



Max Planck Institute
LUXEMBOURG
for Procedural Law

**Max Planck Institute Luxembourg for
International, European and Regulatory Procedural Law
Working Paper Series**

MPILux Working Paper 7 (2017)

COOLING OFF PERIOD (INVESTMENT ARBITRATION)

(Forthcoming update in the Max Planck Encyclopedia of International Procedural Law
(EiPro) to be published online by Oxford University Press)

ARAVIND GANESH
Max Planck Institute Luxembourg

Max Planck Institute Luxembourg
Working Paper Series

All rights reserved
No part of this paper may be reproduced in any form
without permission of the authors

ISSN: 2309-0227
©

*Working Papers are issued at the responsibility of their authors, and do not
reflect views of the MPI Luxembourg, the Max Planck Society, or associated personnel.*

Max Planck Institute Luxembourg
Luxembourg, 2017
Luxembourg

Cite as:
GANESH, Aravind (2017), 'COOLING OFF PERIOD (INVESTMENT ARBITRATION)', MPILux Working
Paper 7, available at: www.mpi.lu

TABLE OF CONTENTS:

A. Introduction

B. Formal Requirements

C. The Interpretation of Cooling-Off Clauses

1. Aspirational or Hortatory
2. Conditions Precedent to Arbitration
3. Contractual Obligations

D. Conclusion

A. Introduction

1 'Cooling off periods', also known as 'waiting periods', are a feature of Bilateral Investment Treaty ('BIT') 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. A recent study estimates that some 90% 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 can vary significantly. While the most commonly stipulated period is 6 months, it can range from as short as 3 months (Art. 8(1) UK Model BIT, Annex 5) to as long as 18 (Austria-Kuwait BIT). Periods shorter than 6 months occur more frequently than longer ones (Pohl, Mashigo, and Nohen, 2012, 17).

3. For an example, Article VI(2) US-Ecuador BIT provides that 'In 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 provides that: Provided 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 but not all BITs require a written notification, known as the 'trigger letter', which marks the start of the cooling off period. An example of an exception to this requirement is the US-Argentina BIT, at Annex 6 (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 ICSID Tribunal held that '[p]roper notice is an important element of the State's consent to arbitration, as it allows States, acting through its competent organs to examine and possibly resolve the disputes by negotiations.' (2006, at para 5). In *Lauder v Czech Republic*, an ad hoc UNCITRAL arbitration, the 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 (2001, at para 185). The importance of notice is further demonstrated by *Goetz and others 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. 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 (2000, at 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 et al opine that 'Notification 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 hand, 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 Šćekić, 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 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 'Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction' (2003, at para 184). On this view, clauses setting out cooling off periods are merely exhortations to consider ADR, which

the parties may choose to ignore (Born, 2014, 924-925). 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 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'. 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' (2008, at para 343).

8. Reed et al consider this approach to be the most widely adopted in the arbitration practice (2011, at 97-98). Considerable bodies of comparative contract law treat agreements to negotiate as unenforceable for vagueness (Born, 2014, 918-919; Born and Šćekić, 2015, 231-232). 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. (*Walford v Miles*, 1992, 138)

9 Moreover, analogy can be made to the jurisprudence of the Permanent Court of International Justice ('PCIJ') and International Court of Justice ('ICJ') (Schreuer, 2004, 232-233). For instance, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, the US objected to the jurisdiction of the Court on the grounds that Nicaragua had not complied with Article XXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation between the US and Nicaragua, which provided that 'Any 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 the 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, [that] it is debarred from invoking a compromissory clause in that treaty. ... 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*, 1984, 428-429). The ICJ also cited *Certain German interests in Polish Upper Silesia, Jurisdiction*, where the PCIJ held that it 'cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned' (1925, at 14). Finally, numerous international commercial arbitral awards also take a similar approach to cooling off provisions (Born and Šćekić, 2015, 234). For instance, in *ICC Case No. 11490*, the 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'. (undated, at 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*, 2001, para 185; *Bayindir v Pakistan*, 2005, para 98) arguably strains the meaning of the word ‘allow’. The parties are always ‘allowed’ to enter into good faith negotiations to settle a 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 sensibly be understood as intended 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 Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims’. (*SGS v Pakistan*, 2003, para 184) As one scholar observes, ‘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 Šćekić, 2015, 230) That keeping down costs is the overriding concern is perhaps demonstrated in *Bayindir v Pakistan*, where an ICSID tribunal concurred with the claimant that ‘to require 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’ (2005, at 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 Corp v Canada*, a NAFTA (Chapter XI) arbitration under UNCITRAL rules, the panel 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. 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 (1999, at 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 v Argentina*, 2008, para 88). Moreover, whereas *SGS v Pakistan* and *Biwater 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*. 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’ (2010, at para 104), and that the negotiations attempted by the consortium did not suffice to give notice to Ecuador of the investor’s particular grievance (2010, at para 131). The tribunal found the investor’s efficiency and cost-reduction arguments per *SGS v Pakistan* ‘totally unacceptable’. Instead, it held 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’ (2003, para 154). Regarding 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’. The tribunal found that it was the investor’s unilateral decision to proceed to arbitration that totally obviated the possibility of an amicable settlement. (2003, 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 (2003, para 157). Curiously though, the tribunal awarded costs equally against the parties (2003, 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, 920-921; Born and Šćekić, 2015, 232-233, 239-240). For instance, with regard to commonwealth jurisdictions, Australian courts in particular have departed from the old common law rule against the enforceability of contracts to negotiate. The Federal Magistrates Court of Australia has held 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 the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections)*, the Court dismissed an application for failure to negotiate before seeking judicial resolution (2011, paras 159, 182-184). Indeed, the Nicaragua reasoning might never actually have been applicable to the issue at hand, 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 Šćekić, 2015, 236; Jaramillo Troya, 2014, 28; see *Philip Morris v Uruguay*, 2013, paras 140-101).

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’ (2010, at para 135). However, the tribunal immediately followed on to hold that in order to ‘determine whether negotiations would succeed or not, the parties must first initiate them’ (2010, at para 135). In requiring actual attempts to negotiate, *Murphy v Ecuador* places a very high standard for proving futility. According to the *Murphy* reasoning, 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 by the tribunal in *Kılıç v Turkmenistan*, regarding a futility defence to a BIT clause requiring the exhaustion of local remedies prior to initiating arbitration (→Exhaustion of Local Remedies) exhaustion in this case having been specified as attempting litigation in domestic Turkmen courts for at least a year (2013, at para 6.2.7). The tribunal held that its jurisdiction derived from the consent of the state to arbitration as expressed in the BIT, and that while the investor was free to accept or turn it down, it could not unilaterally alter the terms of the consent (*Kılıç v Turkmenistan*, 2013, paras 6.2.1-6.2.2). As such, the tribunal lacked jurisdiction to hear the dispute. Regarding the futility argument, the tribunal held that the investor had failed to adduce sufficient evidence regarding the impossibility of recourse to Turkmen courts. Rather than producing a single witness or expert, the investor’s evidence was ‘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’ (*Kılıç 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 *Kılıç* was particularly scathing of the investor for not having taken a single procedural step in Turkmen courts. (2013, at para 8.1.8) *Kılıç* 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) The award was subsequently upheld by the Annulment Committee (*Kılıç 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 context 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, because a domestic court could not have rendered a decision within the time-frame contemplated by the treaty (2013, at para 137). Instead it urged 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*, 2013, para 137). Moreover, it observed that such a provision depending on its wording might constitute an admissibility or procedural criterion, rather than a jurisdictional requirement (*Philip Morris v Uruguay*, 2013, para 138). In *Occidental Petroleum and Occidental Exploration 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 and Occidental Exploration v Ecuador*, 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 and Occidental Exploration v Ecuador [Annulment]*, 2012, paras 132-135).

18 A similar but perhaps subtly different principle may be seen to be at work in Article 13, UNICTRAL Model Law on International Commercial Arbitration. That provision states that: Where 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 Šćekić, 2015, 236). However, there have been arbitrations where the tribunal dismissed a claim for failure to comply with pre-arbitral dispute resolution steps (Bühler and Webster, 2014, para 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, while 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 deprived of jurisdiction. There is a third possibility which stakes a path in between these two approaches: attempting negotiations during cooling off periods may be treated as a contractual obligation, breach of which gives rise to damages, a reduction in the amount of the award, a costs order, etc. (Born, 2014, 930; Born and Šćekić, 2015, 248-249). As Meier *et al* suggest, 'The 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, 930-931; Born and Šćekić, 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 v Argos*, 1994; *Hercules v Koywa*, 2000; *Fai Tak v Sui Chong*, 2009) and international commercial arbitrations (*ICC Case No. 11490*, undated). 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 contextual factors such as 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 Šćekić 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 reasoning in *Ethyl Corp. v Canada*, where, as mentioned above, a NAFTA tribunal assumed jurisdiction but awarded partial costs against the claimant in non-compliance with the relevant cooling off period.

22 Nevertheless, there are difficulties in shoehorning this policy-driven reasoning into the structure of a contractual bargain. The first difficulty 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 self-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 MR once observed in arguing against the recognition of contracts to negotiate, 'No 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 Šćekić, 2015, 251). In this spirit, the Swiss Federal Tribunal has taken an 'equitable' or 'abuse of rights'-based approach to the issuing of such orders. In *Judgment (6 June 2007)*, the Swiss Federal 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 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 (Boog, 2008, 105). In the later *Judgment (16 May 2011)*, the Court annulled an award for failure to comply with a mandatory cooling off provision, but in a manner essentially constituting a stay of proceedings and setting a time frame for the parties to engage in mediation (2011, at paras 3.4, 3.5, 4; Born, 2014, 932; Born and Šćekić, 2015, 251). The problem then becomes 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, a number of 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 (see Jaramillo Troya, 2014; von Kumberg, Lack, and Leathes, 2014; Welsh and Schneider, 2013). A panel taking such an approach might consider a number of options, including compulsory referral to mediation (Welsh and Schneider, 2013, 120-132).

D. Conclusion

24 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 Šćekić, 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 certainly do well to be mindful of these issues when construing and applying these provisions.

25 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.

Cited Bibliography

- *C Schreuer, 'Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 (2) J World Investment & Trade 231-256.*
- *C Boog, 'How to Deal with Multi-tiered Dispute Resolution Clauses' (2008) 26(1) ASA Bull 103-112.*
- *S Chapman, 'Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27(1) JIntlArb 89-98.*
- *I Meier, M Sogo, and D Frenkel, Schweizerisches Zivilprozessrecht: eine kritische Darstellung aus der Sicht von Praxis und Lehre (Schulthess 2010).*
- *R Deutsch, 'ICSID Tribunal Denies Jurisdiction for Failure to Satisfy BIT's Cooling-Off Period: Further Evidence of a Sea Change in Investor-State Arbitration or a Meaningless Ripple?' (2011) 33(3) HousJIntL 589-604.*
- *L Reed, J Paulsson, and N Blackaby, Guide to ICSID Arbitration (Kluwer Law International 2011).*
- *J Pohl, K Mashigo, and A Nohen, Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, (OECD Publishing 2012) OECD Working Paper on International Investment No. 2012/2.*
[https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf]
- *D Ruff, and T Tan, 'Local Remedies First – ICSID and the Kilic decision', (2013) 1 Norton Rose International Arbitration Reports.*
[<http://www.nortonrosefulbright.com/knowledge/publications/108987/local-remedy-first-icsid-and-the-kilic-decision>]
- *N Welsh and A Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18(1) Harvard Negotiation Law Review 71-144.*
- *G Born, International Commercial Arbitration Vol. 1 (2nd edn Kluwer Law International 2014).*
- *J Jaramillo Troya 'Cooling-off periods in investment treaty arbitration: an opportunity to negotiate or a mere formality? Views from a Negotiation Perspective' Seminar Paper, Harvard Law School (2014).*
[<http://repositorio.educacionsuperior.gob.ec/bitstream/28000/1279/1/T-SENESCYT-00491.pdf>]
- Thomas H. Webster and Michael Bühler, Handbook of ICC Arbitration: Commentary, Precedents, Materials (3rd edn Sweet and Maxwell 2014) 85-98.
- *W von Kumberg, J Lack, and M Leathes, 'Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29(1) ICSID Rev/FILJ 133-141.*
- *G Born, and M Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'', in E Triantafyllou, and A Cohen Smutny, (eds) Practising Virtue: Inside International Arbitration (OUP 2015) 227-263.*

Cited Documents

Ad Hoc Tribunal (UNCITRAL), Ethyl Corporation v Canada, Decision on Jurisdiction, 24 June 1998, (1999) 38 ILM 708.

Ad Hoc Tribunal (UNCITRAL), Lauder v The Czech Republic, Final Award, 3 September 2001, IIC 205.

Agreement between the Republic of Austria and the State of Kuwait for the Encouragement and reciprocal Protection of Investments (signed 16 November 1996, entered into force 22 September 1998) BGBl No III 154/1998.

District Court, Hong Kong Special Administrative Region of China, Fai Tak Engineering Co Ltd v Sui Chong Construction and Engineering Co Ltd, 22 June 2009, HKDC 141.

Federal Magistrates Court of Australia, Elizabeth Chong Pty Ltd v Brown, 22 July 2011, FMCA 565.

Hong Kong Court of First Instance, Astel-Peiniger Joint Venture v Argos Engineering and Heavy Industries Co Ltd, 18 August 1994, HKCFI 276.

High Court Court of First Instance, Hercules Data Comm Co Ltd v Koywa Communications Ltd, 23 October 2000, HKCFI 71.

*ICC International Court of Arbitration, ICC Case No 6276, Partial Award, 29 January 1990, *printed in* Dyalá Jiménez-Figueres, 'Multi-Tiered Dispute Resolution Clauses in ICC Arbitration' (2003) 14(1) ICC Ct Bull 76-78.*
[<http://djarbitraje.com/pdf/487MultiTiered%20Dispute%20Resolution%20Clauses%20in%20ICC%20Arbitration%20intro%20and%20comment.pdf>]

ICC International Court of Arbitration, ICC Case No 8445, Final Award, 1994, (2001) 26 YBCA 167.

ICC International Court of Arbitration, ICC Case No 11490, Final Award, undated, (2012) 37 YBCA 30.

ICJ, Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia v Russian Federation, Preliminary Objections, 1 April 2011, ICJ Rep 70.

ICJ, Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States of America, Jurisdiction and Admissibility, 28 November 1984, ICJ Rep 392.

ICSID, Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, Award, 24 July 2008, ICSID Case no ARB/05/22.

ICSID, Bayindir Insaat Turizm Ticaret ve Sanayi AS v Islamic Republic of Pakistan, Decision on Jurisdiction, 14 November 2005, ICSID Case no ARB/03/29.

- *ICSID, Enron Corporation and Ponderosa Assets, LLP v Argentina, Decision on Objections to Jurisdiction of ICSID, 14 January 2008, ICSID Case no ARB/01/3.*
- *ICSID, Goetz, Antoine and others v Republic of Burundi, Award, 10 February 1999, ICSID Case no ARB/95/3 (2000) 15 ICSID Rev/FILJ 457.*
- *ICSID, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, Award, 6 July 2013, ICSID Case no ARB/10/1.*
- *ICSID, Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan, Decision on Annulment, 14 July 2015, ICSID Case no ARB/10/1.*
- *ICSID, Maffezini, Emilio Agustín v The Kingdom of Spain, Decision of the Tribunal on Objections to Jurisdiction of ICSID, 25 January 2000, ICSID Case no ARB/97/7 (2001) 16 ICSID Rev/FILJ 212.*
- *ICSID, Murphy Exploration and Production Co v Ecuador, Award on Jurisdiction, 15 December 2010, ICSID Case no ARB/08/4.*
- *ICSID, Occidental Petroleum Corp. v Ecuador, Decision on Annulment, 11 October 2012, ICSID Case no ARB/06/11.*
- *ICSID, Occidental Petroleum Corp. v Ecuador, Decision on Objections to Jurisdiction of ICSID, 9 September 2008, ICSID Case no ARB/06/11.*
- *ICSID, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Uruguay, Decision on Objections to Jurisdiction of ICSID, 2 July 2013, ICSID Case no ARB/10/7.*
- *ICSID, Société Générale de Surveillance S.A. v Pakistan, Decision on Objections to Jurisdiction of ICSID, 6 August 2003, ICSID Case no ARB/01/13 (2003) 18 ICSID Rev/FILJ 307.*
- *ICSID, Western NIS Enterprise Fund v Ukraine, Procedural Order, 16 March 2006, ICSID Case no ARB/04/2.*
- *PCIJ, Certain German in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 25 August 1925, Series A no 6, 4.*
- *Swiss Federal Tribunal, Judgment, 6 June 2007, 26 ASA Bull 87.*
- *Swiss Federal Tribunal, Judgment, 16 May 2011, 29 ASA Bull 643.*
- *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (signed 27 August, 1993, entered into force 11 May 1997) S Treaty Doc No 103-15. *
- *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (signed 21 January 1956, entered into force 24 May 1958) 367 UNTS 3.*
- *United Kingdom, Court of Appeal of England and Wales, Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd, 28 November 1974, [1975] 1 WLR 297.*
- *United Kingdom, House of Lords, Walford v Miles, 23 January 1992, [1992] 2 AC 128.*