



THE EXHAUSTION OF COOLING-OFF PERIOD: A NON-MANDATORY PRE-CONDITION IN INVESTMENT ARBITRATION

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ABSTRACT

Arbitration as an alternative institution to settle commercial disputes has been widely recognized by the business community and state governments. Dispute settlement through arbitration usually derives from the treaty or contract breach which is put under dispute settlement clause. In regard to investor-state dispute settlement, international arbitration plays an important role. However, there are several admissibility requirements that relate to the jurisdiction of the Tribunal, in particular, cooling-off period requirement. This article is placed for the nature and provision of cooling-off period requirement by analyzing several precedent jurisprudences through juridical normative methods. The cooling-off period in Investment Arbitration has been considered as jurisdictional requirement which also integrated with the procedural requirement to submit investment dispute to ISDS arbitration.

Keywords: investor-state dispute settlement; cooling-off period; foreign direct investment; admissibility; international investment treaty.

I. INTRODUCTION

Arbitration derives from Latin language *arbitrare* which means authority to settle disputes in accordance with expediency.¹ Arbitration is an alternative dispute resolution which may be chosen to settle a dispute. Arbitration is currently recognized by business actors and states as one of many ways in settling modern disputes, especially in a commercial related dispute. The fact that arbitration is quite often used by many entities can be seen by the existence of various arbitral institution from the most well-known institution such as UNCITRAL and ICSID until the most private one such as BIAMC and any other arbitral institution in developing countries. However, although arbitration is commonly used to settle these days common disputes, nonetheless arbitration is not a new dispute settlement mechanism as in essence because arbitration has already been recognized since the year of 600-117 before century.² It was a case in regards to controversy between Athens and Megara for the possession of an island called salamis, settled and referred to 5 Spartans judges, well it is clear that we did not call it as arbitration however it implies arbitral practice, the reason is because the disputes was adjudicated by judges came from a third countries and neutrally chosen by the parties, which is how arbitration exactly works nowadays.³

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¹ Suleman Batubara dan Orunton Purba, *Arbitrase Internasional*, Jakarta: Raih Aksa Sukses, 2013, p. 9.

² History of arbitration practices.

³ Anna Joubin-Bret, Barton Legum, "A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules", *ICSID Review - Foreign Investment Law Journal*, Vol. 29, Issue 1, 2014, p. 23.

The terms investing or investment are already familiar to be heard by the society, especially in business activity. In a wider definition, investment also covers direct investment and indirect investment which is also known as *portfolio investment*.⁴ It is not rarely found that the activity of foreign direct investment could cause disputes arising between investors and state through a claim of breach of Bilateral Investment Treaty (“**BIT**”) or Multilateral Investment Treaty (“**MIT**”). The International Investment Treaty precisely regulates the dispute settlement in matters relating to the investor’s investment in the host state territory. Assuming that the disputing parties proceed to submit the dispute to the international investment arbitration, thus there are several procedural issues that the disputing parties must comply with to gain the tribunal’s jurisdiction in settling the dispute. For instance, ICSID uses its establishment and operation as a system for investor-state dispute settlement based on the ICSID Convention.⁵ Indeed, as another litigation institution, investment arbitrations have rules on admissibility. This made that the case itself must fall within the jurisdiction of an arbitral tribunal. There are several requirements based on persuasive precedents which the parties and Tribunals may rely, that is:

1. *Jurisdiction razione materiae*⁶

This requirement is found in the dispute settlement clause of the International Investment Treaty itself. For instance, in UK-Tanzania BIT 1996 the dispute settlement clause under article 8 stipulates that “any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an **investment** of the latter in the territory of the former” it implies the dispute shall be “legal” and directly arise from “investment”. The first requirement in matters of “legal” the parties have to prove that it relates to the scope of a legal right or obligation, *e.g.*, breach of International Investment Treaty. The second requirement, the disputing parties must show that the object of the dispute falls within the scope of “investment”, thus it refers to the interpretation of investment definition under the International Investment Treaty between the disputing parties.

2. *Jurisdiction razione personae*

Disputing parties are required to be a contracting party of the International Investment Treaty that is relevant to the arbitration clause. Also, the disputing parties have consent to the arbitral jurisdiction. The issues of this jurisdiction requirement may cause the lack of standing of an investor and the Tribunal could not settle the dispute as they do not have the jurisdiction.⁷

3. *Jurisdiction razione temporis*

Since the investment protection is based on a treaty, therefore the dispute must be within the period of time that the relevant arbitration clause under the International Investment Treaty entered into force. Therefore, the treaty claim will only exist and fall within the Tribunal’s jurisdiction after the date that the treaty entered into force for the contracting parties.⁸

⁴ Theodosia Yovita, “Arbitrase Sebagai Penyelesaian Sengketa di Bidang Penanaman Modal Asing di Indonesia”, *PERSPEKTIF*, Vol. 6, No.2, 2001, p. 127-128.

⁵ UNCTAD, *Dispute Settlement: Investor-State UNCTAD Series on issues in International investment agreement*, Geneva: United Nations Publication, 2003, p. 44.

⁶ *Loc. Cit.*, p. 50; Yacob Rihwanto, “Bilateral Investment Treaties dan Penyelesaian Arbitrase Internasional (Studi Kasus Pencabutan izin Kuasa Pertambangan Churchill Mining)”, *Lex Renaissance*, Vol. 1, No.1, 2016, p. 120-121.

⁷ *Loc. Cit.*, p. 52; Filippo Fontanelli, “Jurisdiction and Admissibility in investment Arbitration”, *Brill Research Perspectives in International Investment Law and Arbitration*, Vol.1, No. 3-4, 2017, p. 55.

⁸ Filippo Fontanelli, *Loc. Cit.*

However, arbitration is not merely a stage that only involves the parties to settle their dispute with high tension, there are steps that are usually taken by the parties before settling their dispute through arbitration, such steps are within a period of time frame called a cooling-off period, well at least that is how treaty drafters call it in investment treaties, some of other treaties use the term of *grace period* rather than *cooling off period*, but the point is, this period require the parties to pursue any non-harmful means or an amicable settlement before proceed to arbitration, because arbitration is a royal rumble, and the result would be win or lose, which is usually put as a last resort for parties with business interest. Therefore, the first question that might arise to begin this article is, does cooling off period only exist in arbitration? Or in a narrow sense only exist in a commercial or investment related dispute? The answer is no. Grace period or cooling off period exists almost in every treaty or contract that includes dispute resolution clause, for instance in WTO Agreement on the understanding of rules and procedures governing the settlement of disputes, they recognized cooling off period as a period of consultation, states as the disputing parties are required to conduct consultation before they proceed to settle their dispute before the WTO dispute settlement panel, a consultation must be requested by one of the parties, and must be accepted proven by a receipt.⁹ In practice, cooling off period is manifested in various form of amicable settlement, such as conciliation, good office, mediation, re-negotiation and consultation through diplomatic channel, and most of the states strive to settle their dispute at this stage, while hoping proceed to arbitration or international court would not be needed.¹⁰

Nevertheless, there are also states or business entities that reckon cooling off or grace period is wasting their time, as the alternative dispute settlement methods used within the cooling off period are basically negotiation and negotiation may be failed while on the other hand, most of the business entities involved in the dispute need an immediate decision. This brings us into questions, is fulfilling cooling off period really necessary and is it really affecting the dispute settlement proceedings? These questions are answered by many tribunal decisions and still exist as a debate between lawyers and scholars. There are decisions that leaning on the provision written under the treaty, and using grammatical interpretation deeming cooling period as merely a procedural requirement that may be bypassed by the parties, however some of the tribunal decisions such as *Murphy v. Ecuador* stipulates, fulfilling cooling off period is a jurisdictional requirement, and the parties shall not be allowed to proceed to the merits hearing when the cooling off period has not yet been exhausted. This article will spell out the author's point of view in regards to bypassing cooling off period, whether it disarms the tribunal jurisdiction, or actually it may be bypassed as the consultation or negotiation has come into a deadlock. In this article, the authors will elaborate on many arbitral awards and try to pull the red thread to find a conclusion on the characteristic of cooling off period as a preceding condition particularly in investment arbitration practice.

II. RESEARCH METHODS

This article was written and arranged using desktop study research methodology, normative juridical and qualitative approach. Started by raising the issues or phenomenon and collecting the facts that related to the subject of discussion.¹¹ Furthermore, analyze the facts and data by constructing reality and understanding the meaning.¹² Study research methodology was used as the research of the

⁹ Article 4, WTO DSU agreement.

¹⁰ William J. Davey, "The WTO Dispute Settlement System: The First Ten Years", *Journal of International Economic Law*, Volume 8, Issue 1, 2005, p. 32.

¹¹ Zainuddin Ali, 2018, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, p. 24-27.

¹² *Ibid.*

exhaustion of cooling-off period as a non-mandatory pre-condition requirement based on sources, such as; primary law materials which includes basic norm, national law, and international conventions or treaty, and jurisprudence; secondary law materials such as doctrine, books, publication by international organization, and journal articles from imminent researchers.

III. DISCUSSION AND RESULTS

A. Cooling-off Period Requirement

International investment treaties usually regulate a provision of cooling-off period requirement under the dispute settlement clause. The provision usually obliges the disputing parties to initially conduct an amicable settlement to settle the dispute through, for instance, negotiation, mediation, consultation, or diplomatic channel.¹³ The period of time that the disputing parties have as a cooling-off period are varied and it usually multiples of three such as three months, six months, twelve months, and eighteen months. It needs to be remembered that cooling-off period requirement and exhaustion of local remedies are a different requirement, although both provisions also have certain periods of time that need to be exhausted before proceeding to an arbitration institution. However, exhaustion of local remedies is more to be targeted to redress the investor's claim to an administrative and judicial system of the host state before initiating an international arbitration proceeding.¹⁴

Commonly, cooling-off period requirement become a strategic claim to dismiss the tribunal jurisdiction to settle the dispute between investor and state related to investor's investment on the ground that the investor has failed to comply with cooling-off period requirements by proceed to arbitration proceeding while the period of time to settle the dispute through amicable settlement has not yet been exhausted. The host state usually argues that since it is stipulated under the dispute settlement clause in the International Investment Treaty that is related to the dispute, it contains the state's consent which is formed by certain pre-condition requirements that must be fulfilled first before conducting arbitration proceedings.¹⁵ Therefore, it still becomes a discussion, also a debate between lawyer, arbitrator and also legal scholars whether the requirement of cooling-off period is related to the jurisdiction of the Tribunal or it is a procedural requirement which allows the parties to be dispensed by a certain appropriate situation.

Referring to the *Nicaragua* case, the United States argued that Nicaragua had failed to fulfill article 26 paragraph 2 of Treaty of Friendship, Commerce and Navigation between United States and Nicaragua of 1956. The article contains a compromissory clause which obligates the parties to try to settle the dispute through diplomacy before commencing a proceeding in International Court of Justice, unless the parties had agreed to settle through other means of dispute settlement.¹⁶ However, since the United States emphasized that Nicaragua obliged to settle the dispute through negotiation as a prerequisite to bring the dispute before the ICJ. The United States contention is rejected by the ICJ as the treaty does not explicitly state negotiations with another state related to the treaty that have been violated by another State, thus the ICJ had jurisdiction over the claim relating to the Treaty of 1965.

Another precedent jurisprudence from investment arbitration, in case *AMT v. Zaire*¹⁷ The tribunal found that ICSID had its jurisdiction over the claim on the ground that the cooling-off period

¹³ Joachim Phol, "Dispute Settlement Provision in International investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, 2021, p. 17.

¹⁴ Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, Canada: International Institute for Sustainable Development, 2017, p. 2.

¹⁵ ST-AD GmbH v. Republic of Bulgaria, Award on Jurisdiction, PCA Case No.2011-06, 2013, para. 336.

¹⁶ *Nicaragua v. United States of America*, Judgment on Jurisdiction and Admissibility, ICJ Reports 427-429, 1984.

¹⁷ *American Manufacturing & Trading v. Republic of Zaire*, Award, ICSID Case ARB/93/1, 1997, para. 5.17-5.23.

requirement under United States-Zaire BIT the state's consent had been fulfilled the fact that AMT had attempted to negotiate with Republic of Zaire but without any successful outcome from negotiations to settle the dispute. Furthermore, in the case of *Lauder v. Czech*¹⁸ where Mr. Lauder already submitted notice of arbitration only after seventeen days of cooling-off period requirement had elapsed since the day notice of dispute sent to the Czech Republic. The tribunal initially analyzed article 7(3)(a) of BIT between the United States-Czech Republic to find out which time cooling-off period starts whether from the date of alleged breach occurred or when the state was notified of the breach. Tribunal further concluded that the cooling-off period starts from the date where the State was notified of the breach. The fact that Mr. Lauder initiated arbitration proceedings only after 17 days elapsed from the date of notice of dispute was sent, Czech Republic argues that Mr. Lauder had failed to comply with the cooling-off period requirements where six months had not elapsed yet. However, the tribunal concluded that the relevant provisions of cooling-off period does not affect the Tribunal jurisdiction which barred Tribunal authority to adjudicate the merits of dispute, it is only a procedural requirement that must be satisfied by the Claimant. Conversely, the tribunal did not find any evidence that shows the negotiation would led to amicable settlement, thus the tribunal stipulated that it would be overly formalistic if the Tribunal dismissed Mr. Lauder's claim, made him wait until the six months period elapsed then initiating arbitration proceedings.¹⁹

Other Tribunal in case of *SGS v Pakistan*²⁰ had the same vision as the Tribunal in *Lauder v. Czech*. The situation in the case is that SGS already filed a request for arbitration two days after notifying Pakistan of the dispute claim under the BIT. Just as the other host states, Pakistan argues that the dispute has not met the jurisdiction requirement as the Claimant failed to comply with cooling-off period requirement which twelve months need to be elapsed. However, SGS indeed brings several other precedent jurisprudence where the Tribunal conclude that the cooling-off period is only a procedural requirement in nature and not a mandatory prerequisite for Tribunal jurisdiction with an additional argument that the negotiation would not come to any amicable settlement.²¹ Further, the tribunal concluded that cooling-off period provision under relevant Pakistan-Switzerland BIT is purposely to treat amicable settlement as a procedural requirement in nature and there is only a little indication that either party is willing to enter to the amicable settlement process. Therefore the Tribunal concluded connecting with the principle of arbitration which is cost-effective procedure that it would not be consistent with such a system that arbitration held if the Claimant needed to conduct amicable settlement with the Respondent before re-submitting the claim to the Tribunal.²²

In the case of *Phillip Morris v. Uruguay*²³, the Respondent, which is the Republic of Uruguay argue that article 10 of relevant Switzerland-Uruguay BIT to the dispute need to be satisfied by the Claimant as it prerequisites the Tribunal jurisdiction and if the Claimant failed to do so, it barred the Tribunal's jurisdiction over the claim.²⁴ The Respondent further argues that the provision under article 10 contains the term "shall" as far as possible be settled amicably, additionally they bring other jurisprudence such as *Enron v. Argentina* where the Tribunal in that case concluded that cooling-off

¹⁸Ronald S. Lauder v. The Czech Republic, Final Award, UNCITRAL, 2001, para. 187.

¹⁹Ronald S. Lauder v. The Czech Republic, *Op.Cit.*, para. 190; Christoph Schreuer, Travelling the BIT Route: of Waiting Periods, Umbrella Clauses, and Forks in the Road, *Offprint of the Journal of World Investment & Trade*, p. 235.

²⁰Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of The Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/13, 6 August 2003, para. 184.

²¹*Ibid.*, para. 130-131.

²²*Ibid.*, para. 184.

²³Philip Morris Brand SARL, Philip Morris Products S.A and Abal Hermanos S.A v. Oriental Republic of Uruguay, Decision on Jurisdiction, ICSID Case No. ARB/10/7, 2 July 2013.

²⁴*Ibid.*, para. 31.

period requirement as a very much a jurisdictional requirement which a failure to comply will result in the Tribunal being barred to arbitrate the dispute.²⁵ In the Tribunal's explanation to the Uruguay argument, the Tribunal found that the provision under article 10(1) of the relevant Switzerland-Uruguay BIT to the dispute obliges both parties to settle the dispute amicably and notes that both parties had to make efforts to such amicable settlement.²⁶ The Tribunal is convinced that the Claimant has complied with the six-months requirement before the arbitration proceeding is formed, thus the Tribunal has jurisdiction.

In *Biwater v. Tanzania*²⁷ where the Respondent also argued that under article 3 of the BIT that relevant to the case regulates prerequisites condition of contracting party's consent to the ICSID arbitration which is six-months negotiation or cooling-off period. As such, Republic Tanzania contends that Biwater as the Claimant did not comply with the requirement as they already initiated the arbitration institution only after two months and one day after the alleged expropriation.²⁸ The Tribunal decides that the Republic Tanzania's objection in regards of the nature of the six-months period is only as a directory and procedural requirement, it is not construed to impede or obstruct the arbitration proceeding, if such amicable settlement is not possible. The Tribunal also stipulated that the wording structure under article 8(3) of the relevant BIT to the dispute did not form any such requirement that the Republic Tanzania contends. Further, the Tribunal also found that the treaty usually formed a hortatory language that shows obviously the purpose of the cooling-off period requirement only to encourage parties to attempt settling their disputes.²⁹ The tribunal indeed notes that every case had its own different circumstances, however consider that by the time of request for arbitration filed by Biwater, there already a long process negotiation and renegotiation which is not success and it proven by the Republic Tanzania's position through Minister Lowassa's public statement, thus the Tribunal conclude that since the Republic Tanzania actually have had an opportunity to engage in amicable settlement with Biwater before arbitration proceeding formed, however Republic Tanzania had no willingness to engage in such opportunity.³⁰

A unique situation happens in *ST-AD v. Bulgaria*.³¹ Bulgaria argues that the exemption to bypass jurisdiction *ratione voluntatis* which is the state's consent to commence arbitration institution cannot be altered nor removed on the basis of Most-Favored-Nation clause under the BIT. Since the "offer" to commence arbitration under the Most-Favored-Nation clause cannot be construed as an acceptance.³² Bulgaria also bring another precedent jurisprudence such as cases of *Berschader, Telenor Mobile Communication A.S v. Hungary* and *Austrian Airlines*, to support their contention in regards that dispute resolution clause which also regulates cooling-off period provision could not be extended to cover claims for expropriation based on Most-Favored-Nation clause.³³ In the Tribunal decision and analysis, the Tribunal took an example from previous precedent jurisprudence such as awards in *PLama Consortium Limited v. Republic Bulgaria*, and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, where the Tribunal in those cases had jurisdiction to address the merits issues in acknowledgement of the parties' effort.³⁴ Bulgaria's objection in regards of *ratione voluntatis* which

²⁵ *Ibid.*, para. 37.

²⁶ *Ibid.*, para. 94.

²⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ICSID Case No. ARB-05022, 24 July 2008.

²⁸ *Ibid.*, para. 297.

²⁹ *Ibid.*, para. 345.

³⁰ *Ibid.*, para. 347.

³¹ *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, PCA Case No.2011-06, 2013.

³² *Ibid.*, para. 174.

³³ *Ibid.*, para. 177.

³⁴ *Ibid.*, para. 257.

related to the allegation of Respondent only gave its consent to commence arbitration regarding the amount of compensation owed for the property that have been expropriated by Bulgarian court in the Tribunal's view that in order ST-AD could benefit the jurisdictional protection from the Tribunal they must fulfill the prerequisites condition which contains state's consent to such procedure. This consent depends on the provision of dispute settlement under the relevant BIT to the dispute, for instance, it may be in the form of exhaustion of local remedies, waiting periods, allowing certain claims or all claims.³⁵ Conclusively, cooling-off periods contain a condition of state's consent to commence arbitration proceedings which are also related to the issues of admissibility in particular of the Tribunal jurisdiction to further address the merits issues.

The Tribunal's view in case of *ST-Ad v. Bulgaria* also became a consideration of the Tribunal in *LDA v. India* to decide the nature of cooling-off period under article 9 of the relevant BIT to the dispute.³⁶ The Tribunal concludes that the article 9 of the relevant BIT to the dispute indeed jurisdictional as it is formed under the BIT by the Contracting states party, construct their own condition that possess state's consent and it is not Tribunal's power to treat such requirement only as a precatory, directory, or procedural issues, even allowing one of the parties to sidestepped the provision which significant to the Tribunal's jurisdiction.³⁷

In case of *Khan Resources v. Mongolia*³⁸ The Respondent contends that the Tribunal does not have jurisdiction and decline the Claimant's claim on the basis that the Claimant to the relevant dispute has not made any credible attempt to settle the dispute amicably in accordance with the Article 26 of the Energy Charter Treaty which is relevant to the dispute.³⁹ Furthermore, the Respondent argues that the requirement under Article 26 of the Energy Charter Treaty in accordance with other several arbitral tribunals that it is a jurisdictional issue rather than merely procedural requirement which if the parties fail to comply with such requirements resulting in the Tribunal should decline the jurisdiction over the dispute.⁴⁰ The Respondent also submits that the letter which was sent by Claimant to the Prime Minister did not embark on a cooling-off period under article 26 of Energy Charter Treaty.⁴¹ The letter itself only concerns the alleged breach of Mongolian Law instead of the provision under Energy Charter Treaty, the Respondent refers to the case of *Burlington Resource Inc. v. Republic of Ecuador* which the Tribunal in that case stipulated that the start of six-month waiting period only arises once there is an allegation of a treaty breach.⁴² On the contrary, the Claimant contends that they already fulfill the provision under article 26 of Energy Charter Treaty since such provision only provides whether the dispute can or cannot be settled amicably in light of the possibility.⁴³ Furthermore, they contend, relating to the Respondent's submission that the provision under Article 26 of Energy Charter Treaty does not require any formal, written, specific, notice of dispute to the Host State, instead require a good faith "request" for amicable settlement. Referring to the case of *Salini and Limited Company Amt v. Ukraine* the Claimant validates their argument relating to the "request" requirement, that investors only need to make the problems relating to their investment being known to the host state's government and ask them to resolve the

³⁵ *Ibid.*, para. 336.

³⁶ *Louis Dreyfus Armateurs SAS v. The Republic of India*, Decision on Jurisdiction, PCA Case No.2014-26, 2015.

³⁷ *Ibid.*, para. 94.

³⁸ *Khan Resources Inc. Khan Resources B.V. CAUC Holding Company Ltd. v. The Government of Mongolia, MonAtom LVV*, Decision on Jurisdiction, PCA Case No. 2011-09, 25 July 2012; Abeer Sharma, *Interpretation of the Cooling-Off Period in the Energy Charter Treaty*, Chartered Institute of Arbitrators, hlm.143.

³⁹ *Ibid.*, para. 231

⁴⁰ *Ibid.*, para. 233.

⁴¹ *Ibid.*, para. 236.

⁴² *Ibid.*, para. 237.

⁴³ *Ibid.*, para. 238.

dispute.⁴⁴ The Claimant also disproves that the case brought by Respondent may be relevant to be a reference of their argument, since in that case, it was not issued regarding a request for amicable settlement and must contain allegation of treaty breach. According to the Tribunal in *Khan Resources v. Mongolia*, the Claimant has complied with such requirement under Article 26 of Energy Charter Treaty, proven by the Claimant's attempt to reach an amicable settlement with the Respondent through Letter to the Prime Minister which was sent on 15 April 2010.⁴⁵ The Tribunal further concluded that Article 26 under Energy Charter Treaty does not require any formality to be complied with, as such the investor only need to describe the dispute in manner sufficient to the other party and manifest the desire to seek an amicable settlement.⁴⁶

Similar Tribunal's decision in the matter of the nature of cooling-off period requirement happened in *Amto v. Ukraine*⁴⁷ where the Respondent argues that the Claimant has failed to comply with the Article 26 of the Energy Charter Treaty as the Claimant has not requested to conduct amicable settlement. The Respondent further stipulates that the claim letter cannot be regarded as a request to amicable settlement, therefore cooling-off period requirement under Energy Charter Treaty is not triggered.⁴⁸ The Claimant responded that the Respondent should actually be aware of the breach of Energy Charter Treaty from the claim letters that the Claimant's made and cooling-off period is only a matter of admissibility not to the jurisdiction which the Tribunal cannot dismiss a case on the grounds of admissibility.⁴⁹ Furthermore, the Tribunal analyzes that investors must initiate the type of communication that is stipulated under Article 26(2) of the Energy Charter Treaty by informing the state regarding disagreement of the state's conduct towards their investment and request amicable settlement. Similar view also stipulated by the Tribunal in *Generation Ukraine, Inc v. Ukraine* where the obligation to amicable settlement does not impose the investor to plead its legal case multiple times.⁵⁰ Thus, the Tribunal found that the claim letters already fulfill the minimum requirement to notify the Respondent of the existence of the dispute and requesting for amicable settlement, as such Article 26 of Energy Charter Treaty have been fulfilled by the Claimant.⁵¹

Cooling-off period requirements indeed possess the state party's consent to arbitrate. There are several pre-condition that the disputing parties shall fulfill before commencing arbitration proceedings. Certain things that can be acceptable, that is, failure to comply with the cooling-off period may result in the Tribunal declining jurisdiction over the dispute. However, several cases show different circumstances that the Tribunal found it is a circumstance which also fulfills the cooling-off period requirement. To assess it, the Tribunal needs to interpret the requirements under dispute settlement clauses and connect the dots with the facts appearing in each case. Further explanation of the alternative circumstances that may bypass the requirement will be elaborated in the second point of the discussion. For the state, They are should be more aware of the investor's behavior when a dispute arises relating to the investor's investment. Certain notifications towards the state in regards to the dispute may trigger the cooling-off period under the International Investment Treaty, thus the state shall act in good faith in

⁴⁴ *Ibid.*, para. 240.

⁴⁵ *Ibid.*, para. 403.

⁴⁶ *Ibid.*, para. 404.

⁴⁷ *Limited Liability Company AMTO v. Ukraine*, Final Award, Arbitration Institute of the Stockholm Chamber of Commerce Arbitration No. 080/2005, 26 March 2008.

⁴⁸ *Ibid.*, p. 15.

⁴⁹ *Ibid.*

⁵⁰ *Generation Ukraine, Inc v. Ukraine*, Award, ICSID Case No. ARB/00/9, 15 September 2003, para. 14.5.

⁵¹ *Limited Liability Company AMTO v. Ukraine*, *Loc. Cit.*, p. 38.

response towards such a claim by engaging in amicable settlement with the investor to resolve the dispute.

B. The exemption of cooling-off period requirement

Cooling-off period requirements were made under the BIT as the precondition requirement before the disputing parties come to the front of the tribunal to settle the dispute by conducting an amicable settlement.⁵² Amicable settlement through cooling-off period has encouraged the disputing parties to initiate negotiations (one of an amicable settlement methods).⁵³ Normally, the International Investment Agreement has regulated that cooling-off periods were happening in certain periods of time such as 3 months, 6 months, until 12 months.⁵⁴ It is called the 'cooling-off period' as it cools down disputing parties' desirability to commence arbitration proceedings in settling the dispute.

Previously, it has been explained regarding the cooling-off period requirement as a jurisdictional or procedural requirement. Nonetheless, whether it is jurisdictional, procedural or admissibility requirements, in investment arbitration, there always be an exceptional circumstance that prevails to overstep cooling-off period requirements under International Investment Agreement. The tribunal needs to assess carefully whether certain circumstances fulfill the requirement to overstep cooling-off period requirements by considering the interpretation of the cooling-off period requirements under the International Investment Treaty itself.

Mostly or commonly, the International Investment Treaty has included the formal requirements to start the cooling-off period that requires the investor from disputing parties to make a written notification such as notice of dispute which is sent to the Host State.⁵⁵ The purpose of this requirement is to give a proper notice to the host state regarding the dispute claims and relation to the states' consent to the arbitration proceedings, thus the states are able to examine the dispute and figuring out to settle the dispute amicably with the investor through any amicable settlement that provided by the International Investment Treaty.

Overstepping cooling-off period requirements happened in *Bayindir v. Pakistan*⁵⁶ case. Pakistan as the Respondent of this case claimed that bayindir has failed to fulfill the formal requirements under article 7 of Pakistan-Turkey BIT which has prevented bayindir to submit the dispute to the arbitral institution. Article 7 of Pakistan-Turkey BIT further refer to article 10 of the Pakistan-Turkey BIT, which regulates the settlement of disputes between one contracting party and investors of other contracting parties and stipulates that "Disputes between one of the Contracting Parties and investor of the other Contracting Party, in connection with his or her investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. **As far as possible**, the investor and concerned Contracting Party shall endeavor to settle these disputes by **consultations** and **negotiations in good faith**." However, Pakistan had argued in jurisdictional hearing in front of the tribunal that the notice referred by Bayindir is a contractual notice to Engineer, Pakistan argued that this notice cannot be in the same meaning as the notice under the requirement of article 10 of the Pakistan-Turkey BIT.⁵⁷ Nonetheless, Bayindir contends that it has provided 20 pages in a constitutional petition which contain detailed information regarding the dispute between Bayindir and

⁵² Aravind Ganesh, "Cooling-Off Period (Investment Arbitration)", *MPILux Working Paper*, November 2017, para. 1.

⁵³ UNCTAD, 2010, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, New York and Geneva United Nations, p. 25.

⁵⁴ Aravind Ganesh, *Loc. Cit*, para. 2.

⁵⁵ Aravind Ganesh, *Loc. Cit*, para. 4.

⁵⁶ *Bayindir v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/29, 14 November 2005, para. 88.

⁵⁷ *Ibid.*, para. 91.

Pakistan.⁵⁸ In the Tribunal's view, the provision regarding amicable settlement only allows the disputing parties to conduct negotiations which leads to the settlement of the dispute. Furthermore, the Tribunal reckoned that the articles did not use any phrases that prohibit the disputing parties to bypass the cooling-off period requirements as it read as "cannot be settled" instead of "are not settled" within 6 months.⁵⁹ The Tribunal also stipulated that the notice requirement itself does not constitute a jurisdictional requirement.

However, the Tribunal noticed that on 4 April 2002, Bayindir has sent its notice of commencing arbitration to the Government of Pakistan and Pakistan has not made any proposal to engage in amicable settlement with Bayindir ever since the notice was sent. In the Tribunal's view, this is an explicit reference that Pakistan has failed to make an effort to negotiate, as the amicable settlement shall be conducted in good faith by both parties, therefore the tribunal stipulate that if Pakistan had been willing to conduct any amicable settlement with Bayindir, there are so many opportunities for Pakistan to do so during the six months since the notification of 4 April 2002.⁶⁰

The Cooling-off period case in *Bayindir v. Pakistan* has a relation regarding the formal requirement to make a notice of dispute first to the Host States' government to trigger the cooling-off period to start. However, in *Bayindir v. Pakistan*, eventually Bayindir has through a 6 months period waiting to conduct an amicable settlement with Pakistan.

In cases of *LDA v. India*, the Tribunal faces a problem regarding cooling-off periods requirements. The Respondent which is India states that Cooling-off period requirement is a jurisdictional requirement therefore it cannot be bypassed by any chance by the disputing parties unless the parties has agreed to settle the dispute in arbitration without any amicable settlement.⁶¹ However, the Claimant contends that there are no mandatory cooling-off periods requirements since there is an exemption which allows the parties to commence arbitration before cooling-off period ends as long as there is evidence that any attempts to conduct amicable settlement are futile.⁶² Furthermore, the Claimant has repeatedly and sincerely tried to conduct an amicable settlement over many months with the Respondent, but there is no successful outcome from it. The Claimant even sent six letters to the French embassy in october 2013 seeking any possibilities to conduct an amicable settlement with the Respondent.⁶³ India rejects the Claimant's contention on the grounds that investor's anticipation to attempts any amicable settlement with the host state not satisfy the obligation of means in article 9 of the French-India BIT and stipulates that the futility to conduct amicable settlement is inapplicable in present dispute.⁶⁴

The Tribunal in *LDA v. India* further interprets the provision under article 9 of French-India BIT first in accordance with article 31 of VCLT 1969 to figure out the issues regarding cooling-off period. The tribunal found that article 9 does not support the Respondent's contention that the word "shall" in article 9 requires the Claimant a particular qualitative level of effort to negotiate. The Tribunal stipulates that the word "Shall" is used as a passive tense which refers to desired *outcome*. Subsequently, the word "if" between "Shall, *if possible*, be settled amicably between two parties concerned" describing conditional clauses which have an element of uncertainty.⁶⁵

⁵⁸ *Ibid.*, para .92.

⁵⁹ *Ibid.*, para. 98.

⁶⁰ *Ibid.*, para.102.

⁶¹ *Louis Dreyfus Armateurs SAS v. The Republic of India, Op. Cit.*, para. 63.

⁶² *Ibid.*, para. 66.

⁶³ *Ibid.*, para.68.

⁶⁴ *Ibid.*, para.72.

⁶⁵ *Ibid.*, para. 77-78.

The Tribunal concludes that the provision requires the disputing parties to seek amicable settlement **if and to the extent** that the amicable outcome is reasonably possible. The Tribunal also agreed with the Claimant's argument with additional notes that the only basis to bypass the cooling-off period is the doctrine of futility. Doctrine futility derives from the jurisprudence where ICJ has also addressed general exception of circumstances that shows no possibility nor remedy that is available which lead to any attempts would be futile.⁶⁶ However, the doctrine puts a high threshold of proof which puts the burden on the Claimant. Therefore, any unwillingness cannot be presumed by the Claimant and for any investors who proceed immediately to arbitration without any attempts to conduct amicable settlement may get the futility defense rejected by the Tribunal.⁶⁷ Since according to the facts, the Respondent contentions in regards jurisdiction of the tribunal are denied by the Tribunal since the amicable settlement will be futile proven by the unwillingness of the Respondent's behavior in responding to the Claimant's efforts to conduct negotiations with respect to the dispute between LDA and India.

Same as in the case of *Kompozit v. Moldova*, where the tribunal held that the language under the Russia-Moldova BIT regarding dispute settlement clauses which is article 10 includes "*as far as possible*" implies that when the disputing parties are unable to reach amicable settlement, the investor are allowed to commence arbitration proceedings although the cooling-off period has not ends.⁶⁸ Same thing also in case *Khan Resource v. Mongolia*⁶⁹, the Tribunal interprets Article 26(1) of Energy Charter which provides a term be regarded as "*shall, if possible, be settled amicably.*" related to the term further Article 26(2) stipulate that amicable settlement "*within period of three months from the date on which either party to the dispute requested amicable settlement*", one of the parties may submit the dispute to the international arbitration institution as have had been consented under the dispute settlement clause.⁷⁰ Thus, the tribunal conclude that the Claimant already fulfilled the requirement under Article 26 of Energy Charter as the amicable settlement have become impossible to be conducted proven by Government of Mongolia unwillingness to engage in amicable settlement after being requested by the Claimant through the Letter which sent to the Prime Minister.⁷¹

In *Guaracachi v. Bolivia*, the Respondent which is Bolivia claimed that the new claims which were brought by Guaracachi as the Claimant, did not contain in the notice of dispute which are as the requirement under the article 8 of the UK-Bolivia BIT. The Respondent argues that the Claimant has breached article 8 of the BIT and thus the Tribunal does not have jurisdiction to the dispute brought. The tribunal stipulates that the requirement under article 8 of the UK-Bolivia BIT has narrowed the states' consent given by Contracting Parties to international arbitration.⁷² Additionally, in the case of *ST-AD v. Bulgaria*, the tribunal held that in matter of Claimant would benefit the jurisdictional protection granted by the Tribunal, there is a *pre-conditional* requirements namely *ratione voluntatis* which the state has given its consent to commence arbitration proceeding in certain condition and procedure and this kind of consent are expressly either broadly or restrictively with conditions of exhaustion of local remedies or waiting periods, as allowing certain claims or all claims.⁷³

⁶⁶ *Ibid.*, para.96.

⁶⁷ *Ibid.*, para. 98.

⁶⁸ *Kompozit LLC v. Republic of Moldova*, Emergency Award on Interim Measures, SSC Arbitration EA 2016/095, 2016, para. 55.

⁶⁹ *Khan Resources Inc. Khan Resources B.V. CAUC Holding Company Ltd. v. The Government of Mongolia*, *Loc. Cit.*

⁷⁰ *Ibid.*, para. 402.

⁷¹ *Ibid.*, para. 406.

⁷² *Guaracachi America, Inc and Rurelec PLC v. Plurinational State of Bolivia*, Award, PCA Case No.2011-17, 2014, para. 388.

⁷³ *ST-AD GmbH v. Republic of Bulgaria*, *Loc. Cit.*

A different situation happened in the *Murphy v. Ecuador* case. The Claimant which is Murphy Exploration and Production Company International has sent a notice of dispute to the Respondent, Republic of Ecuador, notifying the existence of the dispute and Murphy's claims regarding their investment. However, 4 days later after notifying Ecuador, Murphy immediately commenced an arbitration proceedings.⁷⁴ In this case, the investor actually has a subsidiary which is a member of a consortium that conducts a negotiation with the government of Ecuador, however, the negotiation did not bring any settlement to the dispute. The futility of amicable settlement as an exemption to the cooling-off period requirements is not applicable in this case as the negotiations in the consortium does not fulfill the requirements under article 6 of the United States-Ecuador BIT. Since the consortium itself did not give the proper notice or data to the government of Ecuador regarding the dispute and the negotiations in article 6 of the United States-Ecuador BIT is aimed to be conducted after the proper notice or data of the dispute itself, while the consortium was conducted prior to the notice that sent by the Claimant.⁷⁵ Furthermore, the tribunal held that the Claimant's argument regarding the amicable settlement had been futile cannot be accepted by the Tribunal. The parties must at least try first the amicable settlement which shows a genuine effort to reach amicable settlement, by the investor's unilateral decision to commence arbitration proceedings has waived and breach the provision under article 6 of the United States-Ecuador BIT.⁷⁶

From the explanation of several jurisprudence above, the existence of exemption to bypass cooling-off period requirements need to be assessed on a case-by-case basis. Each case has a different situation, however the thresholds are the same, which is the doctrine of **futility**. The burden of proof of this threshold is put on the Claimant or the investor, they need to show that the host states are unwilling to conduct amicable settlement as they already attempt to reach amicable settlement with the host states.

Another discussion arises which questioning which situation or any conduct that may fulfill the obligation to comply with the cooling-off period requirements. For instance, is the notice of dispute which is required by a certain International Investment Treaty to start the cooling-off period already enough to show that the investors as the one who had claimed a dispute related to their investment are willing to conduct amicable settlement with the Host State? Considering the previous precedent jurisprudence, the Tribunal in *LDA v. India* stipulates that the futility of amicable settlement needs to be proven by concrete and credible evidence that shows there is no possibility for both parties to engage in negotiation and settle the dispute through such means.⁷⁷ It shall not be presumed by one of the parties that the negotiations or other means of amicable settlement would be futile, the parties should not decide that the amicable settlement would be futile only because the parties face significant hurdles. The parties are advised to initiate the negotiation or other means of amicable settlement to legitimately show their good faith to engage in amicable settlement in respect to the relevant investment.

However, as each case will have a different circumstance, one of the disputing parties may show their unwillingness to engage in amicable settlement even before the investor attempted to. Cooling-off period should be underestimated by the disputing parties, since commencing arbitration proceedings is not always be a best choice for both disputing parties if there is a possibility to settle the dispute amicably. Although arbitration may be a method of dispute settlement which is simpler than a normal litigation in a court, amicable settlement still be an appropriate means to settle the dispute. The futility

⁷⁴ Aravind Ganesh, *Loc. Cit.*, para. 13

⁷⁵ Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case no. ARB/08/4, 2010, para. 104 & 131.

⁷⁶ Murphy Exploration and Production Company International v. Republic of Ecuador, *Loc. Cit.*, para. 157.

⁷⁷ Louis Dreyfus Armateurs SAS v. The Republic of India, *Op. Cit.* para. 98.

to do negotiate may not be a weapon for the investor to immediately commence arbitration, thus both disputing parties shall have good faith and effortly seek the possibilities to reach amicable settlement.

Based on the several investment arbitrations which stated above, it shows that the form of 'bad faith' are should be considered case by case by the arbitrator. Nonetheless, contracting party may also form the form of 'bad faith' on the investment agreement itself to give further legal certainty regarding the definition of 'bad faith' in the context of to fulfill the cooling-off period requirement. This may encourage disputing party to follow the cooling-off period requirement to conduct an amicable settlement.

IV. CONCLUSIONS

Various jurisprudence had its own views regarding the nature of cooling-off period requirements under international investment treaties. However, the reason why the cooling-off period as a jurisdictional requirement thus it is mandatory to be complied with the disputing parties is because the condition under dispute settlement clause contains the contracting states party consent that is formed, for instance, initiating amicable settlement for three months. Consider that international investment arbitration has a crucial and significant relationship with the parties' consent to commence arbitration proceedings, thus such conditions need to be assessed carefully by the arbitrator. The Tribunal's interpretations to the cooling-off period requirement play a key role to determine whether in certain circumstances that related to the dispute had already fulfilled the requirements of the disputing parties' consent in commencing arbitration proceedings in the light of cooling-off period requirement.

In investor-state dispute settlement, it is commonly found that the state claims to dismiss the tribunal jurisdiction over the dispute that the investor has failed to comply with the cooling off period requirement. Disputing parties must carefully consider the procedural requirement especially related to the arbitral jurisdiction over the case brought in front of the Tribunal. The exception of the cooling-off period requirement has to be analyzed on a case-by-case basis. Since the cooling-off requirement is related to the state's consent in bringing the dispute to the arbitration institution under the dispute settlement clause. Therefore, it is related to the procedural issues of investment arbitration, in particular, the matter of the Tribunal's jurisdiction over the dispute. Several precedent jurisprudences have different situations facing the claim of a failure to comply with the cooling-off period requirement. Nevertheless, disputing parties precisely have an obligation to effortly seek the possibilities to reach an amicable settlement and not immediately proceed to an arbitration institution. This has become the core point of the cooling-off period requirement.

The article is purposely formed to encourage the parties settling their dispute through amicable settlement. Furthermore, the interpretation of cooling-off period requirement under International Investment Treaty that is related to the dispute shall be considered in regards whether the provision allows the parties to bypass the cooling-off period requirement on the basis of the doctrine of futility. Once the investor submits the cases to an arbitration institution before cooling-off period has not yet been exhausted, the investor has the burden of proof to show that cooling-off period may be bypassed by the investor under certain situations and evidence that fulfill the threshold of futility. Substantively, the **futility** of amicable settlement itself is another condition that fulfills cooling-off period requirements and it is not quite an exemption to such requirement, since the provision under the International Investment Treaty had already regulated such conditions. Firstly, cooling-off period may be fulfilled after the period of time, for instance, three-month to conduct amicable settlement have been elapsed, or secondly cooling-off period may be fulfilled, although the period of time has not been elapsed, if the

amicable settlement itself is not possible to be conducted by the disputing parties based on credible evidence.

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