



THE URGENCY OF COOLING-OFF PERIOD CLAUSE IN INVESTOR-STATE DISPUTE SETTLEMENT: GOOD FAITH NEGOTIATION

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ABSTRACT

With the development of foreign direct investors, international investment treaties also becoming more popular, causing more cases are occurring from said treaties. To deal with disputes, international investment treaties have dispute settlement mechanisms. Investor-State dispute settlement mechanisms in international investment treaties often include cooling-off clauses. In each case, the arbitral tribunal made different decisions regarding the compliance of this clause, provoking much controversy. Often, the cooling-off period is waived by the claimant since there is no clear motive regarding the urgency. The aim of this article is to determine the urgency of the cooling-off period clauses in bilateral investment treaties as a precondition for arbitration. The method for research used in this study is descriptive analysis. The authors also use primary legal material, such as international arbitration, bilateral investment treaties, and arbitration rules. In addition, the authors use secondary legal sources such as related literature and journals. Based on the findings of this study, the existence of a cooling-off period clause plays a role in enabling parties to discuss their disputes in good faith before submitting them to international arbitration.

Keywords: arbitration; bilateral investment treaties; cooling-off period; investor-state dispute settlement; negotiation.

I. INTRODUCTION

Cooling-off period or waiting period is a clause contained in International Investment Agreements (“**IAs**”). The clause requires investors to abstain, for a specified period, before bringing claims against the host state to international arbitration and should try to settle the dispute amicably first.¹ At least almost 90% of Bilateral Investment Treaties (“**BIT**”) require investors to respect the existence of this clause before bringing disputes to arbitration.² The length of the cooling-off period is based on the agreement of the parties. The existence of a cooling-off period in BITs is to provide the parties with an amicable settlement. This is due to the fact that disputes arising from BIT must be resolved amicably. For example, Article VII of the American-Argentine BIT states that if a dispute occurs, the parties must first resolve the dispute through consultations or peaceful negotiations.³ Amicable settlement can occur prior to the proceeding of arbitration. The reason for amicable settlement is that the relationship between the state and investors will continue after the dispute has been settled.

Not all BITs explicitly state that they must take the path of negotiation or consultation, for example, the Turkey-Qatar 2001 BIT.⁴ In international law, it is also said that when a dispute has

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¹ Cooling-Off Periods, Jus Mundi, 18 January 2023. <https://jusmundi.com/en/document/publication/en-cooling-off-periods>. Accessed on July 12th 2023.

² *Ibid.*

³ Article VII of America-Argentine 1994 BIT

⁴ Article 9(1) of Turkey-Qatar 2001 BIT

occurred, the parties must settle the dispute amicably.⁵ Amicable settlement of disputes is an implementation of a general principle of law, which is, the principle of good faith.⁶ Cooling-off period must be met before arbitration. This clause give the parties the last chance to make up their minds to take the arbitration route. During the cooling-off period, the parties are asked to settle their disputes amicably through negotiations or consultations. Negotiation or consultation during the cooling-off period is a form of good faith on the part of the disputing parties. The cooling-off period is also used as a time when investors notify the host state that a dispute has occurred, thus providing an opportunity for the host state to fix the claims brought by investors.⁷ In several cases, the ICSID Tribunal stated that it was important to comply with the cooling-off period clause because the time off could be used as a respondent expressing consent to arbitration.⁸

Arbitration is not just a place for the parties to settle their disputes. Some steps must be fulfilled by the parties if they want to settle their dispute in arbitration, one of these steps is the cooling-off period. BIT often includes a cooling-off period clause as an effort so that the parties can resolve their disputes amicably without having to resort to arbitration. The language included in the BIT is also often hortatory in nature, thus instructing the parties to resolve their dispute before deciding to arbitrate.⁹

The cooling-off period generally begins with the issuance of a trigger letter by the claimant, the letter indicating that the cooling-off period has started. Not all BITs require the issuance of the trigger letter, however, if the letter has been issued, the contents of the letter must explain the steps to be taken by the claimant for negotiations. This trigger letter is said that an important element for the consent of the host state to carry out arbitration.¹⁰ Another case stated the importance of a trigger letter, where the Arbitral Tribunal stated that the cooling-off period began not at the time of the breach but at the time when the claimant issued a letter of notification of a dispute.¹¹

The problem with the negotiation or consultation requirement in the BIT, it does not explain the form of negotiation or consultation that must be carried out by the parties. In addition, although the IIAs advise the parties to settle their dispute amicably, it does not specify how the negotiation or consultation can be carried out effectively. As a result the parties finally included their respective clauses in the BIT, for example, the Mexico-Singapore BIT. Hence, the existence of a cooling-off period in BIT has become a debate. The first view states that the cooling-off period is only an input to carry out alternative dispute resolution and not an obligation; the second view states that if the parties did not carry out the cooling-off period it will affect the jurisdiction of the tribunals to look at the merits; the third view is, where the cooling-off period is a contractual obligation and will affect jurisdiction.¹²

These views resulted in the vagueness of the urgency and nature of this clause in the BIT. Moreover, case law have different awards for each case, this is because the arbitral tribunal must consider the sentences used in the BIT of the parties and the attitude of the parties when resolving

⁵ Emily Sipiorski, *Good Faith in International Investment Law*, Oxford University Press, 2019, <https://oxia.oup.com/display/10.1093/law/9780198826446.001.0001/law-9780198826446-chapter-1>. Accessed by July 12th 2023.

⁶ *Ibid.*

⁷ UNCTAD, *Dispute Settlement: Investor-State*, UNCTAD Series on Issues in International Investment Agreements, United Nations: New York and Geneva, 2003., p. 57.

⁸ *Enron Corp and Ponderosa Assets v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, p. 88; *Burlington Resources Inc v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/5 Decision on Jurisdiction, 2 June 2010, p. 315; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 21 June 2011, p. 79-94.

⁹ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, p. 143.

¹⁰ Aravind Ganesh, *Cooling-Off Period (Investment Arbitration)*, Oxford University Press, 2017, p. 2.

¹¹ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 2001, p. 185.

¹² Aravind Ganesh, *Cooling-Off Period (Investment Arbitration)*, *Loc. Cit.*, p. 3.

disputes. With the problems that have been described, the author chooses the title “The Urgency of Cooling-off Period Clause in Investor-State Dispute Settlement: Good Faith Negotiation”. To assess the implementation of the cooling-off period clause as a means for negotiation and settling the dispute amicably before carrying out arbitration. It is hoped that this article will help clarify the function and purpose of the existence and application of the cooling-off period clause in the BIT and Investor-State Dispute Settlement (“ISDS”).

II. RESEARCH METHODS

In writing this article, the authors will use a normative juridical method and be analytical descriptive which will then be supported by literature studies and a case approach. The normative juridical approach method is an approach that is carried out by examining library materials (secondary data). The purpose of this study is to review arbitral decisions, bilateral treaties between disputing parties, arbitration procedures used by each international arbitration institution, and literature published by accredited sources. The author will also collect data in the form of a literature study which will be obtained from secondary data in the form of legal theory regarding BIT and from the cases that will be presented. The secondary data comes from books, and scientific works in the form of journals and articles.

III. DISCUSSION AND RESULTS

A. Different Perspectives on the Compliance of the Cooling-Off Period in International Arbitration

The cooling-off period or some say the waiting period, is the period during which the parties attempt to resolve the dispute amicably through pre-arbitration negotiations or consultations within the period agreed in the BIT. In practice, the question arises as to whether compliance with the cooling-off clause affects the jurisdiction of the arbitral tribunal. Some argue that the cooling period in the BIT is a formality and the only purpose is to encourage the parties to negotiate. As a result, there have been different views about compliance with cooling-off periods in investment disputes. Different views such as, the cooling-off period is considered the time when the host state expressed their consent to arbitration, and others have an opinion that the cooling-off period is not mandatory.¹³

More often than not, in answering the debate regarding the compliance of the cooling-off period clause, the arbitral tribunal interprets the BIT of the parties grammatically and also uses the Vienna Convention on the Law of Treaties 1969 (“VCLT 1969”). Grammar interpretation means that the focus of interpretation is on the wishes of the parties.¹⁴ The way the arbitral tribunal uses the grammatical method to interpret the BIT is by interpreting the BIT literally and as it is.¹⁵ The use of interpretation in cases of international arbitration disputes is used contextually, meaning that it is following what is stated in the BIT of the parties and the meaning of the sentence as it is.¹⁶ For example, in *Murphy v. Ecuador*, the ICSID Arbitral Tribunal, in that case, used the VCLT to interpret the BIT of the parties and the ICSID Convention in good faith according to the context and purpose of the BIT.¹⁷

¹³ CIS Arbitration Forum, “Cooling off Period”, *International Commercial Arbitration Review*, Vol. 1 No. 2, 2021, p. 33

¹⁴ Mark. E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers: Leiden, 2009, p. 422.

¹⁵ Maarten Bos, Theory and Practice of Treaty Interpretation, *Netherlands International Law Review*, Vol. 27 Issue 02, 1980, p. 136.

¹⁶ Mark. E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, *Op. Cit.*, p. 423.

¹⁷ *Murphy Exploration and Production Company International v. Republic of Ecuador*, *Op. Cit.*, p. 71.

In the event that the parties do not comply with the agreed time, the cooling-off period is often used as an effective tool to decline the jurisdiction of the arbitral tribunal.¹⁸ Also, if the claimant has not tried to negotiate with the host state and has brought the claim directly to an international arbitration then the host state will use this as an argument to decline the arbitration proceeding.¹⁹ The host state considers the period that has been agreed by the parties implicitly also a period for the host state to express their consent if it is going to take the arbitration route.²⁰ With such arguments, different views arise regarding the compliance of the cooling-off period before bringing a claim to arbitration. The first view emanates from international arbitration cases, for example in of *Enron Corp. v. This Argentine* case stipulates that the cooling-off period clause must be complied with by the claimant, otherwise it will affect the jurisdiction of the arbitral tribunal in carrying out the arbitration. A different view in the case of *SGS v. Pakistan*, the Arbitral Tribunal stated that the cooling-off period would not affect the jurisdiction of the Arbitral Tribunal.²¹

It can be seen that there are different views regarding the fulfillment of the cooling-off period even though these cases were decided by the same arbitral tribunal. When the arbitral tribunal issues a decision on a case originating from the BIT, the arbitral tribunal will examine the BIT and the efforts of the parties when resolving disputes. It has been agreed that the presence of a cooling-off period clause in the BIT has the aim that the parties can resolve disputes amicably, through negotiation and/or prior consultation. It is hoped that the dispute can be resolved without having to go to an international arbitration institution, but if negotiations and/or consultations fail, the parties can settle the dispute with an international arbitration institution. The problem is that sometimes business actors need quick decisions so that their businesses can resume operations, and adhering to the cooling-off period is seen as a waste of time so it is often ignored. This raises debate about the nature of the cooling-off period and the consequences if it is not fulfilled.

B. Classification of the Compliance on the Cooling-Off Period Clause

1. The Cooling-Off Period Does Not Need to Be Fulfilled Due to Futility

Frequently, even though the sentence used in BIT already tends to have a cooling-off period that must be fulfilled, when looking at the facts, it is not essential to carry out. The reason is that if the cooling-off period is met, it is considered that it will only prolong the dispute settlement time because the parties do not have good faith in resolving disputes amicably. Another reason is that investment from foreign investors is already under great threat, thus investors need a quick decision. These things cause the cooling-off period to be ignored. As a result of various kinds of situations that are often encountered, the arbitral tribunal stated that the only basis for ignoring the cooling-off period is futility.²²

Futility is from the International Court of Justice (“**ICJ**”). The ICJ's jurisprudence deals with exceptions to circumstances indicating that efforts made to resolve the dispute will be futile.²³ It Comes from the general principles of international law which are supported by customs, agreements, decisions of negotiations, and consultations as a form of diplomatic

¹⁸ *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 2015, p. 63.

¹⁹ *Murphy Exploration and Production Company International v. Republic of Ecuador*, *Loc. Cit.*

²⁰ *Louis Dreyfus Armateurs SAS v. Republic of India*, *Op. Cit.*

²¹ *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB.01/13, Decision on the Tribunal on Objections to Jurisdiction, 2003, p. 184; *Ronald S. Lauder v. The Czech Republic*, *Op. Cit.*, p. 190.

²² *Louis Dreyfus Armateurs SAS v. Republic of India*, *Op. Cit.*, p. 96.

²³ *Ibid.*

protection.²⁴ Futility also applies to foreign investors who must first exhaust local remedies before bringing a claim to an international arbitration institution.²⁵ This futility is indicated by the possibility that the results are not optimal, or there is no possibility for profitable compensation.²⁶ Futility must be proven by the claimant.

Some examples that can explain the state of futility are when one party does not show a desire to negotiate.²⁷ A futile situation can also occur when the claimant sends the trigger letter, and the respondent immediately denies all the claims brought.²⁸ Another situation is when the cooling-off period is being fulfilled, it will be prejudiced to one of the parties.²⁹

One such example is the observation of the Arbitral Tribunal in *Siemens v. Argentine*, Argentina has never really shown any effort to negotiate while being given a chance by investors. This can be used as evidence that if negotiations are then carried out by investors, the results will be futile.³⁰ Another example is *Kompozit v. Moldova*. In this case, the Arbitral Tribunal stated that due to the attitude of one of the parties who did not want to resolve the dispute amicably, the fulfillment of the cooling-off period and negotiations would be futile. This attitude can be seen when the claimant issued a notification letter that a dispute had occurred, what steps, and how the respondent responded.³¹ This statement is supported in *Occidental v. Ecuador*, where the claimant sent a trigger letter to the respondent but was denied. The claimant's communication was also ignored, so the Arbitration Tribunal stated that the possibility of negotiation was futile.³²

Another example, namely the arbitral tribunal assessing the attitude of the parties, can be seen in the case of *SGS v. Pakistan*. The claimant has filed a claim to be brought to arbitration 2 (two) days after notifying the respondent. In this case, the respondent stated that the Arbitral Tribunal did not have the jurisdiction to render an award because the claimant did not fulfill the cooling-off period. Decision of the case, after reading the defenses of both parties, the Arbitration Tribunal decided that even though the two parties carried out negotiations would be futile, as evidenced by the attitude and treatment of the respondent towards the claimant's investment.³³

Cooling-off period can also be futile if it is considered to disrupt the efficiency and interests of the parties. As an example in *Abaclat v. Argentine*, the Arbitral Tribunal in that case analyzed that the cooling-off period did not have to be fulfilled. It can be proven that if the cooling-off period is fulfilled, it will give excess losses to investors.³⁴ In this case, investors are allowed to directly bring claims to international arbitration considering that compliance with the cooling-off period is no longer essential. Similarly, can be found in the case of *AMT v. Zaire*, in that case, its Arbitral Tribunal ruled that the investor had tried unsuccessfully to negotiate. These reasons and

²⁴ IISD, *Exhaustion of Local Remedies in International Investment Law, the International Institute for Sustainable Development*, 2017, p. 3.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ethyl Corporation v. The Republic of Canada; SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan.*

²⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador.*

²⁹ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5.

³⁰ *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 2004, p. 167.

³¹ *Kompozit LLC v. Republic of Moldova, SSC Arbitration EA 2016/095*, Emergency Award on Interim Measures, 2016, p. 55.

³² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 2008, p. 18.

³³ *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Loc. Cit.*

³⁴ *Abaclat and Others v. Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 2011, p. 587.

the evidence provided by the claimant made the cooling-off period in the BIT the parties considered to have been fulfilled.³⁵

To support the futility concept, the Arbitral Tribunal in the case of *LDA v. India*, concluded that the BIT requires the parties to resolve their dispute amicably only to the extent where it is reasonable.³⁶ The concept of futility can also be seen from the UNCITRAL Tribunal which states that if the parties have agreed in a BIT for negotiation or consultation beforehand, it must be fulfilled before carrying out the arbitration. Such negotiations or consultations can be carried out if the conditions are favorable, are still within reasonable limits, and still respect the rights of the parties.³⁷

2. Cooling-Off Period as a Procedural Requirement Before Arbitration

An arbitration award regarding the type of cooling-off period to be complied with will also likely affect whether compliance with the BIT's obligations regarding the cooling-off period affects jurisdiction. There is a judgment that the cooling-off period must be fulfilled, but failure to do so does not affect the jurisdiction of the arbitral tribunal. An example is the case of *SGS v Pakistan*. In this case, the arbitral tribunal found that reviewing her BITs in Pakistan and Switzerland could lead to the conclusion that the reflection period specified in the BIT is intended only as a procedural requirement.³⁸

Another example is in the case of *Lauder v. Czech*, the investor has sent trigger letter to the host state. The problem is that investors bring their claims to international arbitration before the cooling-off period expires. The Arbitral Tribunal stated that investors did not comply with the cooling-off period clause, yet this did not affect their jurisdiction.³⁹ The Arbitral Tribunal saw this clause as a procedural requirement that must be met by the claimant. Furthermore, in *Biwater Gauff v. Tanzania*, where the ICSID Arbitral Tribunal stated that the cooling-off period in the case was procedural in nature.⁴⁰ Therefore, according to the arbitral tribunal, the existence of this clause in the BIT provides both parties with an opportunity to settle their dispute amicably. In the cases above, the cooling-off period is only an encouragement for the parties to carry out negotiations or consultations before the arbitration.⁴¹ The cooling-off period here is not used as a legal obligation that must be met prior to the arbitration proceeding. The parties are only asked to consider the possibility of dispute settlement other than arbitration. The parties can also waive the cooling-off period.⁴²

3. Cooling-Off Period as Jurisdiction Requirement Before Arbitration

It is also common for the cooling-off period to be deemed as a jurisdictional requirement. If it is not fulfilled, it will affect the jurisdiction of the arbitral tribunal. An example is the award issued in of *Enron v. Argentina*, where the cooling-off period is considered a jurisdictional requirement.⁴³ Likewise, in the case of *Murphy v. Ecuador*. The claimant sent the respondent a notification that a dispute had occurred, but 4 (four) days later the claimant immediately submitted the claims to arbitration. The claimant stated that negotiations would be futile,

³⁵ *American Manufacturing & Trading v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, 1997, p. 5.17-5.23.

³⁶ *Louis Dreyfus Armateurs SAS v. Republic of India*, *Loc. Cit.*

³⁷ *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Award on Jurisdiction, 2001, p. 6.

³⁸ *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, *Op. Cit.*

³⁹ *Ronald S. Lauder v. The Czech Republic*, *Op. Cit.*, p. 190.

⁴⁰ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 2008, p. 343.

⁴¹ Aravind Ganesh, *Cooling-Off Period (Investment Arbitration)*, *Op. Cit.*, p. 3.

⁴² *Ibid.*

⁴³ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, *Op. Cit.*

nevertheless, the Arbitral Tribunal in this case rejected this reason. Due to the reason that the negotiations that have been carried out are between the respondent and the claimant's subsidiary.⁴⁴ the Arbitral Tribunal stated that the investor does not comply with Article 6 of the America-Ecuador BIT.⁴⁵ The Arbitral Tribunal also rejected the claimant's argument that the negotiations would be futile due to the reason the claimant had not carried out the negotiations. The parties must at least try to reach an amicable dispute settlement first, and investors are not allowed to make decisions unilaterally to carry out arbitration. The Arbitral Tribunal deemed that the cooling-off period is an important mechanism and a fundamental one, and forces the parties to carry out negotiations in good faith before pre-arbitration. Whereas, in *Wintershall v. Argentine*. The Arbitral Tribunal stated that not only did the claimant not fulfill the cooling-off period but also did not take exhaust the local remedies route which affected their jurisdiction.⁴⁶

4. Cooling-Off Period and Most Favored Nation Clause

The Most Favored Nation ("MFN") clause is an obligation for the host state to treat an investor from a party to an agreement, or its investment, no less favorably concerning a given subject matter than an investor from any third country, or its investment.⁴⁷ In some cases, MFN clause is used as a solution to avoid the cooling-off period.⁴⁸ Claimants often use the MFN clause to avoid exhaustion of local remedies and cooling-off periods.⁴⁹ As an example in the case of *Maffezini v. Spain* which uses Chile-Spain BIT. The claimant immediately brought the claim to ICSID without trying the exhaustion of local remedies. The reason is due to the presence of an MFN clause in the BIT between Argentina and Spain which allows directly bringing claims to ICSID.⁵⁰ Be that as it may, The ICSID Arbitral allowed investors to bring claims directly to arbitration due to the MFN clause. The reason used by the ICSID Arbitral Tribunal is to protect foreign investors and MFN can be treated for dispute settlement not only substantive matters of investment activities.⁵¹

MFN clause can also be used to shorten the cooling-off period by comparing or using the cooling-off period in different BITs. An example is the case of *Natural Gas v. Argentine*. In this case, the cooling-off period in the parties' BIT is 18 months however, this is considered unequal to other BITs. The result is that investors use the cooling-off period clause contained in the BIT between Spain and Argentina.⁵² Above all, the MFN clause in the BIT must state that it applies to "all matters".⁵³ On the condition that the MFN clause is only stated as valid for investment activities, then in the event of a dispute, investors cannot rely on the MFN clause.

⁴⁴ *Murphy Exploration and Production Company International v. Republic of Ecuador*, *Op. Cit.*, p. 104;131.

⁴⁵ *Ibid.*

⁴⁶ *Wintershall Aktiengesellschaft v. Argentine Republic*, *Op. Cit.*, p. 114-156

⁴⁷ OECD, Most-Favoured-Nation Treatment in International Investment Law, Working Papers on International Investments, 2004, p. 2.

⁴⁸ Cooling-Off Periods, *Jus Mundi*, *Loc. Cit.*

⁴⁹ Mark Mangan and Ananya Mitra, Substantive Protection: MFN, *Global Arbitration Review*, 2022. Substantive Protections: MFN - *Global Arbitration Review*. Accessed on July, 13th 2023.

⁵⁰ OECD, Most-Favoured-Nation Treatment in International Investment Law, *Op. Cit.*, p. 12.

⁵¹ *Ibid.*

⁵² *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Question on Jurisdiction, 2005, p. 31.

⁵³ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/4; *National Grid plc v. The Argentine Republic*, ICSID Case No. ARB/03/10.

C. Cooling-Off Period as A Period for Good Faith Negotiation or Consultation

The cooling-off period clause is considered to provide an opportunity for the parties to settle their disputes without having to resort to arbitration.⁵⁴ Cooling-off period clauses often use hortatory language that encourages the parties to settle their disputes through negotiation or consultation.⁵⁵ It is hoped that if negotiations or consultations are carried out optimally, the parties do not have to pay for arbitration and go through arbitration proceedings. The parties are asked to be active during the cooling-off period to carry out negotiations or consultations for the results to be optimal. The cooling-off period begins when the investor issues a trigger letter to the host state, informing the host state that there has been a breach of the BIT clause along with the claims the investors have brought. The state must be responsive when receiving the trigger letter. The cooling-off period is a clause that must be met by investors as one of the conditions before arbitration, but the host state must also show reciprocity.⁵⁶ The nature of reciprocity from the host state can be in the form of statements or arguments regarding the claims brought, then can immediately declare participation in negotiations or consultations.

From the claimant's point of view, although there are no specific guidelines regarding what kind of trigger letter to give and the claimant has full discretion as to what to write. Many arbitral tribunals ultimately rely on the principles of international law, namely the principle of reasonableness.⁵⁷ The trigger letter that has been written by the claimant must be reasonable so that it can be read easily, containing the claims made, and the purpose and intent of writing the notification. The aim is that after receiving the notification, the parties can settle the dispute in good faith and fully understand the dispute that occurred.

Several BITs formed these days also often include steps to be taken when issuing trigger letters and disputes have occurred. It can be seen from Kyrgyz Republic-India BIT, which states that the trigger letter must at least contain the name and address of the claimant, the article of the BIT that has been breached, and the claims brought.⁵⁸ As well as, the BIT between Japan and Morocco, states that the claimant must provide a notification with a description of the dispute and the actions taken as well as a written request for consultation.⁵⁹

The parties should not appear to be in a hurry in settling their disputes hence that they do not comply with the clauses contained in the BIT, especially the conditions before carrying out arbitration. Arbitration must be carried out with due observance of procedural requirements both before and after an award is issued. Many BITs come with procedural requirements stating that the arbitration must be preceded by negotiations aimed at an amicable settlement of the dispute.⁶⁰ The cooling-off period clause is also included in the BIT so that the good faith element can be fulfilled. An example that can be taken in the case of *Lauder v. Czech*, the Arbitral Tribunal stated that this clause is a pre-arbitration procedure that must be fulfilled by the claimant for negotiation before bringing a claim to arbitration.⁶¹

The existence of a cooling-off period in the BIT is so that the parties can show their good faith in forming a BIT and protect the investment. Not only BIT, but multilateral agreements such as the Energy Charter Treaty also have a cooling-off period clause so that the disputing parties can show good

⁵⁴ Danilo di Bella, *Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection*, *Utrecht Journal of International and European Law*, Vol. 36 Issue 1, 2021, p. 1-10

⁵⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, *Op. Cit.*, p. 345

⁵⁶ *Siemens A.G. v. The Argentine Republic*, *Loc. Cit.*

⁵⁷ Abeer Sharma, *Interpretation of the Cooling-Off Period in the Energy Charter Treaty*, *Chartered Institution of Arbitrators*, Vol. 85 Issue 2, 2019, p. 146.

⁵⁸ Article 15(3) of Republic of India – Kyrgyz Republic 2019 BIT.

⁵⁹ Article 16(3) of Japan-Morocco 2020 BIT.

⁶⁰ M. Sornarajah, *The International Law on Foreign Investment*: Third Edition, Cambridge University Press, 2010, p. 306.

⁶¹ *Ronald S. Lauder v. The Czech Republic*, *Op. Cit.*, p. 190.

faith in settling their disputes. Not only BIT, but multilateral agreements such as the Energy Charter Treaty also have a cooling-off period clause so that the disputing parties can show good faith in settling their disputes.⁶² This good faith can be shown when the trigger has been issued and the cooling-off period has begun.

Good faith must also continue to be shown by the parties even after the arbitral award is issued, the parties must carry out the arbitral award in good faith. Good faith is a real form of the parties appreciating the BIT that has been formed.⁶³ Like in international law, the principle of good faith is also exist in international investment law.⁶⁴ This principle applies to state behavior, relations between countries, and parties who feel that their rights have been violated under international agreements.⁶⁵ Arbitral tribunals often take the view that good faith goes hand in hand with the protection of investments and other activities under international investment agreements.⁶⁶

Apart from applying to the parties, good faith also applies to the arbitral tribunal. When resolving disputes in arbitration, the arbitral tribunal must adjudicate in good faith. This good faith is applied when the arbitral tribunal must use national law, how they must interpret the BIT of the parties, and when issuing an award. If it is determined that there is bad faith on the part of both the parties and the arbitral tribunal, it will have an impact on many things. For instance, awards issued and the allocation of costs.⁶⁷

Bad faith must be proven by the party stating the existence of bad faith. In the application of the cooling-off period, if the claimant stated that the negotiations were futile because the respondent did not show any desire to negotiate, it was considered that the respondent had acted in bad faith. The burden of proof in this matter falls on the claimant. The claimant must prove this concretely before the arbitral tribunal.⁶⁸ For example in *LDA v. India*, here the respondent did not reply to the trigger letter sent by the claimant. As a result, the claimant has succeeded in proving that the respondent had bad faith, therefore the cooling-off period is no longer essential.⁶⁹

Good faith in arbitration also requires the parties who will carry out the arbitration to cooperate in all procedures that will ultimately settle their dispute.⁷⁰ This is due to the fact that, when choosing arbitration, it does not mean that the parties refuse to carry out local remedies or other alternative dispute resolution. When the parties have chosen to take their dispute to arbitration, it means that the parties have agreed to work together to settle their dispute outside the court. The form of cooperation can be proven by the good faith of the parties before, during, and after the arbitration. One of the goals of arbitration is to settle disputes quickly. If the parties carry out the arbitration in good faith, they can avoid actions that will delay the arbitration process.⁷¹

⁶² Article 26 of the Energy Charter Treaty.

⁶³ Simon Weber and Julie Martinez, *Good Faith in International Arbitration: Comparative Approaches in ICC Awards*, *The ICC International Court of Arbitration Bulletin*, Issue. 2, 2020, p. 112.

⁶⁴ The “Bona fide” (Good Faith), *Jus Mundi*, 27 February 2023. <https://jusmundi.com/en/document/publication/en-bona-fide-principle>. Accessed by July 15th 2023.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Louis Dreyfus Armateurs SAS v. Republic of India*, *Op. Cit.*, p. 98-99.

⁷⁰ Simon Weber and Julie Martinez, *Good Faith in International Arbitration: Comparative Approaches in ICC Awards*, *Loc. Cit.*

⁷¹ Peter Muchlinski, Federico Ortino, and Christoph Schreuer, *The Oxford Handbook of International Investment Law*, New York: Oxford University Press, 2008, p. 97.

In international investment law, everything must be carried out in good faith, including instruments related to the formation of investment activities.⁷² The arbitral tribunal is of the view that the fulfillment of good faith includes the fulfillment of the obligations of the parties from the BIT that has been formed.⁷³ This view makes the arbitral tribunal often look at the procedural provisions in the BIT that have been chosen by the parties to settle their disputes.⁷⁴ The aim is for the arbitral tribunal to examine the relationship between investors and the host state more deeply. The BIT that exists between the parties becomes a reference regarding the common interests and cooperation of the parties to their disputes.⁷⁵ Several BITs support the statement that amicable dispute settlement must be carried out in good faith. As an example, the BIT between Pakistan and Turkey stated that, as far as possible, the parties should enter into consultations and negotiations in good faith.⁷⁶ Similar provision can be found in BIT between the Netherlands and Turkey, which states that disputes should, as far as possible, be resolved amicably through consultations and negotiations in good faith.⁷⁷ Negotiation and consultation are procedures before arbitration which have the aim of resolving disputes between the parties based on the agreed BIT.⁷⁸ If the parties have agreed to carry out negotiations or consultations in the BIT, in accordance with Article 25 of the ICSID Convention, one of the parties may not unilaterally withdraw from the negotiations and consultations.

ICJ stated that the principle of good faith is the basic principle governing legal obligations.⁷⁹ The same thing applies to the obligations of the parties arising from the BIT. The clauses contained in the BIT must be carried out by the parties in good faith. This view is supported by Article 26 of the 1969 VCLT concerning *pacta sunt servanda*. Article 26 of the 1969 VCLT states that all agreements must be implemented in good faith. This article also applies to international investment law, international investment activities, and the settlement of disputes arising from international investment agreements.⁸⁰

The cooling-off period stated in the BIT must also be carried out in good faith to maintain the contractual relationship of the parties. The parties include this clause to negotiate or consult in good faith before going to arbitration. This effort is the obligation of the claimant, if they fail, it will then be assessed by the arbitral tribunal that the claimant has good faith to carry out negotiations.⁸¹ Above all, investors are often concerned about impartiality in the courts of the host state. Negotiations or consultations carried out during the cooling-off period can overcome this since it has the aim of settling disputes as best as possible without risk in court and additional costs.⁸²

Before bringing a claim to arbitration, the claimant must at least try to negotiate if there is no response from the respondent then the claimant may bring the claim directly to arbitration.⁸³ The existence of a cooling-off period in the BIT also aims to give the parties time to think about future consequences if they are going to carry out arbitration. For example, in the case of *Lauder v. Czech*. The Arbitral Tribunal in this case stated that the inclusion of a cooling-off period in the BIT was so that

⁷² The “Bona fide” (Good Faith), *Jus Mundi, Loc. Cit.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ A.F.M. Maniruzzaman, *The Concept of Good Faith in International Investment Disputes-The Arbitrators’ Dilemma*, *Amicus Curiae*, Issue 89, 2012, p. 16.

⁷⁶ Article 7 of Pakistan-Turkey 1995 BIT.

⁷⁷ Article 10 of Netherlands-Turkey 1986 BIT.

⁷⁸ Danilo Di Bella, *Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection*, *Loc. Cit.*

⁷⁹ *Ibid.*

⁸⁰ Emily Sipiorski, *Introducing Good Faith in International Investment Law*, *Loc. Cit.*

⁸¹ *Louis Dreyfus Armateurs SAS v. The Republic of India*, *Loc. Cit.*

⁸² Crina Baltag, *Not Hot Enough: Cooling-Off Periods and the Recent Developments Under the Energy Charter Treaty*, *Indian Journal of Arbitration Law*, Vol. 6 Issue. 1, 2017, p. 190

⁸³ *Murphy Exploration and Production Company International v. Republic of Ecuador*, *Loc. Cit.*

the parties could act in good faith and carry out an amicable settlement of disputes through negotiations. Another case that can be seen is *Bayindir v. Pakistan*, where the Arbitral Tribunal in the case stated that an amicable settlement of the dispute must be sought by the parties as a manifestation of good faith.⁸⁴ There is also an Arbitral Tribunal that states that an amicable settlement of the dispute must be carried out in the good faith of the parties to respect the investment in question.⁸⁵

When the cooling-off period is going on, the parties must immediately negotiate or consult and communicate with each other. Both of these are important elements for implementing good faith in dispute settlement. The negotiations that are carried out do not always have to settle all of the claims brought, it can only be part of it.⁸⁶ If the remaining claims cannot be settled, they can be settled in arbitration, and investors are allowed to bring claims to arbitration when the cooling-off period has ended.⁸⁷ During the cooling-off period, the host state can also take appropriate steps to protect investors' investments, in accordance with the claims made.

In practice, investors are dealing with a state. In the event of a dispute has occurred, the state institution that had the authority did not necessarily know that a dispute had occurred. The cooling-off period is here to help with that. At the start of the cooling-off and after the issuance of the trigger letter, it can provide an opportunity for the host state to act by the authorized institution or organ. During the cooling-off period, the host state has the opportunity to gather information and find solutions before negotiations or consultations begin.

The BIT often states that disputes must be resolved in good faith. The presence of a cooling-off period in BIT is a manifestation of this good faith. Negotiation or consultation is used as a dispute settlement form that is a more friendly forum than a formal trial. The parties should always seek negotiation or consultation prior to arbitration. The BIT created has the aim of attracting the attention of foreign investors, and also protecting investment activities in the local country. The presence of a cooling-off period in the BIT can help with this since the state has provided a good place and attitude in the event of a dispute. This good faith will also have an impact on the continuity of investment activities from investors after the dispute is resolved.

Article 31 of the 1969 VCLT often helps the arbitral tribunal in understanding the urgency of having a cooling-off period clause in the BIT. By using the interpretation method, the arbitral tribunal can often have a better understanding of whether the cooling-off period clause must be complied with or not. Examples are as follows:

- a. In *Bayindir v. Pakistan*, the Arbitral Tribunal stated that in the BIT between Pakistan and Turkey the phrase "cannot be settled" was used. The Arbitral Tribunal gave the view that the cooling-off period mechanism provides an opportunity for the parties to resolve disputes amicably before going to arbitration. It should be noted that by using this sentence, BIT does not prohibit investors from directly bringing a claim to arbitration if it fails in an attempt to negotiate or consult.⁸⁸
- b. In *Maffezini v. In Spain*, the Arbitral Tribunal interpreted Article 10(3) of the Argentina-Spain BIT, namely "as far as possible". This sentence gives the view that at the time of the establishment of the BIT, both parties wanted to provide an opportunity to resolve disputes before going to arbitration through a cooling-off period. The Arbitral Tribunal in this case stated that the cooling-off period clause in the BIT did not mean to prohibit investors from bringing claims to arbitration.

⁸⁴ *Murphy Exploration and Production Company International v. Republic of Ecuador, Loc. Cit.*

⁸⁵ *Louis Dreyfus Armateurs SAS v. Republic of India, Op. Cit.*, p. 98.

⁸⁶ Danilo di Bella, *Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection, Loc. Cit.*

⁸⁷ *Ibid.*

⁸⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Op. Cit.*, p. 98

The existence of this clause is because BIT guarantees certain rights of the parties. This clause is for the parties to reconcile before carrying out arbitration and a binding decision is issued.

- a. Article VII of America-Argentine BIT states that if a dispute occurs the parties must immediately settle the dispute through negotiation or consultation first. This led to the Arbitral Tribunal in *Enron v. Argentina* stating that if the cooling-off period was not met it would affect the jurisdiction of the Arbitral Tribunal to adjudicate disputes.⁸⁹

IV. CONCLUSION

In practice, more often than not, the cooling-off period may also be used as a period for negotiation or consultation prior to carrying out an arbitration. The aim of the cooling-off period clause in BIT is for efficiency and to avoid arbitration proceedings altogether. Negotiation or consultation must be carried out in good faith for optimal results. The existence of a cooling-off period in BIT is a form to support the good faith principle. Good faith can be implemented with the parties who settle their disputes through negotiations or consultations during the cooling-off period or at least really try to settle the dispute before opting for arbitration. This is supported by many cases mentioned above, where Arbitral Tribunals stated that the existence of a cooling-off period provides an opportunity for the parties to resolve their dispute through negotiation and consultation.

The existence of a cooling-off period also can help the host state act according to the authorized state agency. The parties involved must be active in negotiations and communication, this is considered as a good strategy. As a result, negotiation or consultation will have a positive outcome and the parties do not have to bring claims to arbitration. Arbitral tribunals also stated that negotiation or consultation is the claimant's obligation. Be that as it may, the respondent must show a willingness to negotiate or settle the dispute amicably. This is considered an important element in reaching an amicable settlement. Such willingness can be shown by the host state opening themselves to negotiation or consultation, host state also can take measures to protect the investor's investment. Furthermore, the host state can also reply to the trigger letter sent by the claimant stating that they are open for any negotiation or consultation.

Good faith amicable dispute settlement is both parties obligation, not only the claimant. The attitude of respondents must state that they are also open to negotiation and consultation so that the results are as desired. This will be the assessment of the Arbitral Tribunal in the future. If it is considered that negotiations or consultations are futile, then the claimant must also provide evidence. Many arbitral tribunal considerations regarding the cooling-off period is because the cooling-off period exists to invite the parties to settle their disputes amicably. Negotiations and consultations that are carried out must be done to one's utmost so that the results are optimal. The cooling-off period must be fulfilled if there is still an opportunity for negotiation but it has not been tried and the investor has brought a claim to arbitration, and it is not essential to fulfill it if the negotiation has been carried out but is not successful or if it is carried out it will harm one of the parties.

Furthermore, arbitral tribunals have various decisions regarding the fulfillment of the cooling-off period. Certainly, case to case basis. As stated above, compliance with the cooling-off period in practice can be made into a (a) procedural requirement: where it will not affect the arbitral tribunal jurisdiction if not being fulfilled and the cooling-off period is only to encourage the party to settle the dispute amicably ;(b) a jurisdictional one: where it will very much affect the arbitral tribunal jurisdiction if it is not being fulfilled then the arbitral tribunal cannot look at the merits that have been brought by the

⁸⁹ *Enron Corporation and Ponderosa Assets, L.P v. The Argentine Republic, Loc. Cit.*

claimant, and © the relation between cooling-off period and MFN clause, with the help of MFN clause, the cooling-off period can be bypassed or shortened. Not to forget to mention, the existence of ICJ Jurisprudence, the concept of futility. The cooling-off period clause can be futile if the trigger letter sent by the claimant is ignored by the respondent, and/or the investor's investment is in danger. Usually, the arbitral tribunal also looks at the host state's demeanor when settling the dispute, if the host state does not show any willingness to settle the dispute amicably then the negotiation that will be carried out is futile. This is due to the fact that each case has different facts, thus the arbitral tribunals need to adjust their award in accordance with the facts at hand.

Additionally, when an arbitral tribunal issues an award, the arbitral tribunal also needs to consider the wording in the party's BIT. The award must be in tune with the BIT object and purpose, whilst honoring the investment. Arbitral tribunals also must try to maintain the investor's rights under international law. An award that has been issued also must be made with good faith and non-biased. In the case where the parties have not made any attempt to negotiate or do a consultation, the arbitral tribunal has the right to decline the claims that were brought by the claimant or give the parties additional time to negotiate. At last, the arbitration can start once the parties have done the negotiation or consultation.

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