



Emergency arbitrator's decisions in Investment Treaty Disputes at the SCC (2014-2019)

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May 2020

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The opinions expressed in this report are the author's own, and do not necessarily reflect those of the SCC.

CONTENT

- I. Introduction..... 3
- II. Overview of EA proceedings under the SCC Rules 4
- III. Emergency decisions in investment treaty disputes at the SCC 6
 - State participation 6
 - Duration and conduct of the proceedings, seat of arbitration 7
 - Form of the emergency arbitrator decision..... 7
- IV. Procedural concerns 7
 - Cooling off period..... 7
 - Temporal application of the SCC Rules..... 8
- V. Types of interim measures requested..... 9
 - Security in connection with the measure 9
- VI. Criteria used in assessing the relief sought 9
- VII. References to previous decisions on provisional measures 10
- VIII. Concluding remarks 11

I. Introduction

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is known as a preferred forum for settlement of investor-state disputes. Sweden and the SCC are mentioned for investor-state disputes in at least 120 BITs and under the Energy Charter Treaty (ECT). Out of 120 BITs, 61 agreements apply the SCC Arbitration Rules to disputes. The remaining 60 BITs assign the SCC to act as Appointing Authority under the UNCITRAL Arbitration Rules or Sweden as the legal seat of the dispute.² In 1993-2019 the SCC registered in total 112 investment treaty disputes.³

In 2010, the SCC was one of the first arbitration institutions in the world to make emergency arbitrator proceedings (EA proceedings) available. These proceedings are aimed at allowing a party in need of prompt interim relief to obtain a decision from an emergency arbitrator if no tribunal has yet been constituted.

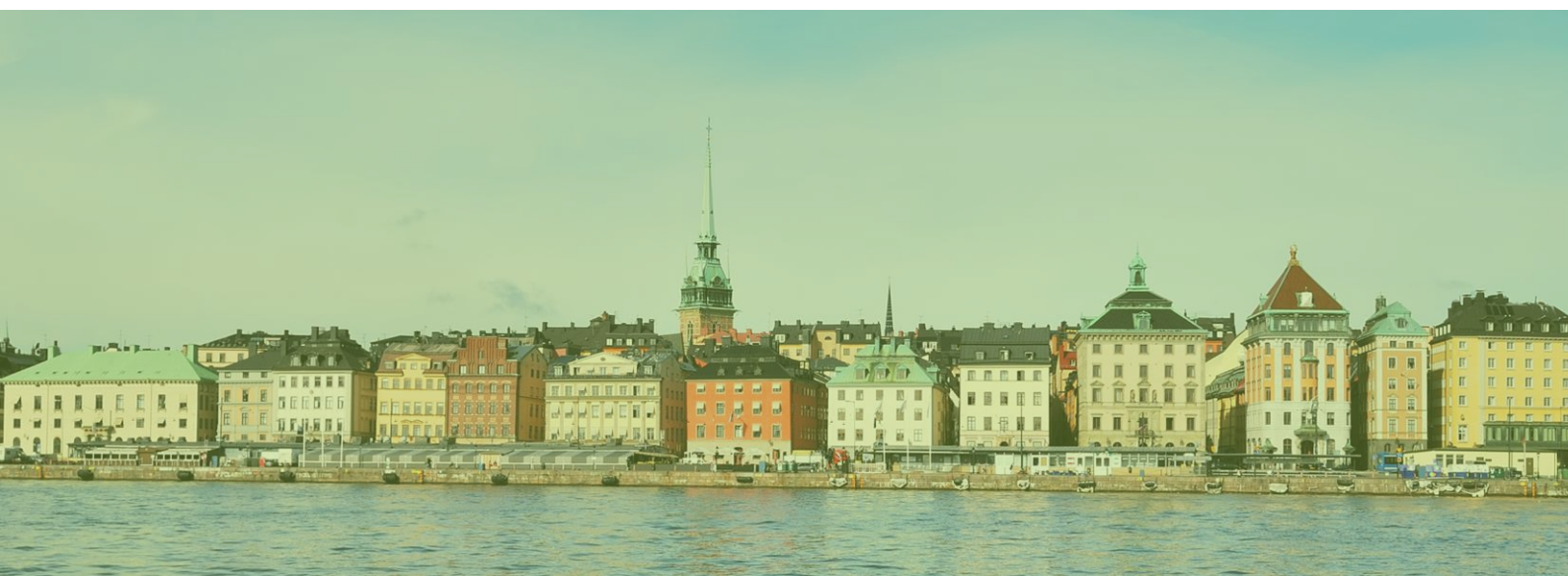
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One particular feature of EA proceedings under the SCC Rules is that they are applicable in investment treaty disputes. By contrast, ICSID and UNCITRAL Rules, which together form the procedural framework in the majority of investment disputes, do not enable EA proceedings.

This report is designed to shed light to application of EA proceedings in investment treaty disputes at the SCC in 2014-2019. The content of the report covers *inter alia* an overview of the EA procedure under the SCC Rules, the number of EA proceedings in investment treaty disputes under the SCC Rules, the duration of EA proceedings, the form of decisions, procedural peculiarities, types of interim measure requested, as well as the criteria used in assessing the interim relief sought.

² The Administration of Investment Disputes, SCC Note, available at: <https://sccinstitute.com/dispute-resolution/investment-disputes/>.

³ Investment Treaty Arbitration 1993-2018, SCC Statistics, available at: <https://sccinstitute.com/statistics/investment-disputes-2019/>



II. Overview of EA proceedings under the SCC Rules⁴

The emergency arbitrator procedure is stipulated in Appendix II to the 2017 SCC Arbitration Rules.

A party may apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal.

A party may apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal.⁵ An application may be made either before initiation of regular arbitration proceedings, or after the proceedings have been initiated, that is, once a request for arbitration has been filed but the case has still to be referred to the tribunal. To date, most but not all applications for the appointment of an emergency arbitrator have been received before the initiation of regular arbitral proceedings.

In granting interim relief the emergency arbitrator has the same powers as the arbitral tribunal, as provided in Article 37 (1)-(3) of the 2017 SCC Rules. Thus, an emergency arbitrator may “grant any interim measures it deems appropriate”⁶ and order the applicant party to provide appropriate security in connection with the measure.⁷

An application for appointment of an emergency arbitrator includes:⁸

- (i) the names, addresses, telephone numbers and e-mail addresses of the parties and their counsel;
- (ii) a summary of the dispute;
- (iii) a statement of the interim relief sought and the reasons therefor;
- (iv) a copy or description of the arbitration agreement or clause under which the dispute is to be settled;
- (v) comments on the seat of the emergency proceedings, the applicable law(s) and the language(s) of the proceedings; and
- (vi) proof of payment of the costs for the emergency proceedings.⁹

⁴ A detailed description of the emergency arbitrator procedure under the SCC Rules was made by Anja Havedal Ipp in SCC PRACTICE NOTE: Emergency Arbitrator Decisions Rendered 2015-2016, available at: <https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf>. Here the procedure is recalled very briefly.

⁵ Article 1 (1) of Appendix II to the 2017 SCC Rules.

⁶ Article 37(1) of the 2017 SCC Rules.

⁷ Article 37(2) of the 2017 SCC Rules.

⁸ Article 2 of Appendix II to the 2017 SCC Rules.

⁹ According to Article 10(2) of Appendix II to the 2017 SCC Rules, the fee for emergency proceedings amounts to EUR 20 000 (the emergency arbitrator’s fee is EUR 16 000 and the application fee is EUR 4 000).

After the application for appointment of an emergency arbitrator has been received, the SCC Secretariat sends the application to the other party.¹⁰

If the SCC does not manifestly lack jurisdiction, the SCC Board will seek to appoint an emergency arbitrator within 24 hours of receipt of the application. This deadline is met in the absolute majority of emergency arbitrator appointments. Any challenge to the emergency arbitrator must be made within 24 hours from the time the circumstances giving rise to the challenge became known to the party raising the challenge.¹¹

Once the SCC Board has appointed an emergency arbitrator and the Secretariat has referred the application to the emergency arbitrator, the emergency arbitrator may conduct the emergency arbitration as he or she considers appropriate, "taking into account the urgency inherent in such proceedings."¹² The emergency arbitrator usually begins the case by organizing a telephone conference with the parties to establish a procedural timetable. The respondent will be invited to offer comments on the application, at times followed by brief rejoinders. A second telephone conference is often held, sometimes followed by comments from the parties. Finally, the emergency arbitrator issues a decision.

Any emergency decision on interim measures must be made no later than five days from the date the application was referred to the emergency arbitrator. However, this term may be extended by the SCC Board upon a reasoned request from the emergency arbitrator, or if otherwise deemed necessary. The emergency arbitrator decision immediately becomes binding on the parties and ceases to be binding if (i) the emergency arbitrator or an arbitral tribunal so decides; (ii) an arbitral tribunal makes a final award; (iii) arbitration is not commenced within 30 days from the date of the emergency decision; or (iv) the case is not referred to an arbitral tribunal within 90 days from the date of the emergency decision.¹³

It is important to note that the arbitral tribunal is not bound by the decision(s) and reasons of the emergency arbitrator.¹⁴

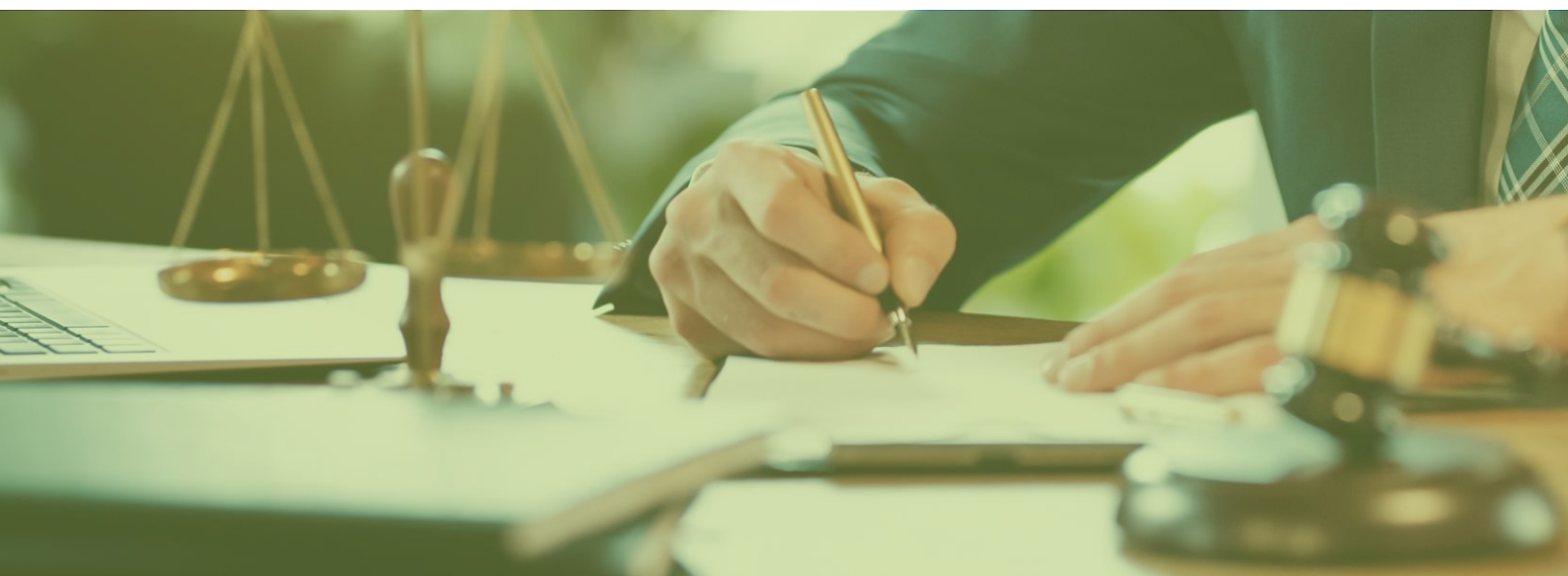
¹⁰ Article 3 of Appendix II to the 2017 SCC Rules.

¹¹ Article 4 (3) of Appendix II to the 2017 SCC Rules.

¹² Article 7 of Appendix II to the 2017 SCC Rules.

¹³ Article 8 of Appendix II to the 2017 SCC Rules.

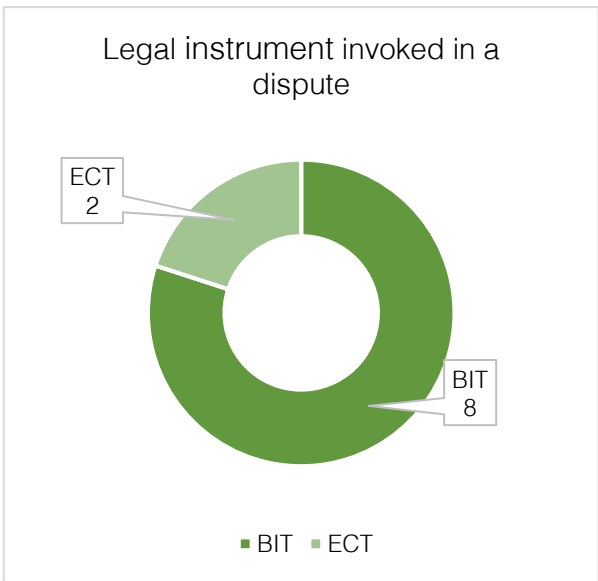
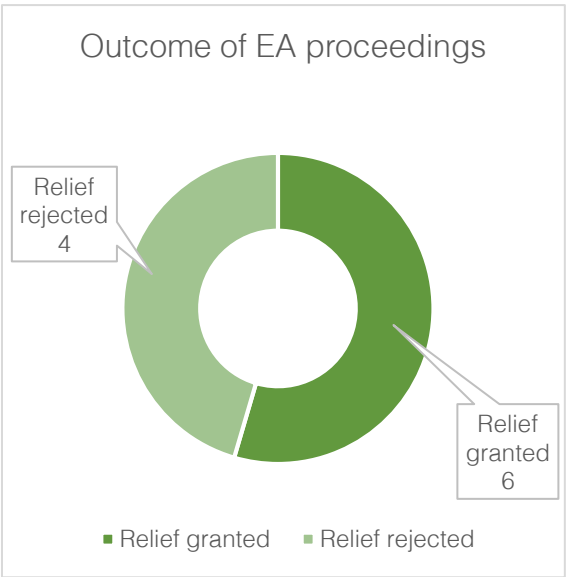
¹⁴ Article 9 (5) of Appendix II to the 2017 SCC Rules.



At the request of a party the emergency arbitrator apportions the costs of the emergency proceedings between the parties,¹⁵ applying the same principles as in ordinary arbitral proceedings, or this question may be left for the arbitral tribunal.

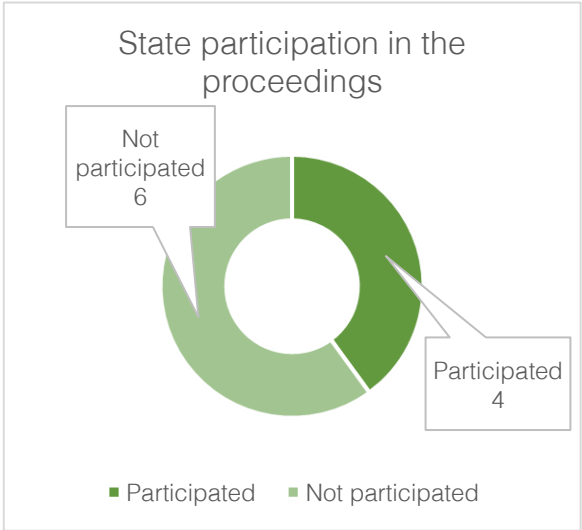
III. Emergency decisions in investment treaty disputes at the SCC

Between 2014 and 2019, ten emergency arbitrator’s decisions have been made in investment treaty disputes under the SCC Rules, in six of which the emergency relief claimed was granted (in full or in part). Eight of these disputes were based on bilateral investment treaties (BITs).



State participation

In six out of ten cases the respondent State did not participate in the EA proceedings. The State was duly notified in all cases. In two out of six cases where the respondent State did not participate it sought – albeit unsuccessfully – revocation of the decision after an emergency decision had been issued.



¹⁵ Article 10 (5) of Appendix II to the 2017 SCC Rules.

Duration and conduct of the proceedings, seat of arbitration

In all ten cases an emergency arbitrator was appointed within 24 hours of receipt of the application. Average duration of the proceedings was 5.5 days, whereas the longest proceedings took nine days and the shortest was conducted in three days after referral of the case to the emergency arbitrator.

There is no consistent practice as to holding a telephone conference/hearing for parties' oral submissions. In five cases a decision was based on written submissions, in the other five cases a telephone conference was held.

In all ten cases, as far as the parties did not agree on the seat of arbitration, Stockholm was decided as the seat of arbitration by the SCC Board.

Form of the emergency arbitrator decision

A decision by an emergency arbitrator can take the form of an order or an award.¹⁶ The first emergency arbitrator's decision in 2014 was made in the form of an order, and the others took the form of an award.

IV. Procedural concerns

Although emergency arbitrator proceedings are equally available both to claimants in commercial disputes and in investment treaty disputes, EA proceedings in treaty-based investor-state disputes involve a number of procedural issues which are unique to investment treaty disputes.

Cooling off period

Many BITs contain a so-called "cooling off" clause to the effect that before initiating arbitration against the host State an investor is required to attempt to resolve the dispute in the host State's local courts. Usually a cooling off clause requires parties not to initiate arbitration during a specified term, such as six months. There are also cooling off clauses requiring the investor and the host State to attempt to resolve their dispute amicably during this time.

All four emergency arbitrators came to the conclusion that an application for the appointment of an emergency arbitrator could be made before the expiry of the cooling off period.

¹⁶ Article 1(2) of Appendix II and Article 37 (3) of the 2017 SCC Rules.

The effect of a cooling off clause on the jurisdiction of the emergency arbitrator was addressed in four decisions. All four emergency arbitrators came to the conclusion that an application for the appointment of an emergency arbitrator could be made before the expiry of the cooling off period.

In two cases the cooling off period was deemed not to constitute a bar to EA proceedings due to acts by the respondent State's. In one case the emergency arbitrator found that application of the cooling off period would be manifestly futile since the respondent explicitly confirmed that it would not suspend the effect of the administrative decision which was subject to the interim relief sought. One decision stated that applying the cooling off period to the appointment of an emergency arbitrator or his or her decision would be contrary to the purpose of EA proceedings and procedurally unfair to the claimant.

Temporal application of the SCC Rules

Emergency arbitrator proceedings first appeared in the 2010 SCC Rules (as Appendix II). Most of the BITs referring to the SCC Rules had been concluded before that time. The issue of temporal application of the SCC Rules was raised in four out of ten EA proceedings, where emergency arbitrators had to determine if the respondent State consented to emergency arbitration at the time this instrument did not exist.

Respondent States argued, *inter alia* that:

- contracting parties to the BIT could not at the time of its conclusion have contemplated EA proceedings because they did not exist;
- introduction of EA proceedings was a “qualitative change”, that is, introduction of a completely new procedure, rather than a change in degree of the SCC Rules; following the principle of sovereignty a respondent State should knowingly consent to it;
- EA proceedings were “inappropriate in the ISDS system, inconsistent with public interests and inherently unfair to States given strict timelines.”

The four emergency arbitrators found that the states concerned had consented to EA proceedings. Their findings included, *inter alia* the following:

- reference to the SCC Rules (without mentioning a specific set of rules) in a BIT means application of the SCC Rules in force at the time of commencement of arbitration or conclusion of the arbitration agreement. In investment treaty disputes the time of conclusion of the arbitration agreement is usually the time of submitting a request for arbitration. If at the time of commencement of the arbitration the SCC Rules in force encompass EA proceedings, then these proceedings should be applicable;
- since the parties did not agree on a specific set of the SCC Rules, they were deemed to have consented to potential future changes to the rules;
- the contracting states to the BIT knew that their offers to arbitrate would be valid many years after conclusion of the BIT. Taking this into account, the contracting States gave advance consent to the version of the SCC Rules in effect at the time an eligible investor accepted their offer to arbitrate.

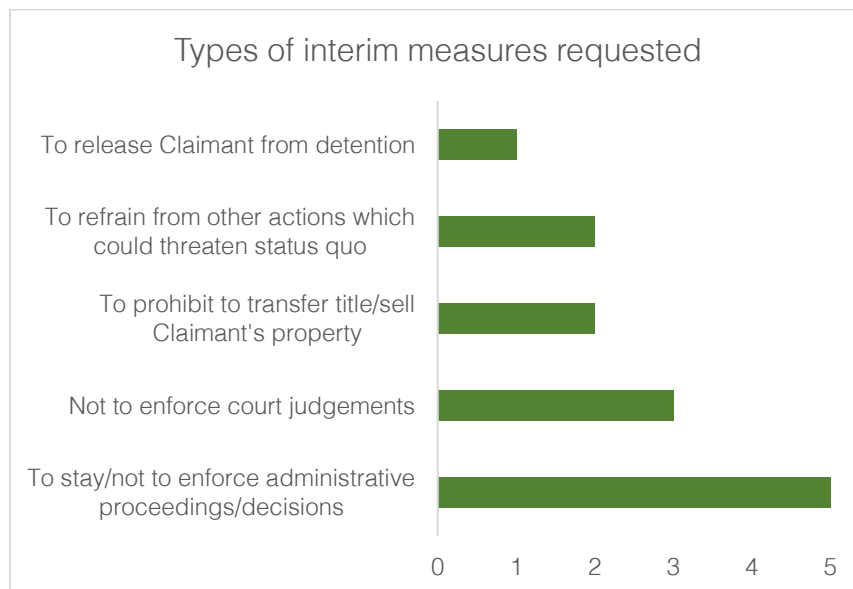
It may be noted that under the SCC Rules, unless agreed otherwise, in any arbitration agreement referring to the SCC Rules the parties are deemed to have agreed that the rules in force on the date of the commencement of the arbitration, or the filing of an application for the appointment of an emergency arbitrator, will be applied.

V. Types of interim measures requested

The 2017 SCC Rules do not specify what interim measures could be granted. According to Article 37 (1) of the 2017 SCC Rules “the Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate”.

The emergency measures requested by claimants in EA proceedings vary and include requests such as:

- to stay/refrain from enforcement of administrative decisions;
- to take all available measure to refrain from enforcement of local courts’ decisions;
- to prohibit forced sale of property, e.g. by auction.
- to take measures related to safety, e.g. to release the claimant from detention;
- not to pursue other actions deemed to threaten the *status quo* pending determination of the substantive claims in arbitration.



Security in connection with the measure

The arbitral tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.¹⁷ In none of the EA proceedings in investment treaty disputes has such security been ordered.

VI. Criteria used in assessing the relief sought

Neither recent versions of the SCC Rules nor the Swedish Arbitration Act (*lex arbitri*) provides criteria which should be considered in making a decision on an interim measure.

¹⁷ Article 37(2) of the 2017 SCC Rules (Article 32(2) of the 2010 SCC Rules).

In practice, all emergency arbitrators have applied very similar criteria, with only slight differences. In three cases it was explicitly stated that the arbitrators are guided by criteria stipulated in Article 17A of the 2006 UNCITRAL Model Law on International Commercial Arbitration:

- harm, actual or imminent, not adequately reparable by an award of damages (irreparable harm);
- such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted (proportionality);
- a reasonable possibility that the requesting party will succeed on the merits of the claim (*prima facie* case on the merits).

These three criteria were usually supplemented by a requirement of urgency, that is, *prima facie* evidence that irreparable harm is likely to be caused to the requesting party unless the order for interim relief is granted before such relief can be obtained from the arbitral tribunal.

Another criterion frequently applied by emergency arbitrators was *prima facie* jurisdiction. In essence, this criterion boiled down to *prima facie* evidence that there was a covered investment and investor under the relevant treaty, and that the respondent state consented to arbitration under the SCC Rules.

Other criteria examined include the admissibility of an interim measure (2 cases), necessity (1 case), and “the appropriateness of interim relief in view of the total circumstances” (1 case).

VII. References to previous decisions on provisional measures

In six out of ten emergency arbitrator’s decisions, reference was made to several decisions on provisional measures made previously, including those in *Occidental v Ecuador*,¹⁸ *Sergei Paushok v Mongolia*,¹⁹ *Amco v Indonesia*,²⁰ *Perenco Ecuador v Ecuador*,²¹ *Tanzania ECS v Independent Power Tanzania*,²² *Libananco v Turkey*,²³ *Nova Group Investments v Romania*,²⁴ *Azurix v Argentina*.²⁵

¹⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, dated 17 August 2007.

¹⁹ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, dated 2 September 2008.

²⁰ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, dated 9 December 1983.

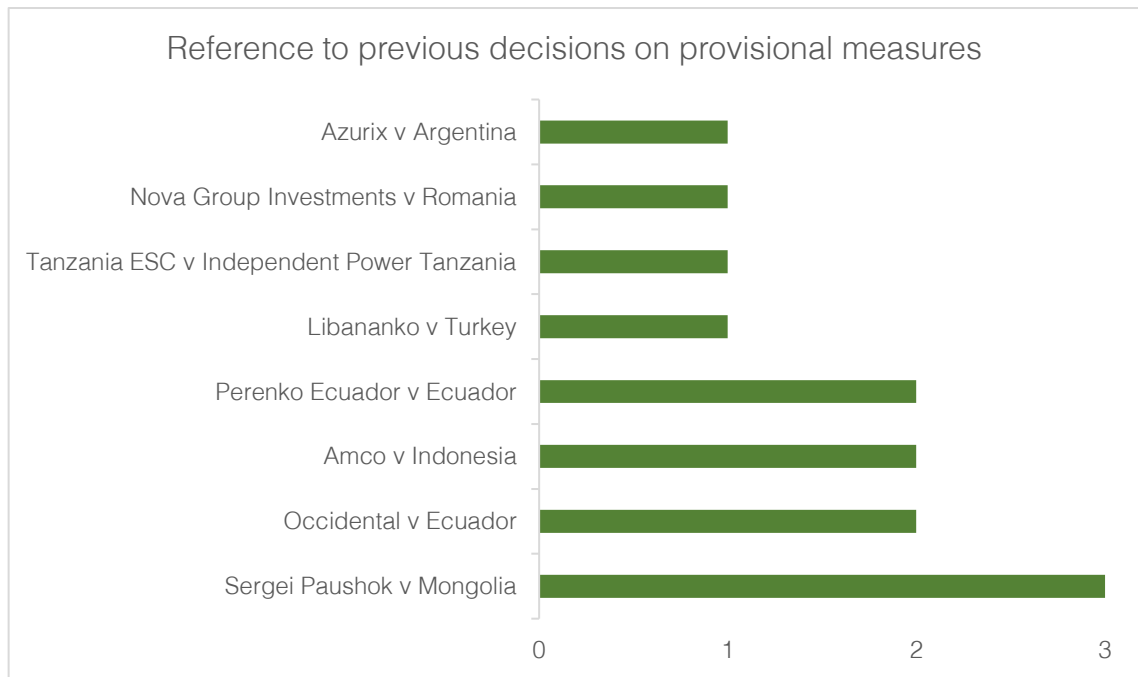
²¹ *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, dated 8 May 2009.

²² *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent’s Request for Provisional Measures, dated 20 December 1999.

²³ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for Provisional Measures, dated 7 May 2012.

²⁴ *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant’s Request for Provisional Measures, dated 29 March 2017.

²⁵ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, provisional measures, dated 6 August 2003.



VIII. Concluding remarks

The SCC Rules provide the opportunity to seek interim relief in investment treaty disputes either before initiation of regular arbitration proceedings, or when the proceedings have been initiated, but the case has still not been referred to the tribunal.

In 2014-2019 emergency decisions were made in ten disputes arising out of alleged violations of BITs or ECT. In six disputes emergency relief was granted (in full or in part). In all cases the emergency arbitrator was appointed in 24 hours, and the average term for rendering the emergency decision was 5.5 days.

In investment treaty disputes, emergency arbitrators have applied the following criteria: (i) *prima facie* jurisdiction, (ii) *prima facie* chance of success on the merits, (iii) urgency, (iv) irreparable harm, and (v) proportionality.

Procedural issues which differentiate EA proceedings in investment treaty disputes from commercial disputes include (i) the application of cooling off periods, and (ii) the temporal application of the SCC Rules. The practice so far on these issues has been quite consistent.

However, it is important to note that, while the cases analysed here may be indicative of how an emergency arbitrator would rule in future emergency proceedings, arbitrators are not bound by, or in any way required to follow, previous SCC decisions. Each emergency arbitrator will consider a request for interim measures on its own merits.