Advancing Emergency Arbitration in Investor-State Disputes: A Call for Broader Institutional Adoption

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Abstract

The emergency arbitrator mechanism is a procedural innovation that has become widely available in commercial arbitration. However, the same cannot be said about the emergency arbitrator in the Investor-State Dispute Settlement (hereinafter ISDS) context. This article identifies the discrepancy between the commercial and ISDS settings and compares the rules of three prominent institutions in depth. It also identifies contentious points that prevent wider adoption of this mechanism in the ISDS context and proposes amendments to facilitate wider adoption.

The article argues that wider adoption could benefit both investors and State parties, provided that emergency relief rests on State consent and includes safeguards for procedural fairness. The proposed institutional model addresses cooling-off periods, the temporal application of rules and the time needed for States to respond. Institutional amendments must operate within the applicable treaty and for International Centre for Settlement of Investment Disputes (hereinafter ICSID), the Convention; they cannot alone create consent to emergency arbitration (hereinafter EA).

Annotasiya

Təcili arbitr mexanizmi kommersiya arbitrajında geniş tətbiq imkanları qazanmış prosessual yenilikdir. Lakin investorlarla dövlətlər arasında mübahisələrin həlli sahəsində bu mexanizm barədə eyni qənaətə gəlmək mümkün deyil. Məqalədə kommersiya və investorlarla dövlətlər arasında mübahisələrin həlli arbitrajları arasında mövcud fərqlər müəyyən edilir və üç aparıcı arbitraj institutunun qaydaları ətraflı müqayisəli təhlil olunur. Həmçinin mexanizmin investorlarla dövlətlər arasında mübahisələrin həlli sahəsində daha geniş tətbiqinə mane olan mübahisəli məsələlər araşdırılır və onun tətbiqinin genişləndirilməsi üçün müvafiq dəyişikliklər təklif edilir.

Məqalədə əsaslandırılır ki, təxirəsalınmaz müvəqqəti təminat tədbirlərinin tətbiqi dövlətin razılığına əsaslandığı və ədalətli icraatın təmin edilməsinə yönəlmiş prosessual təminatlarla müşayiət olunduğu təqdirdə, bu mexanizmin daha geniş tətbiqi həm investorlar, həm də mübahisə tərəfi olan dövlətlər üçün faydalı ola bilər. Təklif olunan institusional model arbitraja müraciətdən əvvəl gözləmə müddətlərini, qaydaların zamana görə tətbiqini və dövlətlərin cavab verməsi üçün zəruri müddəti nəzərə alır. Arbitraj institutlarının qaydalarına edilən dəyişikliklər tətbiq olunan beynəlxalq müqavilənin, İnvestisiya Mübahisələrinin Həlli üzrə Beynəlxalq Mərkəzə münasibətdə isə həm də Konvensiyanın müəyyən etdiyi çərçivəyə uyğun olmalıdır, belə dəyişikliklər özlüyündə təcili arbitraja razılıq yarada bilməz.

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Introduction

Parties to an arbitration may need urgent protection before an arbitral tribunal is constituted. The emergency arbitrator mechanism provides for urgent relief for the parties before the arbitral tribunal has been constituted. Yet, unlike their commercial arbitration counterparts, investors in investment arbitrations often lack access to this mechanism.

These measures can be crucial, because the constitution of an arbitral tribunal can take several months. During this period, assets may be dissipated or evidence destroyed, potentially undermining the effectiveness of a future award or order. For example, the dissipation of assets may leave insufficient assets against which a favourable award can be enforced, while the destruction of evidence may impair a party's ability to establish its case. Urgent measures may therefore be needed to preserve assets, evidence or other rights at risk until the tribunal is constituted and can consider the request for interim protection.[1]

For that reason, institutional rules impose short time limits for an emergency arbitrator to decide upon urgent relief, ranging from a few days to a few weeks. Alternatively, parties seeking relief may apply to a court. However, courts can be less attractive to parties who chose arbitration because of concerns over confidentiality, subject-matter expertise, the language of

[1] Charlie Caher & John McMillan, Emergency Arbitration: The Default Option for Pre-Arbitral Relief?, *The International Comparative Legal Guide to: International Arbitration* 2015 1, 1 (Steven Finizio & Charlie Caher eds., 2015).

proceedings or neutrality in a particular dispute.[2] These considerations help explain the development of an arbitral procedure for the period before the main tribunal exists. In 2006, the International Centre for Dispute Resolution (hereinafter ICDR) introduced emergency arbitrator provisions into its rules. Such provisions were subsequently integrated into other major institutional rules, including the Stockholm Chamber of Commerce (hereinafter SCC) Rules in 2010, the International Chamber of Commerce (hereinafter ICC) Rules in 2012 and the London Court of International Arbitration (LCIA) Rules in 2014.[3] The question for investment arbitration is how to make that protection available while respecting the different legal basis of the State's consent.

The availability of relief does not guarantee its grant: the applicant must establish jurisdiction and satisfy the applicable requirements of urgency and harm. Using a doctrinal comparison of institutional rules, investment treaties and published decisions, the article first examines the approaches of ICSID, the ICC and the SCC. It then considers cooling-off periods, State consent to evolving rules and procedural fairness, before proposing reforms for broader adoption. This focus keeps the question of urgent protection connected to the legal basis and limits of the emergency arbitrator's authority. This article argues for its broader institutional adoption, subject to clear State consent and procedures that balance urgency with a fair opportunity to be heard.

I. Current Role and Legal Framework of EA within the Investor-State Dispute Mechanism

This section examines the current availability and legal framework of EA in investor-state disputes by comparing the approaches of ICSID, the ICC and the SCC and reviewing the experience reflected in some of the publicly available emergency arbitrator decisions. A closer inspection of the arbitration rules used in investment disputes shows that while the mechanism of the emergency arbitrator has not been widely adopted, it should not be overlooked either.[4] In a number of instances, the mechanism of EA has been used in investor-state disputes. These recent developments may come as a surprise, given that investment disputes are typically initiated under international investment treaties and regulated by arbitration rules that

[2] Patricia Shaughnessy, The Emergency Arbitrator, *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 339, 339-340 (Patricia Shaughnessy & Sherlin Tung eds., 2017).

[3] Arbitration Rules of the International Centre for Dispute Resolution, art. 37 (2006); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, app. II (2010); Arbitration Rules of the International Chamber of Commerce, art. 29, app. V (2012); Arbitration Rules of the London Court of International Arbitration, art. 9B (2014).

[4] Lars Markert & Raeesa Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37 Journal of International Arbitration 131, 134 (2020).

generally do not encompass EA mechanisms.[5] This institutional comparison sets the stage for the questions regarding EA in investor-state disputes examined below.

A. Different Institutional Rules on the EA Mechanism in Investor-State Disputes

Institutional rules differ in their treatment of EA in investor-state disputes. A few permit its use in treaty-based disputes, while others expressly exclude such disputes or do not provide an emergency arbitrator mechanism at all. Investment disputes may be initiated under the Arbitration Rules of ICSID or the United Nations Commission on International Trade Law (hereinafter UNCITRAL). Neither set of rules provides an emergency arbitrator mechanism.[6] By contrast, both the ICC and the SCC Rules contain emergency arbitrator provisions, but they differ in whether those provisions extend to treaty-based investment disputes. The existence of an emergency procedure within an institution's rules does not, therefore, necessarily mean that it is available in investor-state arbitration. The following subsections examine these differing approaches by comparing the absence of the mechanism under the ICSID Rules, its exclusion from treaty-based disputes under the ICC Rules and its availability under the SCC Rules.

1. ICSID Approach

The debate over EA within the ICSID framework centres on how to provide timely protection while ensuring that State respondents have a fair opportunity to participate in the proceedings. The need for emergency proceedings is illustrated by the time required to constitute an ICSID tribunal. During this time, a party can suffer irreparable harm. That is why, during discussions about changes to the ICSID Arbitration Rules, some participants suggested the inclusion of an emergency arbitrator mechanism. They argued that, *in some cases,* the *availability of emergency relief* could *be a matter of life and death*.[7] However, the 2018 working paper records concerns about due process for States arising from the *tight schedule* needed for this mechanism. Moreover, it was argued that, because investment treaties may permit provisional measures in domestic courts before the constitution of the tribunal, an emergency arbitrator mechanism was unnecessary *pending constitution of a*

[5] Kyongwha Chung, *Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be*, 20 The Journal of World Investment & Trade 98, 98 (2019).

[6] Arbitration Rules of the International Centre for Settlement of Investment Disputes, rule 47 (2022); Arbitration Rules of the United Nations Commission on International Trade Law, art. 26 (2021).

[7] International Centre for Settlement of Investment Disputes, Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018, 82. Available at: https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf (last visited Sep. 13, 2026).

tribunal.[8] Consequently, the 2022 ICSID Rules did not contain emergency arbitrator provisions. While these concerns of States are valid, especially the availability of domestic measures, domestic courts may be less attractive to investors, because they form part of the host State's legal system. One reason why investors pursue investor-state arbitration is to obtain access to a forum independent of the host State's domestic courts. Requiring investors to rely exclusively on domestic courts for their emergency needs may therefore limit an important benefit of arbitration. Investors may have greater confidence that emergency requests will be dealt with impartially if an emergency arbitrator is available within a neutral arbitral framework.[9] This does not mean that domestic courts are necessarily biased or ineffective. It means that a party's reasons for choosing an international forum may also apply during the period before the tribunal is constituted. The availability of domestic relief and the availability of arbitral relief should therefore be assessed as potentially complementary forms of protection, subject to the applicable treaty and rules. This supports consideration of the mechanism, but does not remove the need for State consent and procedural safeguards.

Although the 2022 ICSID Rules provide for provisional measures that can be requested before the constitution of the tribunal, the tribunal can consider the request only after it has been constituted.[10] This may not meet the need for an emergency decision where constitution of the tribunal takes longer than the threatened harm permits. A provision that delays consideration of an urgent request until that point may lack the response time needed by the investor, unlike an emergency arbitrator who can potentially issue a decision within days. For example, in the SCC EA case of *Mohammed Munshi v. Mongolia*, Mr. Munshi, a dual citizen of the UK and Australia, was detained by the Mongolian authorities and then transferred to a strict-security prison. According to his application, he could make a call only once every sixty days and could speak for no more than five minutes, denying him proper legal access to his lawyers. He also alleged that he was denied basic sanitary conditions and medication, resulting in deterioration of his health. He believed that his life was in danger and requested that the emergency arbitrator order his release from prison.[11] The emergency arbitrator considered the risk to Mr. Munshi's health and life and whether there was a

[8] International Centre for Settlement of Investment Disputes Secretariat, *Proposals for Amendment of the ICSID Rules*, § 492 (International Centre for Settlement of Investment Disputes, Working Paper #1, 2018).

[9] Álvaro Awad & Pablo Mori, No Time to Wait: Arbitration under the Wire—Weighing the Pros and Cons of Emergency Arbitration in ISDS, *The Future of Investor-State Dispute Settlement: Reforming Law, Practice and Perspectives for a Fast-Changing World* 107, 115 (Ben Beaumont et al. eds., 2024).

[10] *Supra* note 6.

[11] *Mohammed Munshi v. Mongolia*, SCC Case No. EA 2018/007, Award on Emergency Measures, §§ 22-23, 34.1 (5 February 2018).

serious possibility of irreparable harm. The arbitrator also concluded that emergency measures were necessary, in light of the conditions in the prison, to provide Mr. Munshi with proper access to legal representatives. Based on these findings, the emergency arbitrator ordered Mongolia to allow reasonable and confidential access to legal representatives for the case, stopping short of ordering his release from prison.[12]

The timeline of this case shows that the claimant filed a request for arbitration on 19 January 2018, an emergency arbitrator was appointed on 31 January and an award was issued on 5 February. The claimant thus obtained limited relief eighteen days after initiating the proceedings. Had this route not been available, he might have had to wait until the constitution of the main tribunal before obtaining arbitral provisional measures. The case demonstrates why pre-constitution protection can matter in urgent circumstances, although it does not establish that the decision saved his life or that ICSID provisional measures are invariably ineffective. The distinction between the relief requested and the relief actually granted also matters. The arbitrator did not decide that emergency protection justified every intervention sought by the claimant. The narrower order illustrates how urgent protection can be directed to the preservation of procedural rights while leaving the underlying dispute for the main tribunal. It therefore supports a case for access to a procedure, rather than an assumption that investors should automatically receive the measures they request.[13]

2. ICC Approach

Despite allowing an emergency arbitrator mechanism in its rules, the ICC expressly excludes EA where the arbitration agreement arises from an investment treaty or statute. According to the ICC's report on emergency arbitrator proceedings, the historical reasoning for excluding treaty-based disputes concerned the signatory requirement in Article 29(5) of the 2012 ICC Rules. In treaty-based arbitration, consent is formed through the State's offer and the investor's acceptance rather than a jointly signed arbitration clause. The issue was therefore the scope of that institutional requirement, not simply whether the investor had physically signed the treaty. To provide further clarity, the 2021 ICC Rules expressly excluded treaty-based arbitration from the emergency procedure. The 2026 ICC Rules, effective from 1 June 2026, retain an express exclusion for arbitration agreements arising from treaties or statutes offering arbitration to investors in Appendix IV, Article 1(3)(c).[14] This

[12] *Id.*, §§ 44-58, 63.

[13] *Id.*, §§ 58, 63.

[14] International Chamber of Commerce, Emergency Arbitrator Proceedings: Report of the ICC Commission on Arbitration and ADR, 39. Available at: https://iccwbo.org/wp-content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf (last visited Sep. 14, 2026); Arbitration Rules of the International Chamber of Commerce, art. 31, app. IV, art. 1(3)(c) (2026).

exclusion remains an obstacle to broader availability of EA in ISDS under the ICC Rules. The consequence is that the ordinary availability of ICC arbitration under a treaty does not, by itself, provide an investor with access to the ICC emergency procedure. A reform must therefore address the emergency provisions themselves, in addition to any question about the interpretation of the treaty. Treating a general reference to ICC arbitration as sufficient would overlook the express institutional exclusion.

3. SCC Approach

There are several distinct features that separate the SCC Rules on EA from the rules of other arbitral institutions. First, unlike the ICC, the SCC Rules provide for EA in both commercial and investment treaty disputes without making a distinction between them. Second, unlike the ICC Rules, which exclude arbitration agreements concluded before 1 January 2012, the preamble of the SCC Rules provides that, unless otherwise agreed, parties are understood to have agreed to the rules in force at the commencement of arbitration or submission of an emergency arbitrator application.[15] In published cases, emergency arbitrators have followed the principle of dynamic application in interpreting the State's consent and considered the emergency arbitrator mechanism applicable.[16] For example, in *Evrobalt LLC v. Moldova*, the emergency arbitrator reasoned that the contracting States could be assumed to contemplate changes to the SCC Arbitration Rules. If they had intended to freeze the rules in force when the treaty was signed, they could have done so expressly.[17] This principle of dynamic application is examined in section 3, where its implications for State consent are considered. The SCC approach thus provides an example of an institution whose emergency provisions can operate in a treaty setting. It does not establish that every investor invoking SCC arbitration has a right to emergency relief. The relevant treaty, any agreement excluding the procedure and the conditions governing the particular application remain material. Its significance is the opportunity it provides to examine State consent and procedural objections through actual decisions, rather than through institutional rules alone.

B. Experience with EA in ISDS

The published experience with EA in ISDS remains limited, suggesting that the mechanism is not yet a routine feature of this type of dispute. This is unsurprising given its absence from the ICSID and UNCITRAL Rules and its

[15] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, preamble, app. II (2023); Arbitration Rules of the International Chamber of Commerce, app. IV, art. 1(3)(a) (2026).

[16] Koh Swee Yen, The Use of Emergency Arbitrators in Investment Treaty Arbitration, 31 ICSID Review 534, 544 (2016).

[17] *Evrobalt LLC v. Republic of Moldova*, SCC Case No. EA 2016/082, Award on Emergency Measures, §§ 24-30 (30 May 2016).

exclusion from treaty-based disputes under the ICC Rules. The SCC cases discussed below nevertheless show that the mechanism can be used in investment disputes and that treaty-specific objections can be considered at the emergency stage. The available cases do not provide a current, comprehensive count or a reliable basis for predicting future use. Institutional availability must also be distinguished from actual use: for example, the SIAC Investment Arbitration Rules provide an emergency procedure where the parties expressly agree to it.[18] The analysis therefore focuses on what the published decisions establish, rather than extrapolating a present success rate from an older sample.

The effectiveness of the procedure also depends on the nature of the relief and the response to the decision. The applicant must establish an adequate jurisdictional basis and satisfy the applicable requirements for urgent protection; the availability of a procedure does not guarantee success. Urgency, the risk of irreparable harm and proportionality are distinct questions. A need for a rapid determination does not dispense with the need to identify which rights require protection or why a particular measure is necessary.[19] This distinction is relevant to the case analyses below: an arbitrator may accept that an emergency application is procedurally available and nevertheless refuse the relief sought.

After the main tribunal is constituted, it may reconsider the measures ordered by the emergency arbitrator. Under the SCC Rules, the emergency decision is binding on the parties, but the main tribunal is not bound by the emergency arbitrator's decision or reasons. The emergency decision can also cease to be binding in the circumstances specified in the rules, including a failure to commence arbitration within the prescribed period.[20] These features make emergency relief provisional. They allow urgent protection to operate before the tribunal exists while preserving the tribunal's authority over the subsequent proceedings.

The possibility of amendment or reversal raises a separate question about the enforcement of an emergency decision under the applicable national law and the New York Convention. An obligation under institutional rules to comply with a decision is not identical to an entitlement to enforce it through a court. The legal form of the decision and the enforcement regime therefore

[18] Arbitration Rules of the Singapore International Arbitration Centre, rule 27.4, sched. 1, § 1 (2017); *See also* Alexey Pirozhkin, SCC Arbitration Institute, Emergency Arbitrator's Decisions in Investment Treaty Disputes at the SCC (2014-2019). Available at: https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/emergency-arbitrators-decisions-in-investment-treaty-disputes-at-the-scc-2014-201.pdf (last visited Sep. 29, 2026).

[19] Evelina T. Wahlström, SCC Arbitration Institute, SCC Practice Note: Emergency Arbitrator Decisions 2019-2022, 26. Available at: https://sccarbitrationinstitute.se/wp-content/uploads/2025/01/scc_practice-note_emergency-arbitrator-decisions-2019-2022-1.pdf (last visited Sep. 22, 2026).

[20] *Supra* note 15, app. II, art. 9(3)-9(5).

matter.[21] In an investment dispute, the involvement of a State adds questions concerning immunity that cannot be resolved merely by describing the decision as an award. This limits what institutional reform alone can achieve, but does not eliminate the practical value of access to urgent protection.

Court enforcement is not the only way an emergency decision can have practical effect. A party may comply voluntarily with interim measures, including because the main tribunal will later examine the conduct of the proceedings.[22] It would nevertheless be inappropriate to assume that States will comply in every case or that non-compliance necessarily determines the final award. The proposed procedure should state the parties' compliance obligations clearly and preserve the main tribunal's power to consider subsequent events. This brings the practical question of effectiveness back to the legal questions of consent and procedural design.

Overall, the approaches of the three major arbitral institutions demonstrate that there is no uniform approach to the emergency arbitrator mechanism in ISDS. Most major institutions remain reluctant to adopt this mechanism for treaty-based investment disputes, likely due to concerns raised by States. However, experience with emergency arbitrator decisions under the SCC Rules may contribute to the wider adoption of the mechanism by other arbitral institutions. The differing institutional approaches therefore provide an important basis for examining the suitability of EA and the challenges associated with its application in ISDS, which will be discussed in section 3.

II. Interim Justice: The Legitimacy of EA in ISDS and Potential Challenges Hindering Broader Adoption

As explored in the previous section, major arbitration institutions have different approaches to the emergency arbitrator mechanism for treaty-based disputes. Considering these differences, difficult questions arise as to whether EA is suitable in the context of ISDS and how broader adoption can be justified while respecting State consent. To address these questions, the place of interim measures in international law is first examined to assess the protective purpose of this mechanism in investment treaty disputes. Possible objections by States are then discussed and assessed through emergency arbitrator decisions, institutional rules and treaty interpretation. The analysis connects the need for urgent protection with the limits on an emergency arbitrator's authority.

[21] Jason Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7 Dispute Resolution International 179, 180 (2013).

[22] A Santens & J Kudrna, *The State of Play of Enforcement of Emergency Arbitrator Decisions*, 34 Journal of International Arbitration 1, 14-15 (2017).

A. Place of Interim Measures in International Law

In principle, the emergency measures discussed throughout this article before the constitution of the tribunal constitute a type of interim measure.[23] The interim protection of rights is a general principle of law, as acknowledged by numerous scholars and rulings in international jurisprudence.[24] Both common and civil law systems acknowledge the significance of provisional measures. For a long time, it has been recognized that parties have a duty not to aggravate the dispute.[25] The purpose of such measures is to preserve the position while the parties' substantive rights remain to be determined. That purpose explains why protection may be needed before a final award and why the party seeking it should not have to establish the whole case at the interim stage. At the same time, provisional protection remains connected to the dispute submitted to the tribunal. Its protective character does not give the decision-maker unlimited authority to address every difficulty facing a party.

Even before the existence of ICSID or the International Court of Justice (ICJ), the principle of non-aggravation was recognized in the *Electricity Company of Sofia and Bulgaria Permanent Court of International Justice (PCIJ)* case,[26] where the court said the following: *"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"*.[27] Therefore, if the parties have an obligation not to aggravate the dispute, temporary measures may sometimes be necessary as an urgent intervention to prevent the situation from worsening before the tribunal is constituted.

The importance of interim protection was also recognized in ICSID cases. For example, in *Quiborax S.A. v. Plurinational State of Bolivia,* the ICSID tribunal was convinced that there was a direct link between the start of the arbitration by the investor and the commencement of the criminal proceedings.[28] For that reason, it decided, by way of provisional measures, that the State of Bolivia should suspend criminal proceedings against the representatives of the claimant because the continuation of the proceedings could harm the investor and aggravate the dispute. Moreover, in another ICSID case, the tribunal decided that the interim protection of rights is a general principle, which is frequently affirmed in international case law, regardless of whether judicial

[23] Awad & Mori, *supra* note 9, 107.
[24] Lawrence Collins, Essays in International Litigation and the Conflict of Laws, 10-11 (1994).
[25] *Id*., 49.
[26] Chung, *supra* note 5, 124.
[27] *Belgium v. Bulgaria*, PCIJ Rep Series A/B No. 79, Interim Measures, § 199 (Dec. 5, 1939).
[28] *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, § 164 (Feb. 26, 2010).

or arbitration proceedings are involved.[29] This principle mandates that each party to a case refrain from engaging in any action or inaction that is likely to exacerbate the case or complicate the execution of the judgment. These examples demonstrate that interim protection may concern the conduct of public authorities and the integrity of the arbitral process, rather than only the preservation of commercial assets. They also show why the State's regulatory powers and the investor's procedural rights must be considered together. Their relevance to EA is therefore functional: they explain the need that a pre-constitution mechanism could meet. They do not establish that a person who has not been appointed under an applicable emergency procedure may exercise the powers of a constituted ICSID tribunal.

As established above, the principle of interim protection is well established in international law and has been recognized by international tribunals. The situation may also deteriorate before the constitution of the tribunal. Sometimes, as demonstrated in *Mohammed Munshi v. Mongolia,* waiting for the constitution of the tribunal may expose a party to irreparable harm. In light of this, parties, especially investors seeking urgent relief, could benefit from access to interim protection before the main tribunal exists. This would provide an additional avenue to protect the effectiveness of the eventual proceedings. However, the absence of an express prohibition on pre-constitution measures does not itself authorize them. The general principle of interim protection cannot establish the emergency arbitrator's jurisdiction: that authority must be grounded in the parties' consent and the applicable legal framework. Accordingly, recognition of a general principle of interim protection supplies a reason to consider institutional reform, rather than a substitute for that reform. The practical objective is to prevent the delay inherent in constituting a tribunal from depriving the eventual proceedings of effectiveness. Whether an emergency arbitrator may act in a particular dispute must still be established by reference to the agreement and rules governing that dispute.[30]

B. Potential Concerns

Despite the positive sides of the emergency arbitrator mechanism in ISDS, its wider adoption raises several legal and procedural concerns. The following section examines three of the most significant concerns: the interaction between EA and cooling-off periods, the temporal application of arbitration rules and the principle of dynamic application and the implications of the tight timeframe inherent in EA.

[29] *Víctor Pey Casado & President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, §§ 67-68 (Sept. 25, 2001).

[30] Charles N. Brower et al., The Power and Effectiveness of Pre-Arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-State Disputes, *Between East and West: Essays in Honour of Ulf Franke* 61, 75 (Kaj Hobér et al. eds., 2010).

1. Concerns Regarding Cooling-off Periods

Numerous bilateral investment treaties (hereinafter BIT) have a cooling-off clause stipulating that, before commencing arbitration against the host State, an investor must endeavor to resolve the dispute amicably. A cooling-off clause typically requires parties to refrain from initiating arbitration for a designated period, such as six months.[31] It may also require negotiations between the parties. These requirements must be distinguished from a separate obligation to pursue remedies in the host State's courts. Because the cooling-off period may be mandatory, some scholars argue that EA is inappropriate for investment treaty disputes insofar as it could compromise the waiting period stipulated in the treaty.[32] This objection requires attention to the wording and function of the particular clause.

An important question therefore arises: if a treaty contains both a mandatory cooling-off period and a reference to arbitration rules providing for an emergency arbitrator, how should those provisions be read together?[33]

In the published cases considered here, SCC emergency arbitrators have allowed applications before the end of the cooling-off period. However, emergency arbitrators have relied on different reasoning to address respondent States' objections. For example, *TSIKinvest v. Moldova* was an early published investment arbitration case in which the emergency arbitrator mechanism was used. The applicable treaty provided a six-month cooling-off period before referral of the dispute to arbitration. The claimant nevertheless applied for an emergency arbitrator without waiting for that period to expire. The claimant relied on several grounds to explain why the waiting period should not prevent the emergency application.[34]

First, the claimant submitted that the cooling-off period related, if applicable, to the commencement of substantive arbitration proceedings rather than to the appointment of an emergency arbitrator. Second, it argued that applying the period to the emergency application would be inequitable and procedurally unfair. Third, it relied on the most-favoured-nation clause in the treaty. Finally, it maintained that the respondent had failed to engage in amicable settlement attempts despite the claimant's efforts. These were

[31] Alexey Pirozhkin, SCC Arbitration Institute, Emergency Arbitrator's Decisions in Investment Treaty Disputes at the SCC, 7 (2014-2019). Available at: https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/emergency-arbitrators-decisions-in-investment-treaty-disputes-at-the-scc-2014-201.pdf (last visited Sep. 29, 2026).

[32] Jonathan Lim & Dharshini Prasad, A Brief Overview of the Draft SIAC Investment Arbitration Rules 2016, Kluwer Arbitration Blog (Mar. 12, 2016), http://kluwerarbitrationblog.com/2016/03/12/a-brief-overview-of-the-draft-siac-investment-arbitration-rules-2016/ (last visited May 7, 2025).

[33] *Supra* note 9, 130.

[34] *TSIKInvest LLC v. Republic of Moldova*, SCC Case No EA 2014/053, Emergency Decision on Interim Measures, § 58 (29 Apr. 2014).

separate submissions by the claimant; they should not all be treated as independent findings of the emergency arbitrator.[35]

The emergency arbitrator agreed with the general reasoning of the claimant and stated that waiting for the end of the cooling-off period would be against the purpose of the emergency arbitrator mechanism since there was a risk of irreparable harm if the interim measure before the expiry of the six months were not granted.[36] The reasoning was directed to the protective function of the emergency application and the risk associated with waiting. It did not purport finally to decide the merits of the investment claim. This distinction supports a limited reading of the decision: the emergency route addressed the need for temporary protection, while the main arbitration remained a separate stage of the dispute.

Similarly, in *Evrobalt v. Moldova,* the claimant asked the emergency arbitrator to order a suspension of certain decisions made by the National Bank of Moldova (NBM) that purportedly impacted the claimant's investment. Moreover, as in the *TSIK* case, there was a six-month cooling-off period in the treaty, which had not yet expired. The claimant in this case argued that the cooling-off period of six months should not be enforced since it was only applicable to the main arbitration process, not to the EA proceedings and it would also be futile because of the respondent's explicit failure to resolve the issue amicably. Although the application for emergency measures was ultimately rejected, the emergency arbitrator still agreed with the claimant regarding the cooling-off period by declaring that waiting for the expiration of the cooling-off period is unnecessary, where doing so would be clearly futile.[37] This distinction between the cooling-off objection and the result of the application is important. Acceptance that a waiting period need not bar an emergency application does not predetermine whether the claimant has shown a sufficient risk of harm. *Evrobalt* therefore illustrates both access to the emergency procedure and the independent scrutiny required before measures are granted.

According to the published report of *Puma Energy v. Benin*, the emergency arbitrator decided that the six-month cooling-off period does not apply to the emergency arbitrator proceedings, since the application of the cooling-off periods to the EA mechanism would be against the nature of the emergency proceedings.[38]

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[35] *Id*., § 59.

[36] *Id*., § 66.

[37] *Supra* note 17, §§ 20-22.

[38] Jarrod Hepburn, Stockholm Arbitrator Finds Emergency Measures Justified Against Benin Where Entire Investment Faces Extinguishment Due to Alleged Denial of Justice, IAReporter (June 14, 2017), https://www.iareporter.com/articles/analysis-stockholm-arbitrator-finds-emergency-measures-justified-against-benin-where-entire-investment-faces-extinguishment-due-to-alleged-denial-of-justice/ (last visited May 11, 2025).

These cases show that SCC emergency arbitrators have been willing to distinguish emergency applications from the commencement of substantive proceedings when considering cooling-off periods. This does not mean that an emergency decision finally resolves the State's jurisdictional objections. After the emergency arbitrator's decision, when the issue goes to the main arbitral tribunal, the respondent may object to the tribunal's jurisdiction. The main tribunal can examine the issue in greater depth and is not bound by the emergency arbitrator's decision under the SCC Rules. It is also important that jurisdiction at the emergency stage is assessed only on a *prima facie* basis, leaving the ultimate determination to the main proceedings.[39] Nevertheless, later review cannot supply consent that was absent when emergency relief was ordered. The emergency arbitrator must first identify a sufficient legal basis for proceeding before the waiting period expires.

Similar questions also arise before ordinary arbitral tribunals when they are asked to rule on an admissibility challenge or jurisdictional objection about the claimant's failure to adhere to the relevant cooling-off period. Some tribunals have regarded cooling-off periods as directory and procedural rather than mandatory and jurisdictional. For example, in *SGS v. Pakistan*, the tribunal decided that adherence to the consultation period is, therefore, not regarded as a condition precedent to jurisdiction.[40] The distinction between a procedural requirement and a condition of consent affects the consequences of non-compliance. If the particular treaty makes completion of a waiting period a condition of the State's offer to arbitrate, a general preference for urgent relief cannot simply remove that condition. If the provision instead regulates the orderly pursuit of an existing right to arbitrate, the assessment may give greater weight to the purpose of consultation and the practical possibility of settlement. The treaty must supply the basis for choosing between those interpretations.

Similarly, in *Occidental v. Ecuador,* the ICSID tribunal decided that if the negotiations between the parties prove to be futile, then there is no need to wait for the expiration of the cooling-off period.[41] The relevance of futility is that the opportunity for settlement should be assessed in the circumstances of the dispute. It does not follow that the investor's wish for a faster procedure is sufficient to establish futility. An emergency arbitrator relying on that reasoning should explain why waiting would fail to serve the particular clause's purpose, as well as why the requested protection cannot await the ordinary proceedings.

[39] *Supra* note 15, app. II, art. 9; *supra* note 18, 10.

[40] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, § 184 (6 Aug. 2003).

[41] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Jurisdiction, §§ 92-94 (9 Sept. 2008).

The analyses of cooling-off periods by SCC emergency arbitrators thus have parallels in decisions of other tribunals. This supports the possibility of emergency relief during a waiting period, while leaving the main tribunal free to revisit the earlier assessment. Due to the nature of EA, which requires swift intervention, requiring months of waiting can defeat its protective purpose and permit irreparable harm. The report of *Puma Energy v. Benin* illustrates the concern that the investment could be extinguished while the applicant waits. Nevertheless, the introduction of EA in other institutions would not automatically resolve the issue. Whether a particular period is procedural or limits the State's consent must be determined from the treaty's wording, context, object and purpose. The practical need for urgent protection does not justify treating every cooling-off period as dispensable.

2. Principle of Dynamic Application: Achilles Heel of the EA Mechanism under ISDS Consent

As mentioned above, the SCC Rules differ from the ICC approach in that they do not distinguish between commercial and treaty-based investment arbitration when providing an emergency arbitrator mechanism. Furthermore, the preamble of the SCC Rules treats a reference to those rules as incorporating the version in force when arbitration commences or an emergency application is submitted, unless otherwise agreed.[42] This matters particularly where an investment treaty was concluded before the introduction of SCC emergency arbitrator provisions in 2010. The question is whether the State is considered to have consented to a mechanism that did not exist when the treaty was signed. The issue therefore concerns the scope of the State's consent, as well as the temporal application of procedural rules.

In the decisions discussed below, emergency arbitrators applied the principle of *dynamic reference* and treated the absence of an express provision freezing the rules as relevant to consent. This is an interpretive conclusion in those cases, rather than a rule that every reference to an institution necessarily includes every future procedure. The absence of an express restriction was therefore part of the arbitrators' reasoning. It should be considered together with the institutional reference and the treaty as a whole. Otherwise, silence would become an independent source of authority for a new mechanism, rather than evidence relevant to the interpretation of consent already expressed.[43]

In *Evrobalt v. Moldova,* the BIT between Moldova and Russia was signed in 1998. At that time, EA was not part of the SCC Rules. The claimant argued that the preamble of the SCC 2010 Rules made those rules applicable to the arbitration agreement regardless of its date, unless the parties opted out of the emergency arbitrator provisions, which had not happened in this case. Based

[42] *Supra* note 15, preamble.

[43] *Supra* note 9, 123.

on that submission, the emergency arbitrator agreed with the claimant's reasoning and ruled that the principle of dynamic reference applied: the treaty referred to the arbitration rules in force when arbitration commenced. The arbitrator reasoned that the parties could be assumed to know, when signing and ratifying the treaty, that the SCC Rules had changed several times in the past. If the parties had intended to apply only the rules in force when the treaty was signed, they could have added words expressly freezing that version. They had not done so and the arbitrator therefore applied the 2010 SCC Rules.[44]

In *Griffin v. Poland,* the State participated and challenged the jurisdiction of the emergency arbitrator. Poland argued that since the BLEU-Poland BIT was signed before the existence of the emergency arbitrator mechanism, the EA provisions could not apply. Furthermore, Poland argued that since the introduction of the EA provisions marked significant qualitative changes in the rules, states should not be assumed to have given consent to this procedure. However, similar to the Evrobalt case, the emergency arbitrator implemented the "dynamic application" principle and noted that, in the past, there were qualitative changes to the rules as well. The arbitrator therefore considered that the parties expected the Rules to change, unless there was evidence to support otherwise.[45] The objection raised by Poland deserves attention even where the dynamic-reference interpretation is accepted. A change to the rules can affect more than the administrative conduct of an existing arbitration. Emergency provisions introduce a decision-maker who can act before the main tribunal has been constituted. The disagreement is consequently about the range of procedural changes that the States can reasonably be taken to have accepted when incorporating institutional rules, rather than about whether those rules may ever change.

The SCC decisions show a consistent approach to the temporal application of the rules, but do not create binding precedent. The question also requires consideration of treaty drafting and the rules of treaty interpretation.

Treaty drafters can expressly freeze a particular version of arbitration rules. For example, the agreement for the Promotion and Reciprocal Protection of Investments between Hong Kong and the United Arab Emirates explicitly contains a provision that freezes the application of the UNCITRAL, SCC and the ICC rules to 2010, 2010 and 2012, respectively.[46] This supports the SCC arbitrators' reasoning that treaty parties can specify a fixed version, although the absence of such a clause is not conclusive by itself. An express reference to a dated version gives both the investor and the State a more specific starting

[44] *Supra* note 17, §§ 24-30.

[45] Koh, *supra* note 16, 543-544 (discussing Griffin v. Poland).

[46] Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, art. 8(5) (2020).

point for identifying the applicable procedure. A reference without a date may point towards an evolving set of rules, but the inference must still be tested against any other treaty language restricting the available process. The example thus supports careful drafting without making the absence of a date decisive in every case.

Dynamic application can also be considered through the Vienna Convention on the Law of Treaties (VCLT) rules of treaty interpretation. Article 31 requires a treaty to be interpreted in good faith according to the ordinary meaning of its terms in their context and in light of its object and purpose.[47] A reference to institutional rules may be understood as a reference to an evolving procedural framework, rather than a permanently fixed text. The protection of investments can support that interpretation, since rules may change between the conclusion of a treaty and the emergence of a dispute. However, the treaty's protective purpose cannot replace its text or override an express limitation on consent. A reference to evolving rules must be established by interpretation of the particular instrument, rather than assumed from a general preference for investor protection. The argument that a treaty reference may use terms whose content evolves over time is strongest where the language and incorporated rules support that understanding. Parties concluding an investment treaty may anticipate that disputes will arise many years later and that the institution's procedures will change in the meantime. That expectation can justify applying later procedural rules. It does not, by itself, answer whether every later expansion of decision-making authority falls within the original offer to arbitrate.[48]

The parties' expectations of changes may also depend on the content of the incorporated rules. The SCC preamble points towards dynamic application, unless otherwise agreed. ICSID adopts a different rule: Article 44 of the Convention refers to the Arbitration Rules in effect on the date on which the parties consented to arbitration, unless they otherwise agree.[49] This is not necessarily the date on which an investment treaty was signed. A standing treaty offer and an investor's later acceptance must therefore be distinguished when identifying the relevant date. The distinction is particularly significant in treaty arbitration because the State's offer may precede the investor's acceptance. Identifying when consent was perfected is different from identifying when the treaty entered into force. A proposal for future ICSID emergency rules must therefore address both the applicable version of the rules and whether the Convention permits the proposed allocation of powers. Conflating those issues would make the temporal analysis appear simpler than it is.

[47] Vienna Convention on the Law of Treaties, art. 31(1) (1969).

[48] *Botswana v. Namibia*, ICJ Case No. 98, Declaration of Judge Higgins, § 2 (13 Dec. 1999).

[49] ICSID Convention, art. 44 (1965).

Dynamic application is defensible where the treaty, read with the incorporated SCC Rules, establishes consent to an evolving procedural framework. Nevertheless, States have legitimate objections when a new mechanism goes beyond ordinary procedural administration. Changes to filing methods or scheduling ordinarily regulate how existing jurisdiction is exercised. Empowering a new decision-maker to issue binding measures before the main tribunal exists raises a more substantial question about the scope of consent. Calling EA "procedural" does not answer that question. A State's reasonable expectations should be assessed from the treaty and the rules it incorporated, rather than assumed solely from the desirability of urgent protection. The procedural and substantive distinction is useful but cannot be reduced to the label attached to the rules. Emergency relief ordinarily preserves the position pending a determination of substantive rights and is therefore provisional in purpose. Nevertheless, an order directed at the conduct of a State may have immediate practical consequences. The relevant inquiry is whether the State accepted that form of provisional authority, including its timing and its relationship with the main tribunal. This allows the argument for dynamic incorporation to be evaluated without denying the significance of the State's objection.

Accordingly, the legal availability of dynamic incorporation and the preferred design of future rules are distinct issues. The existing SCC approach may be justified by the relevant treaty and rules, while a clearer prospective consent provision may offer greater predictability for future reforms. This distinction reconciles support for the SCC decisions with the reforms proposed in section III: the proposal does not treat all existing dynamic references as invalid. It seeks to reduce uncertainty about the authority of the emergency arbitrator and the commitments undertaken by the State.

3. The Tight Schedule Required for EA

As mentioned above, the concern that a tight schedule for EA could violate due process for States was one reason for not including the mechanism in the ICSID Rules.[50] Some arbitration professionals, such as Dahlquist, argue that States face significant challenges in responding within constrained periods because of insufficient resources and infrastructure for emergency requests. This may be especially difficult for small and less developed countries, which may lack legal staff able to respond in the language of the proceedings. State bureaucracy can also cause delays before an official notice reaches the relevant person in the State apparatus.[51] Furthermore, it is often burdensome for a State to obtain external legal counsel if it lacks the internal expertise necessary to deal with the dispute. Finding available counsel and preparing a defence

[50] *Supra* note 8.

[51] *Supra* note 9.

within mere days can be difficult.[52] To make matters more challenging, emergency arbitrator timelines are short: five days from referral under the SCC Rules and fifteen days from receipt of the file under the ICC Rules, in each case subject to extension.[53] These periods may be too short for some State parties to prepare, reducing their ability to defend themselves and raising questions of procedural fairness. The solution requires attention to the timetable and to the practical conditions for participation. The corresponding proposals are set out in section III.

The main arbitral tribunal is not bound by the emergency arbitrator's decision and may reconsider the measures.[54] This review is an important safeguard, but it cannot always remedy prejudice caused by an order made without a fair opportunity to respond. The limited published experience also warrants caution about predicting how emergency procedures would operate across different States and institutions. The proposals below therefore address consent and procedural fairness alongside the need for urgent protection.

III. Reform Proposals to Facilitate the Adoption of the EA Mechanism in the Context of the ISDS Across All Arbitral Institutions

The main reform proposals are discussed principally in the context of the ICSID and ICC Rules, with corresponding changes suggested for the SCC. These institutions are selected because their different approaches illustrate the principal obstacles to broader adoption. ICSID would need a Convention-compatible basis for a pre-constitution decision-maker, while the ICC would need to address its express exclusion of treaty- and statute-based arbitration from emergency proceedings. Adoption by prominent institutions could encourage consideration of similar procedures elsewhere, although it cannot be assumed that other institutions would automatically follow. Broader adoption requires a model that gives investors access to urgent protection while respecting State consent, sovereignty and the right to be heard. The institutional rules should first require the applicant to identify the treaty or other agreement establishing consent to EA. The emergency arbitrator should then give a reasoned prima facie jurisdictional ruling, including any objection concerning a cooling-off period or the applicable version of the rules.

The proposed procedure should require prompt service on the State's designated contact, disclosure of the application and evidence and a meaningful opportunity to respond. Relief should depend on demonstrated

[52] Joel Dahlquist, Emergency Arbitrators in Investment Treaty Disputes, Kluwer Arbitration Blog (Mar.10, 2015), https://arbitrationblog.kluwerarbitration.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/ (last visited May 16, 2025).

[53] *Supra* note 15, app. II, art. 8; Arbitration Rules of International Chamber of Commerce, app. IV, art. 6(4) (2026).

[54] *Supra* note 18, app. 2, art. 9(4)-9(5).

urgency, a risk of irreparable harm and necessity and proportionality, taking account of the State's regulatory functions and the interests of affected third parties. An order should preserve rights pending the main tribunal's determination, without finally deciding the merits. It should give reasons, specify its duration and permit variation or discharge if circumstances change. Review by the main tribunal and lapse if the claimant fails to commence the main proceedings would limit the duration of emergency authority. Compliance obligations should be stated expressly, while recognizing that enforcement against a State remains subject to the applicable legal regime and immunity rules.[55]

These safeguards should operate as successive stages in the procedure. The applicant should first establish a legal basis for the emergency arbitrator's authority, then explain why protection cannot await the main tribunal and finally justify the particular relief requested. The State should be able to contest each stage within a timetable responsive to the urgency. An application should not succeed merely because the investor faces a serious difficulty; the requested order must also fall within the authority conferred and be appropriate to preserve the rights at issue. Conversely, State participation should not be reduced to a formality by a timetable that makes an effective response impossible. This sequence gives practical content to the proposed balance between urgency and consent.

A. Cooling-off Period

Non-compliance with cooling-off periods is one of the issues frequently addressed in SCC EA involving ISDS. Other tribunals have also recognized that a waiting period may be excused in particular circumstances, for example where negotiations would be futile.[56] In EA the issue becomes especially pressing. Waiting for six months or more could defeat the purpose of swift protection against irreparable harm. If a party is forced to wait for an urgent issue to be addressed, harm to its health or business may occur before a tribunal can intervene. For that reason, future treaties or express agreements adopting EA should clarify that an application for urgent protective measures may be submitted during a cooling-off period. The obligation to pursue amicable settlement of the underlying dispute should remain. For existing treaties, however, the emergency arbitrator must interpret the particular clause: institutional rules alone cannot waive a condition limiting the State's consent. This clarification is preferable to assuming that, if ICSID or the ICC introduced EA, their emergency arbitrators would necessarily follow the SCC

[55] For comparable controls on duration and review, *see supra* note 15, app. II, art. 9; On enforcement and immunity within the ICSID framework, *see supra* note 49, art. 53-55 (these provisions do not themselves establish an enforcement regime for a proposed emergency decision).

[56] *Supra* note 41.

decisions. The proposed reform therefore preserves the purpose of the waiting period while expressly addressing the distinct need for urgent protection. Express clarification would also make the relationship between emergency proceedings and negotiations easier to administer. The parties could continue seeking an amicable resolution while a temporary order preserves the position. The application would not need to be treated as proof that negotiations had failed, nor would the existence of negotiations automatically defeat urgency. The reform should distinguish an application for temporary protection from submission of the merits, while leaving the main tribunal to determine the effect of the treaty's conditions on the substantive proceedings.

B. Reform Proposal for Temporal Application

As discussed above, the preamble of the SCC Rules and published emergency arbitrator decisions support dynamic application in appropriate cases. The reasoning is that parties referring to an evolving body of institutional rules may contemplate subsequent changes, unless they expressly freeze a particular version. However, the respondent's objection also deserves consideration when designing future provisions. As Poland argued in the SCC proceedings, the introduction of EA can represent a qualitative change in the procedure: a new decision-maker acquires authority to act before the main tribunal exists.[57] The concern is especially significant where the treaty predates the introduction of the emergency mechanism. This does not establish that the SCC decisions were legally incorrect. It explains why a clearer temporal provision may be desirable as a matter of prospective policy. The distinction resolves the apparent tension between supporting dynamic incorporation under an existing treaty and recommending a more explicit rule for future reforms. For comparison, the ICC Rules generally apply in the version in force when arbitration commences, unless otherwise agreed, but their emergency provisions exclude arbitration agreements concluded before 1 January 2012. The 2026 Rules also retain the separate exclusion for arbitration agreements arising from treaties or statutes offering arbitration to investors.[58] To include investment disputes, the ICC would need to amend that exclusion. A new investment-specific procedure should identify the consent required and apply prospectively, while allowing parties to older treaties to agree expressly to use it. The reference date and its relationship with a standing treaty offer should be stated clearly in the new provision. This would preserve access to urgent relief without assuming that every historical reference to ICC arbitration covers the new mechanism.

For ICSID, Article 44 refers to the date of consent to arbitration, not necessarily the date of conclusion of the treaty. It therefore does not

[57] *Supra* note 16, 543-544.

[58] Arbitration Rules of International Chamber of Commerce, art. 6(1), app. IV, art. 1(3)(a), (c).

automatically exclude all older treaties from later procedural rules. Moreover, Article 47 attributes the power to recommend provisional measures to the Tribunal.[59] Any proposal for an emergency arbitrator must address compatibility with the Convention's allocation of powers, rather than assume that a rule amendment alone is sufficient. Where necessary, a separate express agreement or a change to the governing legal framework would be required before the proposed procedure could operate. The essential point is that a temporal rule and a rule conferring authority perform different functions. Selecting the applicable edition of the Arbitration Rules cannot itself establish that an emergency arbitrator has the powers assigned by the Convention to a Tribunal. Institutional reform should therefore identify the legal route by which the proposed officer would be appointed and authorized before addressing the timetable for that officer's decision.

For future SCC reforms, a clear temporal provision should likewise state when consent to EA is established and allow express agreement for older treaties. A prospective default would improve predictability, but should not be presented as proof that existing SCC decisions applying a dynamic reference were unjustified. The objective is to clarify the scope of consent while preserving the treaty-specific interpretation described in section II. This approach leaves two routes open: a clear default for treaties or agreements concluded after the reform and an express agreement for disputes arising under older instruments. It responds to concerns about predictability without treating the conclusion date of a treaty as an absolute obstacle where the parties subsequently agree to the new procedure. For existing SCC references, the interpretation of consent remains a matter for the applicable treaty and rules.

C. Reform Proposals for the Tight Schedule

As mentioned above, one of the reasons that an emergency arbitrator mechanism was not included in the ICSID Rules was the tight schedule required for it. To address this issue, the proposed ICSID procedure should allow a more flexible schedule. Under the 2022 Rules, the tribunal must decide a provisional-measures request within thirty days after its constitution or the last submission on the request, whichever is later. This is a decision deadline, not a mandatory thirty-day waiting period.[60] Nevertheless, where the constitution of the tribunal takes longer than the threatened harm permits, the existing procedure may not meet the applicant's needs. This article therefore proposes a thirty-day time limit from the appointment of an emergency arbitrator. On the one hand, this would give States more time than the shorter SCC and ICC schedules to prepare and present their defences. On the other hand, it would provide investors with an additional mechanism to protect

[59] *Supra* note 49, art. 37-40, 47.

[60] *Supra* note 6, rule 47(2)(c).

their rights before the constitution of the main tribunal. Thirty days is longer than the five-day and fifteen-day institutional periods discussed above, but it could still allow relief sooner than waiting for the main tribunal. It should be a maximum default period, permitting an earlier decision where the urgency and the parties' opportunity to be heard allow. This proposal takes account of the concerns of both parties, without assuming that a fixed period will be suitable for every emergency. The justification for allowing more time is the practical difficulty of organizing a State's response, including obtaining instructions and coordinating counsel with the relevant authorities. The justification for allowing an earlier decision is the possibility that the harm will occur before the default period ends. Both considerations must remain visible in the rules. A thirty-day maximum should therefore not become an automatic postponement of protection in every case, nor should an assertion of urgency automatically deprive the State of time to respond.

In other arbitral institutions that provide both commercial and investment arbitration services, different time limits could be adopted for EA in investment disputes. For example, under the SCC Rules the five-day period applies without distinguishing between commercial and investment cases. Five days may be a very limited time for some States to prepare and defend themselves. For that reason, a twenty-five-day time limit from appointment is proposed for ISDS disputes, intended to address the concerns of State parties without losing the urgent nature of the procedure. The same reasoning applies to the ICC: if treaty-based disputes were included in its EA procedure, a twenty-five-day period could be adopted for those cases. The proposed thirty-day period for ICSID and twenty-five-day period for other institutions are policy choices, rather than empirically established optimal limits. The difference should not be justified by assuming that ICSID cases are invariably more complex than disputes elsewhere. Adequacy would depend on the urgency of the request, the complexity of the dispute and the State's ability to respond. The emergency arbitrator should be able to shorten or extend the schedule for stated reasons, while preserving a meaningful opportunity for both parties to be heard. These periods would therefore provide starting points for procedural management, rather than inflexible deadlines. The proposed distinction between commercial and investment disputes responds to those practical conditions, rather than to an assumption that all State respondents require the same period. Some States may be able to respond promptly through existing counsel; others may require additional time to obtain instructions or locate relevant records. The arbitrator should explain any departure from the default period in terms of the circumstances of the particular application. This would preserve the flexibility needed for urgent protection while making the treatment of both parties more transparent.

A more flexible timeline for investment disputes would help States prepare and present their cases. States could also strengthen their capacity to respond

by training and retaining permanent counsel for investment disputes. Spain and Italy provide examples of reliance on in-house counsel in this field.[61] Designating a contact for service and maintaining access to relevant records would further reduce delays without requiring a longer period in every case.

A longer and adaptable time limit could address some objections concerning the tight schedule and make broader institutional adoption more practicable. It would complement, rather than replace, the requirements of consent, effective notice, proportional relief and review by the main tribunal.

Conclusion

This article has analyzed the concept of the emergency arbitrator in the ISDS context and argued in favour of expanding the mechanism through targeted reforms. EA is a relatively recent procedural innovation, adopted by prominent institutions primarily in commercial arbitration in the 2010s. Nowadays, it has become a norm for institutions to include EA provisions in the context of commercial arbitration disputes. This innovation so far has been perceived as positive.[62] Moreover, it has also been established in this analysis that the interim protection of rights is recognized as a general principle of law. Therefore, implementing this principle before the constitution of the tribunal in commercial arbitration but not in investment arbitration is discriminatory. Just like their commercial arbitration counterparts, investors may face situations in which intervention is needed before the main tribunal is constituted. Pre-constitution protection in a neutral forum could therefore provide an additional means of preserving rights and the effectiveness of the eventual proceedings. However, this practical need does not itself establish jurisdiction or demonstrate that broader adoption would necessarily increase investment. The main concerns of States have been examined and proposals have been made to facilitate adoption while respecting those concerns. These proposals involve compromises and a more explicit treatment of consent than an unrestricted assumption of dynamic application. For ICSID, adoption must address the Convention's allocation of powers as well as the institutional rules. For the ICC, inclusion of treaty-based disputes would require amendment of the present exclusion. The proposed approach combines clarification of consent and temporal application, treaty-sensitive treatment of cooling-off periods and more flexible schedules for States to present their defence. Broader adoption on that basis could extend access to urgent protection without treating investor need as a substitute for the State's consent. An investor should not lose the practical benefit of a neutral dispute-resolution process simply because an urgent risk arises before the ordinary appointment process is complete. At the same time, access to justice does not

[61] *Supra* note 9, 120.

[62] Chan Leng Sun Tan & Weiyi, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief* , 6 Contemporary Asia Arbitration Journal 349, 369 (2013).

justify extending jurisdiction beyond the agreement on which that process rests. The reform proposals seek to address both concerns within the same institutional design. They therefore depart from an unrestricted assumption of dynamic application while retaining the central case for broader availability of emergency protection. Their value lies in making the legal basis and procedural safeguards clearer to both parties at the time an urgent application is made. It is crucial for ICSID, which alone accounts for the majority of investment arbitration cases around the world, to adopt EA measures due to its vast influence and size in the ISDS mechanism. In a similar fashion to the ICSID, ICC should also include an EA mechanism for treaty-based arbitration agreements, as ICC Rules are the most preferred rules around the world. By following the footsteps of the SCC, these two institutions would send a strong message to the international investment law community and potentially make the EA in investment arbitration a norm around the world.

As addressed throughout the article, some concerns of States are substantial and adoption of the mechanism raises particular questions in the ISDS context. Although investment and commercial arbitration share procedural features, experience with EA in commercial disputes does not guarantee equivalent results in investment disputes. Nevertheless, parties may have a comparable need for urgent intervention before the main tribunal exists. Wider availability could also benefit State-owned investors where they qualify for treaty protection.[63] The case for broader adoption is therefore conditional. Access to a neutral emergency decision-maker should be accompanied by respect for State consent, sovereign functions and procedural fairness. The proposed model seeks to make that balance workable through clear authority, proportionate relief and a genuine opportunity for the respondent to participate.

At the end of the day, the EA mechanism in ISDS is an innovation consistent with the ever-evolving nature of the arbitration rules. Innovations should be embraced, not feared, for the maximum benefit of all parties involved. As Frank Herbert puts it perfectly in his widely-acclaimed sci-fi novel *"Dune"*: *"Fear is the mind-killer. Fear is the little death that brings total obliteration".*

[63] *Supra* note 9, 121.