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ENHANCING INVESTOR-STATE DISPUTE RESOLUTION: SUGGESTIONS TO OPTIMIZE THE EFFECTIVENESS OF COOLING-OFF CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENT NEGOTIATIONS

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Abstract

The cooling-off clause in international investment agreements, intended to foster amicable dispute resolution before arbitration, often causes varied tribunal interpretations and jurisdictional disputes due to its unclear drafting. This article aims to comprehensively explore the cooling-off clause, covering its definition, the beginning and ending points of the cooling-off period, function, and enforceability in investor-state dispute settlement practice. It also delves into two different approaches adopted by investment tribunals in case of non-compliance with the cooling-off clause. Drawing from this analysis, the article provides recommendations for Vietnam as a host state to ensure the effective application of this clause.

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A research published in March 2021 identified that out of the 2,885 treaties with clauses relating to investor-state dispute settlement ("ISDS"), 2,052 treaties contain cooling-off clauses, representing approximately 71% of the total.[1] The popularity of the cooling-off clause stems from the demand of foreign investors and host states for maintaining their mutually dependent relationship in terms of economic interests. Cooling-off clause presents a mechanism for dispute resolution that underlines goodwill and high collaboration of parties through negotiation, consultation, conciliation, and/or mediation, which occurs before arbitration. In some instances, the clause may combine these amicable settlement means and arrange them in an order: Initially, disputing parties engage in negotiation and/or consultation, striving for mutual agreement. Should these efforts prove unsuccessful, the

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1 The research team adopted a supervised machine learning approach based on the text of investment treaties, to estimate the existence of cooling-off clauses in IIAs. They identified 2,885 treaties with ISDS-related clauses out of the total 3,127 known treaties, collected by the Electronic Database of Investment Treaties (EDIT) of World Trade Institute (WTI) up to March 2021. See: Kessedjian C. et al. (2020), *Mediation in Future Investor-State Dispute Settlement*, Academic Forum on ISDS Concept Paper 2020/16, 5 March 2020, pp. 5-6; and the database in EDIT, "Electronic Database of Investment Treaties'. Retrieved from: https://edit.wti.org/document/investment-treaty/search [accessed 13 June 2023].

parties proceed to conciliation and/or mediation, involving third parties.[2]

While intended as a mechanism for dispute resolution, the cooling-off period itself sparks controversy among disputing parties and the tribunal community. The ongoing debate revolves around whether adherence to the cooling-off clause is obligatory and decisive in determining the jurisdiction of the tribunal. This article aims to clarify the critical aspects of the cooling-off period, encompassing its definition, its starting and ending points, function, and enforceability.

In order to reflect the divergent perspectives held by arbitral tribunals concerning the consequences of breaching the cooling-off clause, this article examines two typical investor-state disputes, namely *SGS v. Pakistan*[3] and *Murphy International v. Ecuador.*[4] Based on this review, the article endeavors to distill valuable lessons for Vietnam by proposing insights into the drafting and invocation of the cooling-off clause in the context of international investment arbitration.[5] The analysis will also elucidate practical insights for both the host states and the investors in navigating the application of this clause in relevant situations.

1. Definition of the cooling-off period

Cooling-off period exists in the dispute resolution clause of an international investment agreement ("IIA").[6] Despite being commonly referred to as "cooling-off period", the term itself is not explicitly mentioned in the text of any IIA.[7] The term "cooling-off period" is widely used to describe the dispute settlement phase characterized by amicable measures that occur before arbitration. The phase is intended to de-escalate tensions arising from the dispute and return parties to a calmer state. The cooling-off period, stipulated within a clause, is known as the cooling-off clause, or the cooling-off period requirement.

According to Oxford Dictionary, a cooling-off period refers to "a period of time during which two sides that disagree try to reach an agreement before taking further action".[8] The definition emphasizes the actions taken by disputing

2 Article 14 of Costa Rica - the United Arab Emirates BIT (signed on October 03, 2017); Articles 14.23-14.26 of Australia-Indonesia Comprehensive Economic Partnership Agreement (CEPA) (signed on March 4, 2019); Article 7.19 of Indonesia – Korea CEPA (signed on December 18, 2020).

3 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, 8 ICSID Rep. 406 (2005).

4 *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010.

5 For more information about investment arbitration see Turkens U., Nguyen H. T. (2020), 'The free trade agreement and investment dispute settlement between the European Union and Vietnam: A critical assessment', *Vietnamese Journal of Legal Sciences*, Vol. 03, No. 2, pp. 43-83, https://doi.org/10.2478/vjls-2021-0003; Trinh H. Y., NguyenT. H. (2020), 'Procedural transparency in the settlement of treaty-based investment disputes in EVIPA and CPTPP', *Vietnamese Journal of Legal Sciences*, Vol. 01, No. 1, pp. 58-75, https://doi.org/10.2478/vjls-2020-0010.

6 Draetta, Ugo (2004), 'The International Arbitration Clause: Essential and Optional Elements - An Update', *International Business Law Journal*, Vol. 2004, No. 4, p. 578.

7 Kaysin D. V., and Aigul F. U. (2021), 'Cooling-off Period Clauses in Investment Treaties', *International Commercial Arbitration Review,* p. 24.

8 Oxford Advanced Learner's Dictionaries. Retrieved from https://www.oxfordlearnersdictionaries.com/definition/english/cooling-off-period [accessed 13 June 2023].

parties, particularly their joint efforts to negotiate or mediate to seek a solution before resorting to litigation. On the other hand, Black's Law Dictionary defines a cooling-off period as "a period during which no action may be taken by either party",[9] which emphasizes the state of inaction by the parties, particularly their refraining to initiate any arbitration or court proceedings for a designated period.

The cooling-off clause is also part of the multi-tiered dispute resolution (MDR) clause.[10] One can rely on the definition of the MDR clause to deduce the definition of the cooling-off clause. German courts and legal scholars have characterized the nature of MDR clauses as three separate agreements combined into a single clause. These three agreements consist of (i) an agreement to resolve disputes through alternative dispute resolution (ADR) methods such as negotiation, consultation, mediation or conciliation; (ii) an agreement of the waiver to initiate any proceedings against the other party; and (iii) an agreement on dispute resolution, whether it be through court or arbitration.[11] Thus, cooling-off clause relates to the first two agreements, including (i) and (ii). The first two agreements, including (i) and (ii), is binding on disputing parties at the same time. When the dispute occurs, parties shall conduct ADR methods and waiver to initiate any legal proceedings during a cooling-off period. If parties cannot reach any agreement by ADR means during such cooling-off period, parties are allowed to move to the step of the dispute resolution mechanism set out in (iii), seeking the intervention of the court or arbitral tribunal.

In sum, the cooling-off period is a timeframe during which disputing parties hold off on a decision to initiate litigation and instead make attempts to resolve the dispute through ADR methods. The formulation of the cooling-off clause is articulated within the dispute resolution clause of IIAs, typically stating that "if a dispute cannot be settled amicably within a period of […] months from the date […], the dispute shall be submitted to arbitration". The subsequent section delves deeper into elucidating the beginning and end of the cooling-off period.

2. The beginning and the end of the cooling-off period

2.1. The beginning of the cooling-off period

The cooling-off clause, applicable to investor-state dispute, specifies the minimum period and starting point of the cooling-off period, whereas the cooling-off clause for resolving State-State disputes does not often provide a

9 Garner B. A. (2009), *Black's Law Dictionary*, Ninth Edition, p. 384.

10 Vy N. N. T. and An N. T. (2020), 'Hiệu lực thi hành của điều khoản trọng tài đa tầng trong Trọng tài quốc tế và kiến nghị cho Việt Nam' [trans: 'Validity of multi-tiered arbitration clauses in international arbitration and recommendations for Vietnam'], *Vietnamese Journal of Legal Sciences*, Vol. 08, No. 138, pp. 93-95.

11 Dendorfer-Ditges R., and Wilhelm P. (2017), 'Mediation in a Global Village: Legal Complexity of Cross-Border Mediation in Europe', *Yearbook on International Arbitration*, No. 5, p. 237; Westerlund J. (2022), *The enforceability of multitier dispute resolution clauses: A comparative analysis of enforcement in selected jurisdictions*, University of Helsinki, p. 8.

specific timeframe. The duration of the cooling-off period is usually determined by the contracting parties of relevant IIAs. This period ranges from 3 to 18 months,[12] with 6 months being the most common.[13] The 6-month timeframe strikes a balance, allowing parties sufficient time to engage in effective negotiations without causing excessive delays. During the initial 3 months, parties can conduct research, consult experts, and explore options, while the following 3 months can be dedicated to discussion and reaching an agreement. However, some experts argue that the allocated three to 6-month timeframe is relatively short,[14] as states often require a significant amount of time to identify the source of the breach and responsible institutions among various government agencies.[15]

A cooling-off period is essential to "give the Respondent-State an opportunity to remedy a treaty breach and thereby avoid arbitration proceedings under BIT, which would not be possible without knowledge of an allegation of treaty breach".[16] Therefore, Notice of Dispute, also known as Trigger Letter, serves as a crucial tool to initiate this cooling-off period. While there are no strict requirements for the content of Trigger Letter, unless otherwise specified in IIAs, it should at least contain a written allegation stating that a party has violated a treaty obligation. In a case, meeting minutes that provide evidence of such an allegation may suffice.[17] The beginning of the cooling-off period is when the defaulting party receives the Trigger Letter from the aggrieved party. For instance, Article 17.2 of the Japan - Morocco BIT[18] and Article 13 of the Colombia - Singapore BIT[19] stipulate that the cooling-off period begins when a party receives a notification of the dispute from the other party.

It is important to note that the delivery and receipt of the Trigger Letter must occur prior to the filing of a Request for Arbitration, or even before serving a Notice of Intent to submit a claim to arbitration. A pertinent illustration of this principle can be found in *Burlington v. Ecuador,*[20] wherein the Arbitral Tribunal held that the filing of a Request for Arbitration was "too late a time for Claimant to comply with the 6-month waiting period requirement".[21] In the Tribunal's view, the 6-month waiting period requirements of Article VI under the

12 For example: 3 months (United Kingdom Model BIT 2008); 6 months (Canada - Mongolia BIT signed on September 08, 2016); 18 months (Austria - Kuwait BIT signed on November 16, 1996).
13 Ganesh A. (2017), 'Cooling Off Period (Investment Arbitration)', *Max Planck Encyclopaedias of International Law*, p. 2; Pohl J., Mashigo K. and Nohen A. (2012), 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey', *OECD Working Papers on International Investment*, No. 02, p. 17.
14 UNCTAD (2010), 'Investor-State Disputes: Prevention and Alternatives to Arbitration', *UNCTAD Series on International Investment Policies for Development*, pp. xvi, 4.
15 Kessedjian C. et al. (2020), *supra* note 1, p. 7.
16 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, p. 335.
17 *Ibid*., p. 334-335.
18 Japan - Morocco BIT, signed on January 8, 2020.
19 Colombia - Singapore BIT, signed on July 12, 2013.
20 *Burlington Resources Inc. v. Republic of Ecuador*, *supra* note 15.
21 *Ibid*., p. 312.

United States - Ecuador BIT[22] serves the specific purpose of allowing the state a chance to resolve the dispute before the investor decides to submit the dispute to arbitration.[23] The claimant had apprised the respondent of the dispute only by submitting it to arbitration, thereby bypassing the respondent's opportunity to redress the dispute before it was escalated to arbitration.[24] Consequently, the claimant failed to adhere to the cooling-off clause, as it should have raised the issue of the treaty breach before filing the Request for Arbitration.[25]

Certain IIAs state that, the cooling-off period commences from the date on which the dispute arises. Upon tribunal interpretation, it does not differ from the date on which the defaulting party receives a Trigger Letter from the aggrieved party. In *Lauder v. Czech Republic* case, given that the Czech Republic - United States of America BIT[26] calculates the 6-month cooling-off period "from the date on which the dispute arose", the Arbitral Tribunal concluded that this period begins from the date on which the Czech Republic was informed of its breach.[27] It is not triggered from the date on which Czech Republic caused such breach against the investor. Siding with the *Lauder* Tribunal, the Tribunal in *Burlington v. Ecuador* stated that a dispute arises when a relevant breach is claimed.[28]

When determining the beginning of a cooling-off period, in the case of a long-lasting dispute, several tribunals consider it to commence from the date the Claimant first informs Respondent that Respondent has breached a treaty obligation. This point is exemplified in *Occidental v. Republic of Ecuador (II)*. On 15 May 2006, Ecuador (Respondent) issued Caducidad Decree, which terminated the Participation Contract between OEPC (one of Claimants) and the Ecuador-owned company PetroEcuador, adversely affecting the business opportunities of claimants. Respondent argued that Claimants did not comply with the cooling-off clause, since they filed a Request of Arbitration only two days after the issuance of the Decree without negotiations. However, the Tribunal finally found in favor of the Claimants, noting that for about 18 months before the Decree was issued, OEPC tried several times to challenge the accusations that trigger the Caducidad procedure, but their efforts were not successful.[29] The cooling-off period expired, as it started running in 2004 when respondent instructed PetroEcuador to terminate the Participation Contract,

22 Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investments, siged on 11 May 1997.
23 *Burlington Resources Inc. v. Republic of Ecuador, supra* note 15, p. 312.
24 *Ibid*.
25 *Ibid*., p. 336.
26 Czech Republic - United States of America BIT, signed on October 22, 1991.
27 *Ronald S. Lauder v. The Czech Republic,* Ad-hoc Arbitration (UNCITRAL), Final Award, 3 September 2001, p. 185.
28 *Burlington Resources Inc. v. Republic of Ecuador, supra* note 15, p. 335.
29 *Occidental Petroleum Corp. & Occidental Exploration and Production Co. v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, p. 121.

leading to multiple negotiations with Claimants regarding the Respondent's treaty breach. The contractual termination on 15 May 2006 represents the culmination, rather than the inception of the dispute. Another Tribunal, in *Link-Trading* case, aligned with the *Occidental* Tribunal in determining the starting point of the cooling-off period as the date when the claimant first notified the respondent of the breach.[30] In addition to the date of notification of the treaty breach, some IIAs mark the beginning of the cooling-off period as the date on which a party requests the other party to engage in negotiations (e.g. Article 8 of Russia - Cambodia BIT).[31] However, it is not too different since the request for negotiations encompasses the claim of treaty breach.

In summary, international investment law and investment arbitration practice elucidate that the cooling-off period customarily commences from the date when one party initially apprises the other party of a treaty breach, typically accomplished through the delivery and receipt of a Trigger Letter. It is of paramount importance to underscore that this Trigger Letter must be dispatched prior to the filing of a Request for Arbitration.

2.2. The end of the cooling-off period

Given the set timeframe and starting point of the cooling-off period, the ending point of the period is normally the date on which the timeframe has elapsed. Disputing parties can mutually agree to extend this period if they remain committed to ADR methods and have been unable to resolve their dispute within the initially established timeframe (e.g. Article 13 of the Colombia - Singapore BIT[32] allows for an extension of at least 6 months). Upon the expiration of the cooling-off period, a party intending to initiate arbitration could proceed with filing a case against the other party.

In international investment law, the cooling-off period has an alternative name which is "waiting period".[33] Disputing parties shall wait for a specific period before proceeding to arbitration. However, the cooling-off period should not be misconstrued as a passive waiting period until the prescribed timeframe elapses, solely triggering the right to initiate arbitration. The cooling-off clauses explicitly mandate that "parties shall settle the dispute amicably" and reference the utilization of ADR methods. Parties are expected to actively engage in essential discussions aimed at seeking a resolution to the dispute. Tribunals would review evidence of parties' attempts at seeking an amicable resolution throughout a stipulated time to assess compliance with cooling-off clauses. Therefore, if a party solely waits until the period's end to initiate arbitration proceedings, it would not meet the cooling-off period requirement.

30 *Link-Trading Joint Stock Company v. Department for Customs Control of Republic of Moldova,* UNCITRAL Arbitration, Decision on Jurisdiction, 16 February 2001, p. 86.

31 Russia - Cambodia BIT, signed on March 03, 2015.

32 Colombia - Singapore BIT, signed on July 12, 2013.

33 Voitovich S. A. (2012), 'Agreed Settlement v. Unfavourable Award in Investment Arbitration', *Journal of World Investment & Trade,* Vol. 13, No. 5, p. 719.

Concerning the temporal aspect, the cooling-off period would be prematurely concluded if ongoing negotiation attempts prove to be unproductive. This rule serves to prevent the cooling-off period from evolving into an unnecessary delay in the dispute resolution process. In the case of *Ethyl v. Canada*,[34] the Arbitral Tribunal determined that any further suspension of the claimant-investor's right to proceed by continuing the cooling-off period, would serve no purpose if negotiations or consultations were unlikely to yield a settlement. The Tribunal cited the analogous requirement of local remedy exhaustion in international law, emphasizing that such requirement can be waived if it is demonstrated that no remedies were genuinely available, and any attempt at exhaustion would have been pointless.[35]

Despite its simplicity, the cooling-off period remains a mechanism that necessitates the parties to adhere to specific steps initiated by the delivery and receipt of a Trigger Letter. The conclusion of the cooling-off period is contingent upon the time stipulated in the IIAs, or the end of the extended period. However, in instances where negotiations between the parties prove ineffective, tribunals may acknowledge the potential for the cooling-off period to conclude earlier than the duration specified in the abovementioned situations. A crucial aspect to note during the cooling-off phase is the requirement for both parties to demonstrate genuine efforts and goodwill in conducting ADR means, aiming to find a mutually agreeable solution to the conflict. This factor contributes to the foundation upon which the tribunal assess the implementation of the cooling-off clause, thereby exercising its authority to hear the case at hand.

3. Function of the cooling-off period

In the context of IIAs, the function of the cooling-off period is to give room for disputing parties to hold meetings in search of a feasible solution.[36] This period promotes amicable settlement and reduces the need for resorting to arbitration. ADR methods offer significant advantages when compared to arbitration, as they facilitate conflict resolution without resorting to confrontation and help preserve the working relationship between the parties. Investor-state disputes often encompass long-term commitments, and they may entail a complex interdependence between the parties.[37] A country's population may depend on a private foreign investor for developing public services, while the investor has made substantial capital investments in the host state, with a return achievable only after several years. The undesirable experience of investment arbitration can have a severe impact on the relationship between the investor and the host state. It contradicts the host state's objective of attracting foreign investments

34 *Ethyl Corp. v. Canada,* UNCITRAL, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708 (1999), p. 84.
35 *Ibid*.
36 Kessedjian C. et al., *supra* note 1, p. 3.
37 UNCTAD (2010), *supra* note 13, p. 12.

that make contributions to the national economic growth. A deterioration in this relationship poses a risk to the investor's ability to achieve a profitable long-term investment in the host state. Consequently, both the investor and the host state may be compelled to maintain a working relationship despite the existence of a dispute. This underscores the importance of ADR methods in fostering cooperation and resolving disputes in a manner that is conducive to the long-term interests of parties.[38]

The establishment of the cooling-off period is designed to benefit both disputing parties, rather than unduly favoring one party over the other. It thus reflects a balanced approach to dispute resolution that encourages ADR means before resorting to arbitration procedures. However, the utilization of this clause varies based on the perspectives, objectives, and specific tactics pursued by the parties involved when a dispute arises. In practice, the cooling-off clause is frequently invoked by the host states when disputes with foreign investors arise, primarily to contest the jurisdiction of the arbitral tribunals. The cooling-off period provides the states with the necessary time to understand ongoing issues, formulate their responses and prevent frivolous claims from investors that could impose financial burdens on the states. Host states employ the cooling-off clause as a strategic tool to dissuade investors from immediately resorting to investment arbitration. From the investors' perspective, there is a keen awareness of the time constraints involved in reaching an amicable settlement, aiming to avoid prolonged and fruitless negotiations with the host state. Interestingly, investors would not view the cooling-off period as a delay tactic, as they retain the option to bypass it by demonstrating that negotiations were either impossible or futile. This approach serves to alleviate concerns about unnecessary delays.

4. Approaches in interpreting the enforceability of the cooling-off clause

The determination of the mandatory nature of the cooling-off clause and the consequences of non-compliance hinges upon the intentions of the parties within the IIA, as expressed through the language of the clause.[39] In certain instances, the clause expressly mandates parties to experience the cooling-off period before resorting to arbitration; while in other cases, it affords parties the choice of whether to undergo such a period. In the absence of a mutual agreement by the parties on this matter, the interpretation of the enforceability of the clause falls upon the arbitral tribunal, leading to conflicting views. Each approach to the cooling-off clause, whether non-mandatory or mandatory, yields distinct consequences for the tribunal's jurisdiction. If the tribunal regards the period as procedural and non-mandatory, it maintains jurisdiction over the dispute although the claimant does not comply with the cooling-off clause.

38 *Ibid*, p. 5.

39 Quaide D. M. (2021), *The Dark Side of the Swiss Approach to the Enforcement of Multi-Tiered Clauses: A study on the nature of multi-tiered clauses,* Master Thesis at Faculty of Law - Stockholm University, p. 22.

Conversely, if the tribunal deems the period as mandatory, it refuses jurisdiction over the dispute and requests the claimant to negotiate with the respondent before resubmitting a claim. These conflicting approaches by the tribunals will be illustrated through two practical cases that have garnered significant attention and are debated among scholars and experts in the field.

4.1. Tribunal retains jurisdiction over the case

The first approach delineates cooling-off period requirements as advisory and non-mandatory for disputing parties. Non-compliance with these clauses does not entail adverse consequences for the claimant's submission, or the tribunal's jurisdiction. Tribunals adopting this approach typically assert their competence to address the substantive aspects of the case, even in the event of a breach of the cooling-off clause. Illustrating this lenient stance in arbitration practice, the case of *SGS v. Pakistan* serves as a fitting example.

In *SGS v. Pakistan* case, the claimant-investor initiated an arbitration before the International Centre for Settlement of Investment Disputes ("ICSID") on 12 October 2001, alleging that the Respondent-state wrongfully repudiated or unlawfully terminated the contract. Respondent underlined the fact that the claimant filed its Request for Arbitration only two days after filing its consent to the ICSID arbitration under the BIT. Respondent submitted that, the claimant had not engaged in any prior negotiations regarding the dispute, contrary to Article 9 of Switzerland - Pakistan BIT.[40] According to Article 9, "if these consultations do not result in a solution within twelve months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration". The *SGS* Tribunal finally did not reject the claimant's act to skip the negotiation phase, but retained its jurisdiction to consider the dispute on the following grounds:

Firstly, the Tribunal cited and agreed with the general trend in tribunal community that cooling-off period (also referred to as "consultation period") is treated as "directory and procedural rather than as mandatory and jurisdictional in nature", and compliance with such a requirement is "not seen as amounting to a condition precedent for the vesting of jurisdiction."[41] Consequently, the claimant shall not strictly comply with the cooling-off period requirement. At the outset, the claimant has the discretion to decide whether to initiate pre-arbitral negotiations with respondent. Even if the claimant proceeds with arbitration without prior negotiations, it does not hinder the Tribunal's competence to hear the case.[42]

Secondly, the Tribunal indicated a fact that the respondent expressed no inclination to conduct negotiations with the claimant to resolve the dispute, even in the prolonged period from the contract termination to the submission

40 Switzerland - Pakistan BIT, signed on July 11, 1995.
41 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, supra* note 3, p. 184.
42 *Ibid*.

of the claimant's written consent to arbitration. Therefore, the Tribunal opined that, it is not in line with the "orderly and cost-effective" requirement to stop this arbitration at this juncture, demanding that the claimant first consult with respondent before resubmitting its claims to the Tribunal.[43] For avoidance of doubts, such significant fact is merely an add-on, the unavailability of which does not affect the Tribunal's view about the non-mandatory cooling-off clause as stated firstly. According to international investment arbitration rules (i.e. Article 3 ICSID Arbitration Rules), the Tribunal has the power to decide and manage the hearing in the cost-effective manner. If respondent shows no willingness to negotiate, the insistence on getting backward to the cooling-off period and suspending the case gives no meaning but wasting time and costs on the claimant. Consequently, the lack of the respondent's genuine attempts to negotiate justified the Tribunal's decision not to suspend the dispute.

Disputing parties in the *SGS* case successfully reached a settlement before the Tribunal rendered a decision on liability. Within the framework of investment arbitration procedures, disputing parties retain the flexibility to conduct discussions at any stage, including during the arbitration process itself. This case challenges the necessity to revert parties to their pre-arbitration positions for negotiations, considering that they possess the liberty to engage in dialogue at any point throughout the arbitration proceedings. The Tribunals in some other cases affirms that the non-compliance by claimant with the cooling-off clause does not have any adverse effects on their jurisdiction over the dispute. In the *Sedelmayer v. Russia* case, the Tribunal stated that the consequences of failure to abide by the cooling-off clause would be too far-reaching if, solely on this ground, the Tribunal would be prevented from examining the case.[44] Similarly, in *Wena Hotels v. Egypt*, the Tribunal expressed satisfaction with the fact that the respondent had withdrawn its jurisdictional objection regarding jurisdiction by invoking the cooling-off clause.[45] In conclusion, the *SGS* case and several similar cases reflect the approach where the Tribunal regards the cooling-off period as non-mandatory and maintains jurisdiction to hear the case in the face of claimant's breach of the cooling-off clause. In these cases, the Tribunals also consider the secondary factor, which is the level of respondent's cooperation in negotiation.

4.2. Tribunal refuses jurisdiction over the case

In contrast to the perspective that views the cooling-off clause as advisory or non-mandatory, certain tribunals classify the cooling-off period as obligatory. If claimant initiates arbitration without prior negotiations, its claim is rendered

43 *Ibid*.

44 *Franz J. Sedelmayer v. The Russian Federation, SCC* (Stockholm Chamber of Commerce), Award, 7 July 1998, p. 322.

45 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 29 June 1999, 6 ICSID Rep. 74 (2004), 41 ILM 881 (2002), p. 891.

inadmissible. In these instances, the Tribunal would reject its jurisdiction to adjudicate the case, directing the parties to engage in a series of meetings, thereby reinstating the parties' right to negotiate a settlement. This remedy aims to eliminate the effects of the procedural breach and restore the wronged party to the position it would have occupied had the wrongful conduct not occurred. To illustrate this conductive approach in arbitration practice, the case of *Murphy International v. Ecuador*[46] is worth mentioning in this article.

In *Murphy International v. Republic of Ecuador,* Respondent-State raised a jurisdictional objection before the Arbitral Tribunal, contending that the claimant had not engaged in negotiations with Respondent before initiating arbitration, a deviation from the cooling-off clause outlined in Article VI of Ecuador - United States of America BIT.[47] In response to the respondent's challenge, claimant submitted that non-compliance with a waiting period is not a bar to jurisdiction because it is viewed as a procedural rather than jurisdictional requirement. The claimant asserted that procedural requirements can be breached without consequences, whereas non-compliance with jurisdictional requirements deprives the Tribunal of its competence to hear the dispute. In contrast, the Tribunal dismissed the claimant's position, explaining that non-compliance with purely procedural requirements, such as the time limit to appeal a judgment, can have severe consequences for the party in breach.[48]

In the Tribunal's view, the cooling-off period is not a procedural or directory rule that is non-binding, as the claimant and some tribunals have argued.[49] The cooling-off period "constitutes a fundamental requirement that Claimant must abide by, compulsorily, before submitting a request for arbitration".[50] The Tribunal explained that non-compliance with the cooling-off clause "amounts to something more serious, particularly an essential mechanism enshrined in many BITs which compels parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration".[51] Accordingly, the claimant shall not submit a Request for Arbitration while disregarding the six-month cooling-off requirement.

In another similar case, particularly in *Burlington v. Republic of Ecuador*, where the dispute arose under the same Ecuador - United States of America BIT, the Tribunal also agrees on the mandatory nature of the cooling-off period. In its view, "the 6-month waiting period requirement of Article VI is designed to provide the state with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration".[52] In this regard, Burlington's

46 *Murphy International v. Republic of Ecuador*, *supra* note 4.
47 Ecuador - United States of America BIT signed on August 27, 1993.
48 *Murphy International v. Republic of Ecuador, supra* note 4, p. 142.
49 *Ibid.,* p. 148.
50 *Ibid.,* p. 149.
51 *Ibid.,* p. 154.
52 *Burlington Resources Inc. v. Republic of Ecuador*, *supra* note 15, p. 315.

failure to comply with the cooling-off period has deprived Ecuador of that opportunity, which suffices to defeat jurisdiction.[53]

However, the breach of a cooling-off period requirement does not imply that an arbitral tribunal lacks the power to hear a dispute. Instead, it signifies that the tribunal, possessing such power, deems it inappropriate to exercise it in hearing the case at the time of consideration. The first is a matter of jurisdiction; while the latter, within which the cooling-off clause fall, is a matter of admissibility. The distinction between jurisdiction and admissibility is crucial in this regard. Jurisdiction focuses on whether the tribunal has the power or competence to adjudicate a dispute. To establish jurisdiction of an investment tribunal (in case of ICSID Arbitration), the following main conditions must typically be met:[54]

i. The dispute must be between a Contracting State and a national of another Contracting State;

ii. The dispute must be a legal dispute arising directly out of an investment;

iii. The parties must have expressed their consent to ICSID arbitration in writing; and

iv. The dispute must meet the temporal requirements stipulated in IIAs and the date of the breach occurrence.

Given that the claims fail to satisfy any of these conditions, the tribunal lacks the jurisdiction to adjudicate the case and is mandated to promptly halt any ongoing proceedings. These consequences cannot be remedied. Should the tribunal choose to proceed in defiance of this jurisdictional limitation, the final award would be rendered null and void. This determination concerning the tribunal's jurisdiction primarily serves the dual purpose of showing deference to other competent panels and eradicating the potential for parties to manipulate forum selection for strategic advantages.

In contrast, regarding the matter of admissibility, the tribunal questions whether it "should" hear the case at the time of consideration. A claim is considered inadmissible for arbitration if it is deemed premature and should have first been settled within the pre-arbitral stage (e.g. cooling-off period) agreed upon by the parties.[55] The inadmissibility of claims yields the same consequence as the failure to meet jurisdictional requirements, namely, the tribunal is prevented from hearing the case. However, the inadmissibility of a claim is provisional, as it can be remedied through subsequent compliance

53 *Ibid*.

54 ICSID Arbitration Rules (2006), Article 25; Huong N. T. L. et al. (2022), *Xác định thẩm quyền của trọng tài đầu tư quốc tế qua một số tranh chấp tiêu biểu* [trans: *Determining jurisdiction of arbitral tribunals through some typical international investment disputes*], Summary Report of the School - Level Scientific Research and Technology Project, Ho Chi Minh City University of Law, pp. 15-16.

55 Heiskanen V., 'Admissibility in International Arbitration', in Cottier T., Schefer K. N. et al. (eds.) (2017), *Elgar Encyclopedia of International Economic Law*, Edward Elgar Publishing, p. 320

with the pre-arbitral procedures.[56] In general, the rule of admissibility is necessary to discourage hasty resort to international investment arbitration and create opportunities for parties to resolve disputes through ADR methods, or the domestic system of the state involved. According to the second approach, the cooling-off period is considered a requirement for an admissible claim, and its non-compliance leads to the temporary refusal of jurisdiction by the tribunal.

In *Murphy International v. Ecuador*, the Tribunal declined its jurisdiction over the dispute because the claimant breached cooling-off clause. Under the Tribunal's view, the claimant did not conduct any negotiations with the Respondent from the onset or failed to prove the futility of those negotiations. The Tribunal arrived at this conclusion in response to the Respondent's jurisdictional challenge, as mentioned below:

Firstly, the Tribunal supposed that the claimant could not rely on the negotiations held earlier on 12 November 2007 between Repsol Company and Ecuador to assert that it had negotiated with Ecuador before arbitration. In specific, the Tribunal held that negotiations entered by Repsol Company with Ecuador are not the negotiations required for the present dispute under the cooling-off clause.[57] The negotiations involving Repsol Company occurred before the dispute between Murphy International and Ecuador.[58] The claims of the two disputes also differ in terms of parties and governing laws. Consequently, Repsol Company's earlier attempts to negotiate did not make Murphy International fulfil its obligation to negotiate with Ecuador under the cooling-off clause.

Secondly, the claimant could not rely on the futile negotiations between Burlington (another foreign oil company like Murphy International) and Republic of Ecuador to excuse its failure to hold pre-arbitral negotiations with the respondent. In the Tribunal's thinking, Burlington's failure to reach an agreement with Ecuador did not not necessarily indicate a poor possibility of settlement negotiation between Murphy International and Ecuador, or did it allow Murphy International to ignore negotiation attempts during the 6-month cooling-off period.[59] The Tribunal presented instances where numerous other foreign oil investors within Ecuador' territory settled their cases amicably with the host state.[60] Therefore, the claimant's subjective consideration did not release the claimant from the obligation to enter into negotiations and follow cooling-off clause before pursuing arbitration.

Thirdly, in the Tribunal's opinion, disputing parties are not put under pressure to succeed in negotiations during the cooling-off period, as "there is

56 Quaide D. M. (2021), *supra* note 38, p. 26.
57 *Murphy International v. Republic of Ecuador, supra* note 4, p. 116.
58 *Ibid*.
59 *Ibid*, p. 137.
60 *Ibid,* p. 136.

no obligation to reach, but rather to try to reach, an agreement".[61] Parties shall first carry on negotiations to know whether negotiations would succeed or not. However, it is evident that no discussions took place between the Claimant and the Respondent in the case. On 29 February 2008, Murphy International sent a letter to Ecuador stating its BIT claim against this State, and on 3 March 2008, it submitted the Request for Arbitration to ICSID. There was no opportunity for the Respondent to explore the possibility of amicably resolving their disputes within a cooling-off period. According to the Tribunal, the claimant's conduct to decide, "a priori and unilaterally", that it would not even try to resolve its dispute with Ecuador through negotiations, constitutes "a grave breach of the cooling-off period requirement" under Article VI of the BIT.[62]

Derived from the *Murphy International* case, the cooling-off period is designated as mandatory due to its role in fostering amicable dispute resolution measures. Nevertheless, an exemption or waiver of compliance with the cooling-off clause exists when all endeavours for further negotiations prove futile. The essential threshold for meeting this exemption is that the claimant must have made a sincere attempt to engage in negotiations, at a minimum, once.

Concluding remarks

As discussed above, a consensus regarding the mandatory nature of the cooling-off clause remains elusive among various investment arbitral tribunals. Figuring out the disputing parties' intentions can be challenging, especially when the cooling-off clause is ambiguously drafted. The authority of the tribunals is confined to interpreting the parties' intention as inferred from the treaty language, complemented by the principles articulated in the Vienna Convention on the Law of Treaties.[63] Consequently, tribunals are constrained in their interpretation and cannot stray too far from the treaty language. In practice, when parties fail to specify whether adherence to the cooling-off clause is mandatory, tribunals typically adopts varying approaches, which makes the clause application uncertain. This, on one hand, diminishes the cooling-off clause's significance within the IIAs and, on the other hand, diminishes the predictability of the ISDS system with respect to the interpretation of this clause.

Drawing from the examination of the illustrative cases mentioned earlier, this article identifies two important factors that tribunals commonly consider when deciding whether to strictly enforce compliance with the cooling-off clause.

The first factor for consideration is whether the investor has made sufficient efforts to engage in prior negotiations with the host state. If,

61 *Ibid,* p. 135.
62 *Ibid*.
63 Regarding the influence of the Vienna Convention on the Law of Treaties on international investment law including in the context of investment treaty arbitration, see Shirlow E., and Gore K. N. (2022), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future,* Kluwer Law International.

following the onset of the dispute, the investor has indeed attempted negotiations but failed to reach a mutual settlement with the host state due to unresolved issues, the investor has implemented cooling-off clause and may proceed with arbitration. In such a scenario, it is imperative that the investor, at a minimum, engages in one discussion with the host state concerning potential solutions. The investor cannot claim negotiation failure when it has not entered any prior negotiations with the host state. Furthermore, the investor cannot rely on the existence or outcomes of negotiations involving other parties to anticipate its own case.

The second factor focuses on whether the host state has declined to initiate negotiations. If the host state has not demonstrated any intent or willingness to negotiate with the investor during the cooling-off period, the investor should not be compelled to participate in discussions with the host state before proceeding to arbitration, nor should the investor be held liable for bypassing the cooling-off period.

This article advocates the position that the arbitral tribunal considers the aforementioned factors to assess the viability of negotiations before determining whether to adjudicate the dispute when the claimant bypasses the cooling-off period. This approach is imperative to uphold the application of ADR methods, thereby maintaining the flexible efficacy of the dispute resolution mechanism. Cooling-off clause is, and will likely continue to be, integral components of IIAs and contracts entered between investors and host states. Recognizing substantial advantages such clauses offer, over the years, proposals for reforming the ISDS system from UNCITRAL's Working Group III have been exploring the incorporation of a conciliation mechanism for resolving ISDS disputes with the aim to enhance the prospects of long-term relationships between the parties.[64] From the standpoint of effective dispute management, both parties can proactively address conflicts before they escalate into disputes incurring substantial costs. For the host state, the cooling-off period facilitates the gathering of information, the re-evaluation of measures implemented by the country, and most importantly, the opportunity to negotiate with investors to avert the submission of disputes to arbitration. For investors, achieving an agreement with the host state during this phase is a success, as it establishes a balanced negotiating position and helps fulfil their business goals without resorting to legal action in investment arbitration. An early approach to resolving conflicts between host states and investors significantly reduces costs and time while enhancing overall flexibility for both parties. Cooling-off clauses, therefore, offer crucial advantages in terms of dispute management, particularly in ISDS. The remaining challenge lies in drafting these clauses to

64 UNCITRAL (2021), *Note by the Secretariat, Mediation and other forms of alternative dispute resolution (ADR) - Possible reform of investor-State dispute settlement* (ISDS), ADR initial draft.

maximize their effectiveness and ensuring that tribunals correctly interpret and apply them in accordance with the parties' intention.

In alignment with the objectives outlined above and stemming from the issues highlighted in the practice of ISDS discussed earlier, this article presents specific considerations for drafting cooling-off clauses. A sufficiently detailed cooling-off clause can enhance the applicability of this mechanism as an alternative to arbitration while preventing inconsistent interpretations among tribunals. Therefore, during the drafting phase of cooling-off clauses, it is advisable for the parties to address and clarify the following elements:

(i) Mandatory or discretionary cooling-off period: Determine whether the engagement in ADR methods within a specified timeframe before initiating arbitration is mandatory for the disputing parties or subject to their discretion.

(ii) Legal consequences for breach: Define the legal repercussions arising from violating the mandatory cooling-off clause, especially regarding the admissibility of claims and the jurisdiction of the tribunal over the case.

An exemplary cooling-off clause is found in Article 14 of the Costa Rica - United Arab Emirates BIT.[65] This article clearly delineates the key aspects of the cooling-off period within the investor-state dispute settlement mechanism. To ensure unambiguous compliance with the cooling-off clause, this provision employs precise terminology such as "mandatory" and "a condition precedent to the submission of the dispute to arbitration". These terms underscore that compliance with the cooling-off clause is not optional for the involved parties. Failure to engage in prior negotiations bars the investor from initiating proceedings, and the arbitral tribunal will deny jurisdiction over the case. This binding language serves as both a safeguard and a facilitator of potential amicable settlements.

Of the two elements mentioned above, the second element encompasses the first element since the consequences stemming from breaching a specific provision indicate the mandatory nature of that provision for the parties. Certain IIAs concentrate on clarifying the second aspect. For example, Article 3.35 of the European Union - Vietnam Investment Protection Agreement (IPA)[66] establishes a cooling-off clause stipulating that a claim can only be submitted to the arbitral tribunal if it fulfils the cooling-off period requirements. Similarly, Article 21.2 of the Canada - Mongolia BIT[67] refers to the cooling-off clause as a condition precedent to submitting a claim to arbitration, specifying that an investor may proceed with arbitration only if the cooling-off period requirement has been met. On the other hand, if parties in IIAs intend to render the cooling-off clause non-mandatory, it is essential to clarify these two elements using specific language such as "non-mandatory" or "not a condition precedent to the submission of a

65 Costa Rica - United Arab Emirates BIT, signed on October 03, 2017.

66 European Union - Vietnam Investment Protection Agreement (IPA), signed on June 30, 2019.

67 Canada - Mongolia BIT signed on September 08, 2016.

claim to arbitration". However, as this aricle underscores the significant value of the cooling-off clause in managing investment disputes, this may not be a strategy that host states should pursue, especially in an era when the global investment landscape is characterized by numerous risks and fluctuations like today.

From an international investment law perspective, advocating for the inclusion of cooling-off clauses is important in rebalancing this regime, rather than solely prioritizing investment protection, as was predominantly observed in the initial wave of BITs drafted in the 1950s. A more equitable approach to drafting IIAs is expected given the contemporary landscape of global IIA negotiations.[68] Indeed, concerns at the international level arise regarding investors' obligations toward domestic investment and environmental stewardship. Consequently, the obligation to amicably settle the dispute before resorting to arbitration is more than necessary; it serves as a catalyst for reshaping investors' mindsets and aligning them as collaborative partners with host states, thus fostering a mutually beneficial environment for international investment. ●

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Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

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