ *Biwater Gauff v. Tanzania*, *supra* note 128, at para. 343.

¹⁷² *Bayindir v. Pakistan*, *supra* note 128, at paras. 99-100.

¹⁷³ *Biwater Gauff v. Tanzania*, *supra* note 128, at 343.

Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.¹⁷⁴

Similar decisions were rendered by tribunals in *Ronald S. Lauder v. Czech Republic*,¹⁷⁵ *Bayindir v. Pakistan*,¹⁷⁶ and *Biwater Gauff v. Tanzania*.¹⁷⁷

Yet, some other tribunals took a more formalistic approach. Tribunals in *Murphy International v. Ecuador* and *Enron v. Argentine* decided that the requirement for a cooling-off period was a jurisdictional one.¹⁷⁸ According to these tribunals, a “failure to comply with that requirement would result in a determination of lack of jurisdiction.”¹⁷⁹

¹⁷⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, at para. 184.

¹⁷⁵ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, September 3, 2001, at para. 187 (The tribunal viewed that “this requirement of a six-month waiting period ... is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant.”)

¹⁷⁶ *Bayindir v. Pakistan*, *supra* note 128, at paras. 99-100 (The tribunal decided that “international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant” and “the notice requirement does not constitute a prerequisite to jurisdiction.”)

¹⁷⁷ *Biwater Gauff v. Tanzania*, *supra* note 128, at para. 343. (The tribunal stated that “this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. ... Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding.”)

¹⁷⁸ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, at para. 141; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, at para. 88 [hereinafter, *Enron v. Argentina*].

¹⁷⁹ *Enron v. Argentina*, *supra* note 178, at para. 88.

Furthermore, the tribunal, in *Ethyl v. Canada*, even sanctioned the claimant for not complying with the cooling-off clause; it ordered the claimant to bear the litigation costs arising from the premature filing of the case.¹⁸⁰

In sum, according to the view that the requirement for a cooling-off period is only procedural, an applicant for emergency arbitration would not need to comply with a cooling-off period before filing for an emergency relief. By contrast, it might seem that emergency arbitration is obstructed if one follows the view that the requirement for a cooling-off period is jurisdictional. This is not true for the reason set forth below.

Secondly, it is noteworthy that a formal and final determination on jurisdiction is not necessary for emergency arbitration. It is sufficient that *prima facie* jurisdiction is established for a decision on emergency relief. Private arbitral institutions, which contain rules on emergency arbitration, explicitly state that the institution may make *prima facie* jurisdiction decisions. For instance, the SCC Rules state that the SCC Board is entitled to make a determination on *prima facie* jurisdiction of the emergency arbitrator.¹⁸¹ Relying on ICJ jurisprudence, investment arbitration practice also shows that the establishment of *prima facie* jurisdiction is satisfactory for a decision on provisional measures. With regard to the ICSID practice, in the *Occidental v. Ecuador* case, the tribunal stated that it would “not order such measures unless there is, *prima facie*, a basis upon which the tribunal’s jurisdiction might be established.”¹⁸² Under the ICSID system, *prima facie*

¹⁸⁰ *Ethyl Corporation v. Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1988, at para. 92.

¹⁸¹ SCC Rules, Article 32(4), Appendix II Article 4(2).

¹⁸² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v.*

jurisdiction is established by the determination made by the Secretary-General of the ICSID, under Article 36 of the ICSID Convention, when the request for arbitration is registered.¹⁸³ Tribunals deciding under the UNCITRAL Rules have a similar approach as to the determination of *prima facie* jurisdiction. Following the ICJ's reasoning in the *Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, tribunals started requiring the establishment of *prima facie* jurisdiction.¹⁸⁴ For instance, in the *Encana v. Canada*, the tribunal referred to “an apparent basis of jurisdiction.”¹⁸⁵

Non-compliance with a cooling-off period does not impact the filing of emergency arbitration because the requirement to comply with the cooling-off period only impacts the final determination of the jurisdiction of a case. The concern of opposing commentators might be that applicants undermine the requirement of a cooling-off period by filing for emergency relief without first abiding by the clause. However, this view is mistaken because the effect of non-compliance with a cooling-off period would be decided by the arbitral tribunal at a later stage, and the consequence of not complying with a cooling-off period would have an impact on the entire case, regardless of the filing for emergency arbitration. Considering the urgent nature and the purpose of emergency

Ecuador, ICSID Case No ARB/06/11, Decision on Provisional Measures, August 17, 2007, at para. 55.

¹⁸³ Brower & Goodman, *supra* note 131, at 455.

¹⁸⁴ See Gabrielle Kaufmann-Kohler & Aurélie Antonietti, *Interim Relief in International Investment Agreements*, in *Arbitration under International Investment Agreements* (Katia Yannaca-Small ed., 2010), at 532.

¹⁸⁵ *Encana Corporation v. Republic of Ecuador*, UNCITRAL, Interim Award, January 31, 2004, at para. 13.

arbitration, an applicant should be allowed to file for emergency relief regardless of its compliance with a cooling-off period. In conclusion, the introduction of emergency arbitration would have less correlation with parties' undermining of a cooling-off period.

4. State Defendants

One of the objections to the idea of introducing emergency arbitration in investment treaty disputes is the fact that the respondent is a state, which is less suited in moving in a prompt manner in defending itself. Some commentators opine that states are in a harder position to respond in compressed timeframes since it lacks the resources and infrastructure to deal with emergency relief in a swift manner.¹⁸⁶ As is obvious from its purpose, emergency arbitrations are conducted in a very swift manner: an emergency arbitrator should decide no later than fifteen days after the file has been transferred to him/her under the ICC Rules, whereas five days are given to emergency arbitrators under the SCC Rules. It can be argued that a state party, unlike a commercial party, is less competent in dealing with highly complicated disputes. Small governments lack internal resources to handle disputes in English, and the process to retain external counsel is often very time-consuming.¹⁸⁷ A commentator opines that such problem could raise the “fundamental questions of procedural fairness.”¹⁸⁸ In fact, in one of the emergency

¹⁸⁶ See Joel Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, Kluwer Arbitration Blog (March 23, 2016), <http://kluwarbitrationblog.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/>

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

arbitration cases against state entities, in *TSIK v. Moldova*, the respondent state was unrepresented.

In assessing this objection, it is worth considering the salient differences between commercial and investment arbitration. In commercial arbitration, the so-called “cooling-off period provision” is not frequently found. In contrast, many investment treaties contain provisions under which investors are required to resolve the dispute in an amicable manner in a limited time period before initiating arbitration. Since there is a risk of an investor’s claim being dismissed should it not comply with the cooling-off period, investors usually engage in (or at least try to engage in) amicable discussions with state parties. In the course of such amicable discussions, state parties become aware of the dispute at issue and retain counsel to represent them in negotiations, who usually continue to represent the state parties in the subsequent arbitration. Considering such practice, the objection based on lack of procedural fairness becomes less persuasive.

Furthermore, since one of the reasons for the lack of procedural fairness arises from the limited time for defense, permitting a more lenient time frame in the case of investment treaty arbitration can be a solution. Different arbitral institutions have different time schedules for emergency arbitration. As long as the time frame does not defeat the purpose of emergency arbitration, a longer time frame would cure the lack of procedural fairness problem.

5. Retroactive Application

A state party may claim that when it entered into an investment treaty, it did not agree to the new rules on emergency arbitration, which did not exist at the time of the conclusion or ratification of the treaty. This objection was indeed raised by the Ukraine government in *JKX Oil & Gas plc. v. Ukraine* case.

In examining such objection, it is worth looking at the reasons behind the retroactive application of the SCC Rules.¹⁸⁹ Patricia Shaughnessy, who was on the committee that drafted the new emergency arbitrators rules of the SCC, cites implied consent, reasonable anticipation, and procedural efficiency as the grounds for the retroactive application.¹⁹⁰ Firstly, Shaughnessy cites implied consent of the parties. By adopting particular arbitration rules, parties “impliedly agreed to arbitrate under the rules which are currently applied by the institution.”¹⁹¹ The assumption rests on the fact that the parties would want to apply the most updated version of the rules.¹⁹² This point was also raised by some delegates to the Working Group for the revision of UNCITRAL Rules.¹⁹³ Secondly, it is

¹⁸⁹ The 2010 SCC Rules provide in the foreword that: “Under any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “Arbitration Rules”) the 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.”

¹⁹⁰ Shaughnessy, *supra* note 3, at 353.

¹⁹¹ *Id.*, at 354.

¹⁹² *Id.*

¹⁹³ UNCITRAL, 41st Session, U.N. Doc A/CN.9/646, at 16–17, para. 72 [hereinafter UNCITRAL 41st Session].

reasonable to expect that parties predict the change in arbitration rules.¹⁹⁴ Arbitration rules are different from arbitration acts, which are more difficult to amend.¹⁹⁵ In order to reflect the change in the market and the needs of users, arbitration rules are amended from time to time. And parties, who are users of arbitration, should reasonably expect such change. Thirdly, Shaughnessy notes that applying rules at the time of the commencement of an arbitration is a better approach as it enhances procedural efficiency.¹⁹⁶ Applying old rules might cause unnecessary confusion and disputes as to the applicability of different versions of rules. Also, from an administrative point of view, relying on old rules might cause internal disorder, especially should the new rule provide for a different decision-making process.¹⁹⁷

Proponents of prospective application of the latest version of arbitration rules argue that the retroactive application is “inconsistent with the contractual nature of arbitration.”¹⁹⁸ Allowing retrospective application of a new set of arbitration rules would run contrary to the paramount principle in arbitration: party autonomy.¹⁹⁹ It is observed that given the contractual nature of the Rules, their binding nature was derived from the will of the

¹⁹⁴ Shaughnessy, *supra* note 3, at 355.

¹⁹⁵ *Id.*

¹⁹⁶ Shaughnessy, *supra* note 3, at 353.

¹⁹⁷ *Id.*

¹⁹⁸ Retroactive application of 2010 UNCITRAL Rules was not supported after considering the consent-based nature of arbitration. UNCITRAL 41st Session, *supra* note 193, at para. 76.

¹⁹⁹ *Id.*

parties.²⁰⁰ The UNCITRAL 2010 Rules and the HKIAC 2013 Rules have adopted the prospective application of their new rules stating that the rules applicable are those in effect on the date of the commencement of arbitration.²⁰¹

Whether to apply new arbitration rules retrospectively is not a matter of wrong or right, but a matter of decision by arbitral institutions. Neither retrospective application nor prospective application can be said to be absolutely just and fair. Hence, retrospective application of a certain set of arbitral rules should be determined by the provision on the scope of application in respective arbitration rules. Of course, the presumption for this solution is that arbitral institutions, when revising their rules, should expressly state in the rules which version of the rules would apply to cases in which arbitration agreements were concluded before the revision of the rules.

V. CONCLUSION

This paper has discussed various possible objections that could be argued by state entities, which are unlikely to be the beneficiaries of emergency arbitration. Five objections were assessed, but none of them showed a likeliness of being a real threat to the introduction of emergency arbitration. First, as to the objection based on jurisdictional defense, it is well established that the decision on interim measures requires only the establishment of *prima facie* jurisdiction and emergency arbitration mechanism does not

²⁰⁰ UNCITRAL, 40th Session, U.N. Doc A/CN.9/614, at 6–7, para. 25; Peter Binder, *Analytical Commentary to the UNCITRAL Arbitration Rules 27* (2013).

²⁰¹ UNCITRAL 2010 Rules, Article 1(2); HKIAC 2013 Rules, Article 1(4).

deny the power of the full tribunal to make a final determination on the jurisdiction of a case. Secondly, the principle of sovereignty may hinder emergency arbitration in several stages. The legitimacy of the emergency arbitrator could be challenged based on the principle of sovereignty and state immunity. However, entering into an arbitration agreement by a standing offer and the consent of an investor waives the state immunity. Specific types of provisional measures, in particular specific performance or *restitutio in integrum*, pose a challenge based on the principle of sovereignty. International arbitral practice opposes the practicability of such types of provisional measures. In order to avoid further controversy, a statutory provision stating the measures not allowed, like Article 1134 of NAFTA Chapter 11, is suggested. The enforcement of the emergency decision might be challenging as well. However, considering the trend in the practice of international courts and arbitral tribunals, it is highly unlikely that the binding effect of an emergency decision would be ignored. Furthermore, the non-enforcement of emergency decisions could lead to liability for states . Thirdly, it is unlikely that the introduction of emergency arbitration would undermine compliance with the cooling-off period. Investment arbitration practice is divided as to the interpretation of the consequence of not abiding by the cooling-off period. However, since the non-compliance with the cooling-off period affects the decision on jurisdiction by the subsequently constituted tribunal, parties assume the risk of non-compliance with the cooling-off period, regardless of their filing for emergency relief. Fourthly, being a state entity in itself cannot be a justifiable reason for opposing the introduction of emergency arbitration. Due to the cooling-off period provision in many investment treaties, it is highly likely that parties would be engaged in amicable discussions prior to the initiation of arbitration.

Also, the short time period from the receipt of the application for emergency relief to the appointment of the emergency arbitrator could be modified in the case of investment treaty disputes.

Interim protection of one's rights is a general principle of law recognized across both common law and civil law systems. Furthermore, it is within the powers of a court or a tribunal to render a decision on interim measures. The necessity to protect and preserve one's rights exists not only in commercial disputes but also in investment treaty disputes as observed by a few recent cases using the SCC Rules on emergency arbitration. The increasing need to introduce emergency arbitration mechanism in investment treaty disputes prompted the SIAC to include a new set of rules on the emergency arbitrator in investment treaty arbitration in its most recently revised rules.²⁰² Until now, emergency arbitration has been utilized only by investors. However, taking into account the various applications for interim measures to arbitral tribunals by state entities, one cannot preclude the possibility that emergency arbitration would become a useful tool for state entities as well.

²⁰² Singapore International Arbitration Center, *Draft Arbitration Rules of the Singapore International Arbitration Center* (6th edition, June 1, 2016), <http://siac.org.sg/images/stories/articles/rules/2016Rulesclean%20-%20website.pdf> (last visited April 21, 2016).