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Cooling off Period

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A. Introduction

1 'Cooling off periods', also known as 'waiting periods', are a feature of bilateral investment treaties ('BITs'; → *Investments, Bilateral Treaties*) or state-investor arbitration, whereby parties seeking to initiate arbitration proceedings are required to hold off for a specified period during which an amicable settlement should be attempted. One study estimates that some 90 per cent of all BITs contain clauses imposing such requirements (Pohl, Mashigo, and Nohen, 2012, 17). Similar practices are found in other fields such as commercial arbitration, trade law, and the peaceful settlement of international disputes (see → *Guyana-Venezuela Border Dispute*; → *Bryan Treaties 1913-14*).

B. Formal Requirements

2 The length of cooling off periods varies significantly. While the most commonly stipulated period is six months, it can range from as short as 60 days (Art 20 (1) Agreement for the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan) to as long as 24 months, when domestic litigation requirements are taken into account (Art 10 (2)-(3) Agreement between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments). Periods shorter than six months occur more frequently than longer ones (Pohl, Mashigo, and Nohen, 2012, 17).

3 For an example, Article VI (2) Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment provides that:

[i]n the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution.

Article VI (3) further states that:

[p]rovided that the national or company concerned has not submitted the dispute for resolution under [alternative methods] and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.

4 Most BITs require a written notification, or 'trigger letter', which marks the start of the cooling off period. An example of an exception to this requirement is the US-Argentina BIT (Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment) (Reed, Paulsson, and Blackaby, 2011, 97). Where a trigger letter is required, it should set out with sufficient detail the existence and nature of the grievance, such that the counterparty is put on notice and may begin to take steps to negotiate. In *Western NIS Enterprise Fund v Ukraine*, an → *International Centre for Settlement of Investment Disputes (ICSID)* tribunal held that '[p]roper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the disputes by negotiations' (*Western NIS Enterprise Fund v Ukraine*, 2006, para 5). In *Lauder v Czech Republic*, the ad hoc → *United Nations Commission on International Trade Law (UNCITRAL)* tribunal found that the cooling off period began not on the date of the breach, but on the date the state was put on notice of it (*Lauder v Czech Republic*, 2001, para 185). The importance of notice is further demonstrated by *Goetz and ors v Burundi*, where the investors had properly notified Burundi of a complaint regarding the withdrawal of a free

zone certificate issued by it. However, the same had not been given regarding a claim for a reimbursement of taxes, duties, and controvertible shares. As a result, the ICSID tribunal found itself unable to hear the latter claims (*Goetz and ors v Burundi*, 1999, paras 90–93). However, this requirement of notice may be disapplied in certain circumstances, for instance when the state expressed its consent to arbitration through other means. In *Maffezini v Spain*, a six-month waiting period (as well as an 18-month ‘local jurisdiction’ period) was ousted by the investor’s invocation of a → *most-favoured-nation clause* in the BIT. As such, the investor was allowed to proceed according to the terms of other treaties to which Spain was a signatory, which did not impose waiting periods (*Maffezini v Spain*, 2000, paras 19–64).

5 The requirement of a trigger letter raises the question of the appropriate government department to which it should be addressed. Reed and others opine that ‘[n]otification to a subdivision of a State, such as a provincial governor, may not be sufficient, even if the underlying investment agreement is with the province’ (Reed, Paulsson, and Blackaby, 2011, 97). Evidently, the issue of the proper governmental addressee will often be determinable only on a case-by-case basis, depending on the terms of the BIT involved and the constitutional and administrative structure of the defendant state. Interesting questions are raised in this regard by states that designate a specialized body to promote and manage foreign investment, for example the Peruvian governmental agency Proinversión (Jaramillo Troya, 2014, 21). On the one hand, their general lack of authority to make decisions binding upon the state may render them inappropriate as addressees. On the other, if the purpose of the trigger letter is to serve notice, nothing could arguably be more appropriate in this regard than informing a governmental agency specifically tasked with managing relations with investors, especially if it is involved in addressing disputes.

C. The Interpretation Of Cooling off Clauses

6 The jurisprudence on cooling off clauses reveals considerable diversity, prompting some commentators to condemn it as a ‘dismal swamp’ (Born and Šcekić, 2015, 227). Three main strands are discernible. The first views cooling off clauses as mere exhortations to attempt alternative dispute resolution (‘ADR’), rather than as legal obligations proper. The second interprets such clauses as ‘conditions precedent’ to arbitration, and as imposing a defeasible obligation to pursue ADR upon the claimant—that is, to negotiate unless futile. Non-compliance with this obligation robs the tribunal of jurisdiction to hear the dispute. A third line of reasoning falls somewhere between the first two: cooling off provisions are characterized as contractual obligations, breach of which results not in lack of jurisdiction or inadmissibility, but in damages or injunctive relief.

1. Aspirational or Hortatory

7 The prime example of the first line of awards is *SGS Société Générale de Surveillance SA v Pakistan*, where an ICSID tribunal rejected an objection to its jurisdiction on the grounds that the investor had failed to comply with a 12-month cooling off period requirement, observing that ‘[t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction’ (*SGS Société Générale de Surveillance SA v Pakistan*, 2003, para 184 [‘*SGS v Pakistan*’]). On this view, clauses setting out cooling off periods are merely exhortations to consider ADR, which the parties may choose to ignore (Born, 2014, 924–25). They do not oust a party’s right to initiate arbitration proceedings or impinge upon a tribunal’s competence to hear a dispute. This approach was followed in *Biwater Gauff (Tanzania) Ltd v Tanzania*, where another ICSID tribunal similarly held a six-month waiting period to be ‘procedural and directory in nature, rather than jurisdictional and mandatory’ (*Biwater Gauff (Tanzania) Ltd v Tanzania*, 2008, para 343 [‘*Biwater Gauff v*

Tanzania’]). The tribunal observed that a contrary finding would have ‘curious effects’, such as ‘preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason’, and ‘forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter’ (*Biwater Gauff v Tanzania*, para 343).

8 Reed and others consider this approach to be the most widely adopted in the arbitration practice (2011, 97–98). Many traditions of contract law treat agreements to negotiate are often as unenforceable for vagueness (Born, 2014, 918–19; Born and Šcekić, 2015, 231–32). For instance, the House of Lords has held that:

[a] duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party ... while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a ‘proper reason’ to withdraw. Accordingly, a bare agreement to negotiate has no legal content (UK House of Lords, *Walford v Miles*, 1992, 138).

9 The jurisprudence of the International Court of Justice (‘ICJ’) and Permanent Court of International Justice (‘PCIJ’) exhibits a similar tendency (Schreuer, 2004, 232–33). For instance, in *Military and Paramilitary Activities in and against Nicaragua*, 1984 [‘*Nicaragua*’], the United States objected to the jurisdiction of the Court on the grounds that Nicaragua had not complied with the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (1956), which provided at Article XXIV (2) that ‘[a]ny dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means’. The Court rejected this argument, finding that the fact that a state has not expressly ‘referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State’ cannot mean that ‘it is debarred from invoking a compromissory clause in that treaty’ and that it ‘would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do’ (*Nicaragua*, 428–29). In this regard, the ICJ cited the *Certain German Interests in Polish Upper Silesia, Germany v Poland* decision, where it was held that the court ‘cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned’ (*Certain German Interests in Polish Upper Silesia, Germany v Poland*, 1925, 14). Finally, numerous international commercial arbitral awards also take a similar approach to cooling off provisions (Born and Šcekić, 2015, 234). For instance, in *ICC Case No 11490*, an International Chamber of Commerce (‘ICC’) panel found that a ‘provision in the arbitration clause that disputes “be settled in an amicable way” constituted no condition precedent to referral to arbitration but rather underlined the parties’ intent not to litigate disputes in court’ (*ICC Case No 11490*, undated, 30).

10 This approach is not without criticism. While much depends upon the particular language of the applicable clause, to say that cooling off periods are intended merely ‘to allow the parties to enter into good-faith negotiations before initiating arbitration’ (*Lauder v Czech Republic*, para 185; *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Pakistan*, 2005, para 98 [‘*Bayindir v Pakistan*’]) strains the meaning of the word ‘allow’. Parties are always ‘allowed’ to enter into good faith negotiations to settle their dispute amicably—they are free to do so even after arbitration has been initiated. The deliberate inclusion of an express treaty provision detailing precise instructions cannot be understood as intended merely to ‘allow’ negotiations, but to ‘require’ them. Instead, the most likely reason for this particular construction of cooling off provisions is that it is not ‘consistent with the need for orderly

and cost-effective procedure to halt [an] arbitration ... and require the [c]laimant first to consult with the [r]espondent before resubmitting the [c]laimant's BIT claims' (*SGS v Pakistan*, para 184). As Born and Šcekić observe:

the principal objective of most such pre-arbitration procedural mechanisms is enhanced efficiency and avoidance of formal legal proceedings: parties seek to encourage the amicable resolution of disputes through informal negotiations or conciliation, thereby avoiding the expenses, delays, and contention of actual arbitral proceedings (Born and Šcekić, 2015, 230).

That costs are the overriding concern is also demonstrated in *Bayindir v Pakistan*, where an ICSID tribunal concurred with the claimant that requiring 'a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage' (*Bayindir v Pakistan*, para 100).

11 For precisely this reason, however, cooling off provisions may not be devoid of consequence, even if interpreted as merely hortatory. In *Ethyl Corporation v Canada*, a NAFTA Chapter XI arbitration under UNCITRAL rules, the tribunal found it had jurisdiction to hear the dispute despite the fact that the claimant's request for arbitration was filed just five days after the sending of the trigger letter (*Ethyl Corporation v Canada*, 1998 [*Ethyl Corp'*]). Nevertheless, it found that it would have been spared having to deal with a particular issue if the claimant had complied with the six-month waiting period. On this basis, it issued a costs order against the claimant with respect to that part of the proceedings concerning the cooling off period (*Ethyl Corp*, para 88).

2. Conditions Precedent to Arbitration

12 A second, newer line of awards deems cooling off provisions to impose legal obligations upon the parties to attempt negotiations in good faith for the duration of the stipulated period, defeasible upon a showing of their futility. In contrast to the characterization of cooling off provisions as directory and procedural, the second trend views the requirement of a waiting period as 'very much a jurisdictional one', such that 'failure to comply with that requirement would result in a determination of a lack of jurisdiction' (*Enron Corporation and Ponderosa Assets LLP v Argentina*, 2004, para 88). Moreover, whereas *SGS v Pakistan* and *Bewater Gauff v Tanzania* are premised upon the possibility that negotiations might be futile, the newer trend requires such futility to be proved, although the standard of proof varies across tribunals.

13 The prime example of this trend in the jurisprudence is *Murphy Exploration and Production Co v Ecuador*, 2010 ('*Murphy*' or '*Murphy v Ecuador*'). The investor had a local Ecuadorean subsidiary, whose interests were adversely affected by the passage of certain legislation. While the subsidiary was a member of a consortium that had carried out unsuccessful negotiations for over a year with the Ecuadorean government, the investor itself was not. Nonetheless, the investor filed a request for arbitration four days after sending a trigger letter. The tribunal held that despite the absence of a formal notice requirement in the BIT, a dispute could not be submitted to arbitration 'without the prior allegation of a Treaty breach', and that the negotiations attempted by the consortium did not suffice to give notice to Ecuador of the investor's particular grievance (*Murphy v Ecuador*, paras 104, 131). The tribunal found the investor's efficiency and cost-reduction arguments per *SGS v Pakistan* 'totally unacceptable', holding instead that compliance with cooling off was 'something much more serious' than a 'mere formality' but 'an essential mechanism enshrined in many bilateral investment treaties, which compels parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration' (*Murphy v Ecuador*, para 154). As for the investor's argument that negotiations with Ecuador would have been futile, the tribunal held that in order for the parties to know

this ‘they must first try it’, and that the investor’s unilateral decision to proceed to arbitration totally obviated the possibility of an amicable settlement (*Murphy v Ecuador*, para 155). Accordingly, the investor’s conduct constituted ‘grave noncompliance’ with the BIT, as a result of which the tribunal lacked jurisdiction to hear the dispute (*Murphy v Ecuador*, para 157). Curiously though, it awarded costs equally against the parties (*Murphy v Ecuador*, para 159).

14 Some commentators have surmised that *Murphy v Ecuador* represents a ‘sea change’ in the investment arbitration jurisprudence (Deutsch, 2011, 589). If so, this would arguably mirror developments in other areas of practice. Domestic courts have increasingly begun to enforce agreements to negotiate or pursue ADR, where they have been set forth with sufficient detail (Born, 2014, 920–21; Born and Šcekić, 2015, 232–33, 239–40). For instance, Australian courts have departed from the traditional common law rule against the enforceability of contracts to negotiate to hold that ‘[a]n agreement to mediate is enforceable in principle, if the conduct required of the parties to participate in the process is sufficiently certain’ (*Elizabeth Chong Pty Ltd v Brown*, 2011, para 23; see also Chapman, 2010, 90–95). In addition, recent ICJ case law reveals a change from its stance in *Nicaragua*: in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation*, the Court dismissed an application for failure to negotiate before seeking judicial resolution (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation*, 2011, paras 159, 182–84). Indeed, the *Nicaragua* reasoning might never actually have been applicable, because the treaty involved in that case ‘did not specify a period of time during which a diplomatic settlement was to be attempted’ (Schreuer, 2004, 233). Accordingly, some scholars argue that the first trend of treating all cooling off clauses as merely aspirational violates the principle of effective interpretation of contractual provisions, and that the better view is that they impose substantive legal obligations, particularly where they are drafted in precise and mandatory language—that is, in terms of ‘should’ and ‘must’, rather than ‘can’ or ‘may’ (Born and Šcekić, 2015, 236; Jaramillo Troya, 2014, 28; *Philip Morris Brands SÀRL and ors v Uruguay*, 2013, paras 140–41 [*Philip Morris v Uruguay*]).

15 In deeming cooling off provisions as productive of substantive legal obligations, the second trend of jurisprudence raises a number of interesting questions regarding the content of the obligation to negotiate and the criteria for proving futility. Regarding the content of the obligation to attempt negotiations, the tribunal in *Murphy* held that ‘it is an obligation of means, not of results. There is no obligation to reach, but rather to try to reach, an agreement’. However, the tribunal immediately went on to hold that in order to ‘determine whether negotiations would succeed or not, the parties must first initiate them’ (*Murphy v Ecuador*, para 135). In requiring actual attempts to negotiate, *Murphy v Ecuador* places a very high standard for proving futility. According to *Murphy*, a claimant has an absolute obligation to offer to enter into ADR; it is only if this offer is rebuffed—for instance, if several letters are sent and receive no reply—that the claimant may proceed to file a request for arbitration without running out the full duration of the waiting period. Without going through these steps, a claimant cannot really be sure that there is no chance of amicable settlement. As such, attempting negotiations during the cooling off period is truly a jurisdictional requirement: the tribunal is not constituted unless negotiations were attempted except where provably futile.

16 A similar approach was taken in *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* regarding a futility defence to a BIT clause requiring the exhaustion of local remedies prior to initiating arbitration (→ *Local Remedies, Exhaustion of*), exhaustion in this case having been specified as attempting litigation in domestic Turkmen courts for at least a year (*Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v*

Turkmenistan, 2013, para 6.2.7 [*'Kiliç'* or *'Kiliç v Turkmenistan'*]). The tribunal held that its jurisdiction was derived from the state's consent to arbitration as expressed in the BIT, and that while the investor was free to accept or reject the same, it could not unilaterally alter the terms of that consent. Accordingly, the tribunal lacked jurisdiction to hear the dispute (*Kiliç v Turkmenistan*, 2013, paras 6.2.1-6.2.2). Regarding the futility argument, the tribunal held that the investor had failed to adduce sufficient evidence regarding the impossibility of recourse to Turkmen courts. Instead of producing a single witness or expert, the investor's submissions were 'based principally on broad statements and third-party studies/reports, to the effect that the Turkmen judiciary lacks independence, and that the Turkmen authorities would have had a particular aversion to Turkish investors' (*Kiliç v Turkmenistan*, 2013, paras 8.1.5, 8.1.10). Much like the *Murphy* tribunal's criticism of the investor for not having attempted to reach out the Ecuador, the tribunal in *Kiliç* was particularly scathing of the investor for not having taken a single procedural step in Turkmen courts (*Kiliç v Turkmenistan*, 2013, para 8.1.8). *Kiliç* has been interpreted by commentators as requiring the party claiming the futility of negotiations (or other pre-arbitration requirements) to (1) show it made efforts towards complying with the requirement, (2) bear the burden of demonstrating the probable failure of such overtures with reference to the particularized circumstances of the dispute, without (3) relying on generalized third-party studies or reports (Ruff and Tan, 2013). On appeal, the award was upheld by the Annulment Committee (*Kiliç v Turkmenistan (Annulment)*, 2015).

17 In contrast, other tribunals have dispensed with or contemplated dispensing with cooling off period obligations, on the grounds that it was clear from the circumstances that it would have been pointless even to request mediation or conciliation. Speaking in the context of a pre-arbitration obligation to exhaust domestic remedies, the tribunal in *Philip Morris v Uruguay* expressed disagreement with the claim that the obligation was 'nonsensical' and therefore futile merely because a domestic court could not have rendered a decision within the time-frame contemplated by the treaty. Instead it observed that:

a finding that domestic litigation would be 'futile' must be approached with care and circumspection. Except where this conclusion is justified in the factual circumstances of the particular case, the domestic litigation requirement may not be ignored or dispensed with as futile in view of its paramount importance for the host State. Its purpose is to offer the State an opportunity to redress alleged violations of the investor's rights under the relevant treaty before the latter may pursue claims in international arbitration (*Philip Morris v Uruguay*, para 137).

Moreover, such a provision depending on its wording might constitute admissibility or procedural criteria rather than a jurisdictional requirement (*Philip Morris v Uruguay*, para 138). In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, another ICSID tribunal held that the claimant was justified in requesting arbitration before the completion of the cooling off period for reasons of futility: it had sent letters to the Ecuadorean government rebutting allegations made of it by the latter, and which were the basis of new Ecuadorean measures in violation of the applicable BIT. These communications had gone unheeded, and as a result the tribunal was satisfied that any attempts to negotiate would likely have been ignored as well (*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, Decision on jurisdiction, 2008, paras 19, 93). While the tribunal's decision on jurisdiction itself predates *Murphy v Ecuador*, the *Occidental Petroleum* tribunal's factual and legal determinations as well as general approach to cooling off periods were upheld subsequent to *Murphy* by the Annulment Committee (*Occidental Petroleum Corporation and Occidental*

Exploration and Production Company v Ecuador, Decision on annulment of the award, 2015, paras 132–35).

18 A similar but perhaps subtly different principle may be seen to be at work in Article 13 UNCITRAL Model Law on International Commercial Arbitration. That provision states that:

[w]here the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights.

19 The inclusion of the qualifier ‘in its opinion’ might appear to limit the provision to being merely aspirational and hortatory (Born and Šcekić, 2015, 236). However, there have been arbitrations where the tribunal dismissed a claim for failure to comply with pre-arbitral dispute resolution steps (Webster and Bühler, 2014, paras 5–14) and which have held pre-arbitration procedures to be ‘strictly binding upon the parties and govern[ing] their conduct before resorting to arbitration’ (*ICC Case No 6276*, 1990, 77).

3. Contractual Obligations

20 Suppose a claimant duly waits for the duration of the cooling off period before initiating arbitration but does not take any steps to settle the dispute amicably during this time (Jaramillo Troya, 2014, 7). According to the first line of awards, the proper response of the tribunal would be to find itself possessed of jurisdiction to hear the dispute. The opposite would obtain on the second strand of awards; the claimant would not have fulfilled her substantive legal obligation to attempt negotiation, as a result of which the tribunal would be devoid of jurisdiction. A third possibility stakes a path in between these two poles: it states that there is a contractual obligation to attempt negotiations during the cooling off period, breach of which gives rise to damages, a reduction in the amount of the award, a costs order, etc (Born, 2014, 930; Born and Šcekić, 2015, 248–49). As Meier and others suggest, ‘[t]he clause [providing for pre-arbitration procedures] is on the one hand regarded as valid and admissible. However, for the court, applying the clause is irrelevant. This means a party can file a claim at any time irrespective of such a clause. The party is at most liable to pay damages’ (Meier, Sogo, and Frenkel, 2010, 598; Born, 2014, 930–31; Born and Šcekić, 2015, 249).

21 While there have not yet been any investment arbitrations where this third approach was taken, something like it can be discerned in a number of Hong Kong decisions (*Astel-Peiniger Joint Venture v Argos Engineering and Heavy Industries Co Ltd*, 1994; *Hercules Data Comm Co Ltd v Koywa Communications Ltd*, 2000; *Fai Tak Engineering Co Ltd v Sui Chong Construction and Engineering Co Ltd*, 2009) and international commercial arbitrations (*ICC Case No 11490*). Of course, whether the controverted provisions are to be read as contractual bargains or as conditions precedent to arbitration will of course depend greatly on the language of the clauses and the intentions of the parties. Nonetheless, there may be policy reasons militating in favour of this approach. Born and Šcekić observe that:

[t]reating a negotiation, mediation, or local litigation requirement as a condition precedent to arbitration ... imposes disproportionate costs and delays on the entire dispute resolution process, which reasonable parties cannot generally be assumed

to have intended absent very explicit language requiring this result (2015, at 250; Born, 2014, 931).

Needless to say, such extra costs do not obtain where negotiations would be futile, futility being established presumably on the same basis as under the second line of awards. This cost-reduction rationale bears some resemblance to the aforementioned reasoning in *Ethyl Corp*, where the tribunal assumed jurisdiction but awarded partial costs against the claimant not complying with the cooling off period.

22 Nevertheless, there are difficulties in shoehorning such policy-driven reasoning into the structure of a contractual bargain. The first relates particularly to BIT arbitrations: insofar as a cooling off provision is a 'bargain', it is a bargain between states. The investor was not a party to the 'contract', even if it is privy to it in the fashion of a third-party beneficiary. Given that a contract cannot create duties for third parties, it would be improper to hold them liable under its terms. The second difficulty is broader, and draws upon the same reasons supporting the first, 'aspirational' reading. While reading cooling off provisions as conditions precedent is possible where precise drafting sets out the steps the parties must take to negotiate in good faith, the problem of nebulosity persists with the 'cooling off provisions as contractual obligations' approach with regard to the calculation of damages. As Lord Denning observed, '[n]o court could estimate the damages [resulting from breach of a contract to negotiate] because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be' (*Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*, 1975, 301-2).

23 Given that the 'harms' may not be remediable by damages, injunctive relief in the form of an order to participate in pre-arbitration mediation or other forms of ADR might be appropriate (Born, 2014, 932; Born and Ščekić, 2015, 251). In this spirit, the Swiss Federal Tribunal has taken an 'equitable' or 'abuse of rights'-based approach to issuing such orders. In one case, the Tribunal heard a challenge to an arbitral award brought on the basis that the claimant had not complied with a cooling off provision. The Court dismissed the challenge on the basis that the clause was phrased in non-mandatory language, but observed that even if it had been mandatory, the plaintiff was estopped from relying upon it because it had neither proposed nor initiated mediation proceedings before or during the arbitration (*Judgment (6 June 2007)*, 2007; see Boog, 2008, 105). In a subsequent case, it held that a cooling-off provision did indeed constitute a substantive contractual obligation, but that it had not been violated on the facts of the case, and that in any event the appellant could not claim it in good faith (*Judgment (16 May 2011)*, 2011, paras 3.4, 3.5; Born, 2014, 932; Born and Ščekić, 2015, 251). Finally, in a recent case, the Tribunal annulled an award for failure to comply with a cooling off provision, which it construed as a substantive contractual obligation. However, the effect of the judgment was to stay the proceedings and set a time-frame for the parties to engage in mediation (*Judgment (16 March 2016)*, 2016; Stutzer et al, 2016).

24 The problem is essentially one of knowing when it would be appropriate to make such an order, because neither the goals of cost reduction nor the protection of contractual bargains would be served if the parties have no hope of settling their differences through ADR: cooling off period obligations 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute' (*ICC Case No 8445*, 1994, 168). In this regard, thoughtful commentators have argued for the incorporation of insights from negotiation theory in the interpretation of cooling off clauses, whereby the panel looks beyond the legal relations between the parties, and considers the strategic, psychological, and structural barriers preventing the parties from reaching a settlement that would create value for both (Welsh and Schneider, 2013; Jaramillo Troya, 2014; von Kumberg, Lack, and Leathes, 2014). A panel taking such an approach might consider a

number of options, including compulsory referral to mediation (Welsh and Schneider, 2013, 120-32)

D. Conclusion

25 Cooling off clauses are productive of such uncertainty that some commentators have criticized as unwise the contemporary practice of including them as a matter of course in BITs (Born and Šcekić, 2015, 228). The diversity of interpretations is most likely a function of numerous factors: the drafting of the provisions, the policy imperatives weighing upon different types of tribunals, competing philosophies of contractual obligations, and changing attitudes towards mediation and other forms of ADR. Students and practitioners would do well to be mindful of these issues when construing and applying these provisions.

26 Nevertheless, cooling off periods potentially advance the vital interests of both investors and investment-receiving states. Immediate descent into litigation might enable the parties to preserve their 'slice of the pie', but often poisons relations between investors and investment-receiving states beyond repair. On the other hand, the respite provided by cooling off clauses keeps alive the possibility that the pie itself might be enlarged.

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