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"Cooling-off Period" Clauses in Investment Treaties

https://doi.org/10.32875/icar.2021.1–2.24

So-called "cooling-off period" clauses are frequently included in international investment treaties. Being an example of an escalation clause, they are designed to conciliate conflicting parties prior to recourse to international arbitration. The wording of such clauses is not identical and arbitral tribunals interpret them differently.

The authors study the nature of these clauses and the consequences of not-complying with their conditions, including jurisdictional and admissibility objections. Based on various examples, the authors analyze when the "cooling-off period" starts, how the notice of dispute should be drafted and to whom it should be addressed. The article also answers the question of whether a shorter "cooling-off period" can be incorporated into parties' relations from another investment treaty.

The article stresses that although there is a trend favoring the procedural nature of "cooling-off period" clauses, investment arbitration case law on this issue is not uniform. New investment treaties regulate the "cooling-off period" issues in a more detailed manner.

Keywords: international investment arbitration; "cooling-off period"; bilateral investment treaties; notice of dispute; dispute resolution; conciliation; initiation of arbitration; jurisdiction; admissibility.

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Так называемые оговорки о «периоде охлаждения» часто включаются в международные инвестиционные договоры. Являясь примером эскалационной оговорки, они призваны примирить конфликтующие стороны до обращения в международный арбитраж. Формулировки таких оговорок неидентичны, а третейские суды толкуют их по-разному.

Авторы исследуют природу данных оговорок и последствия несоблюдения их условий, в том числе вопрос о возражениях против юрисдикции третейского суда и приемлемости требований. На различных примерах авторы анализируют, с какого момента рассматриваемый период начинает течь, в какой форме и кому должно быть направлено уведомление о споре. В статье также дается ответ на вопрос о том, можно ли инкорпорировать в отношения сторон более короткий «период охлаждения» из другого инвестиционного соглашения.

В статье подчеркивается, что хотя и существует тенденция процессуального истолкования таких оговорок, практика инвестиционного арбитража в этом отношении не является единообразной. Новые инвестиционные договоры регулируют вопросы «периода охлаждения» более детально.

Ключевые слова: международный инвестиционный арбитраж; доарбитражный период урегулирования («период охлаждения»); двусторонние инвестиционные соглашения; уведомление о споре; разрешение споров; примирение; возбуждение арбитражного разбирательства; юрисдикция; приемлемость.

Библиографическое описание: *Kaysin D.V., Urmantseva A.F.* "Cooling-off Period" Clauses in Investment Treaties // Вестник международного коммерческого арбитража. 2021. № 1(22) / 2(23). С. 24–33. https://doi.org/10.32875/icar.2021.1–2.24

Around 90 % of bilateral investment treaties (hereinafter – BITs) include specific escalation clauses. Contracting states to BITs establish a regime setting out a transition period ahead of Investor-State arbitration. They are "cooling-off period" clauses although they are never called expressly this way in the text of a treaty.

Such clauses provide that parties to a dispute can only resort to arbitration when they have previously attempted or exhausted other channels. In this regard, the matter of a "cooling-off period" becomes essential.

It stands for a period during which an investor seeking to initiate an Investor-State arbitration is required to hold back and try to reach an amicable resolution of a dispute with a State. BITs set forth the duration of that pre-arbitration phase and particular actions the investor is supposed to take.

The duration of a "cooling-off period" varies from three to eighteen months, however predominantly, it amounts to six months. In some early treaties, there was no time limit at all.[1]

---

[1] *See, e.g.*, Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (1989), Art. VII(3), at <https://jusmundi.com/en/document/treaty/en-treaty-between-the-united-states-of-america-and-the-republic-of-zaire-concerning-the-reciprocal-encouragement-and-protection-of-investment-democratic-republic-of-the-congo-usa-bit-1984-friday-3rd-august-1984> (accessed Aug. 4, 2021).

1. Consequences of Non-Compliance

First of all, it is highly important to understand the consequences of non-compliance with the "cooling-off period" requirements. As always in the arbitration world, there are several opinions on this matter.

Many tribunals held that the failure to comply with a "cooling-off period" was a *procedural* matter that did not affect the tribunal's jurisdiction.[2]

Some tribunals held that the failure to comply with the "cooling-off period" requirements prevented *them from entertaining jurisdiction*.[3] The lack of jurisdiction, in turn, will prevent the parties from successfully re-submitting the same claim to the same arbitration body.[4]

When tribunals arrive to such conclusions, they are usually faced with a specific wording of the clause. A recent case – *Almasryia v. Kuwait* – may serve as an illustration. The Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait was applied. Articles 1 and 2 of this BIT provided:

> "Disputes which arise between a Contracting State and an investor belonging to the other Contracting State, in relation to an investment in the territory of the first State which returns to the latter, *shall* be settled, as far as is possible, by amicable means.
>
> *If* that dispute *cannot be settled within six months* of the date on which either of the two parties to the dispute requested an amicable settlement by notifying the other party in writing, *then* the *dispute shall be referred* . . . to arbitration."

The tribunal substantiates its ruling that a "cooling-off period" is a jurisdictional prerequisite by paying attention to the clause's text. It stated that the words "shall," "if," "then" indicate that complying with the "cooling-off period" is an obligation of a party, steps that are to be complied with before initiating an arbitration. It expressly states that "this requirement is an integral part of the State's consent rather that a negligible formality."[5]

Besides, facts of the case may be striking as to support the State's jurisdictional objection. It is highly probable that if an investor did not make any attempts to notify a State of the alleged

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2 *Mr. Franz Sedelmayer v. The Russian Federation*, Arbitration Award (Jul. 7, 1998); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (Jun. 29, 1999); *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction (Jun. 24, 1998); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, ¶ 189 (Sep. 3, 2001); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶ 184 (Aug. 6, 2003).

3 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 315 (Jun. 2, 2010); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 131 (Dec. 15, 2010); *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 88 (Jan. 14, 2004).

4 *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 247 (Aug. 4, 2011); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, ¶ 225 (Jun. 6, 2016); *see also* Laurent Gouiffès & Melissa Ordonez, *Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?*, 31(1) Arb. Int'l 107 (2015). https://doi.org/10.1093/arbint/aiv024

5 *Almasryia for Operating & Maintaining Touristic Construction Co. LLC v. Kuwait*, ICSID Case No. ARB/18/2.

treaty's breach, especially when a clause provided for such notification, tribunals would not uphold jurisdiction.[6] As the Tribunal in *Guaracachi v. Bolivia* asserted:

> "The explicit wording requiring a written notification and the expiry of a period of six months from that notification leads the Tribunal to consider that the 'cooling off period' narrows the consent given by the Contracting Parties to international arbitration.
>
> . . . the 'cooling off period' is a jurisdictional barrier conditioning the jurisdiction of the Tribunal *rationae voluntatis*, since it is not up to a claimant to decide whether and when to notify the host State of the dispute, just as it is not up to such claimant to decide how long they must wait before submitting the request for arbitration."[7]

While declining jurisdiction based on this reason, arbitral tribunals found that otherwise the State would not receive an opportunity to redress the problem before the investor submits the dispute to arbitration.

Some tribunals find that if a party does not satisfy the "cooling-off period," its claim is *inadmissible*.[8] It will not prevent the claimant from re-submitting its claim provided that it cures the previous flaw causing the inadmissibility.[9]

Even *national* courts in setting aside proceedings find that failure to observe a "cooling-off period" does not result in the tribunal lacking jurisdiction.[10] To the same conclusion arrived the Hong Kong Court in a recent commercial arbitration matter:

> ". . . it appears that the generally held view of international tribunals and national courts is that non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal's jurisdiction . . ."[11]

Importantly, the court noted that there can be an exception to this when the contract explicitly states that failure to comply with pre-arbitral requirements affects the tribunal's jurisdiction.

Similar conclusion was made by the High Court of Justice in its recent decision.[12] The court closely analyzed the arbitration agreement at hand and agreed that

> "if reaching the end of the settlement period is to be viewed as a condition precedent at all . . . it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction."[13]

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6 *See*, *e.g.*, *Burlington*, *supra* n. 3.

7 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, ¶¶ 388, 390 (Jan. 31, 2014).

8 *Antoine Goetz and Others v. Republic of Burundi*, ICSID Case No. ARB/95/3; *RREEF*, *supra* n. 4; *Burlington*, *supra* n. 3; *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2.

9 *Abaclat*, *supra* n. 4, Decision on Jurisdiction and Admissibility, ¶ 247.

10 *See*, *e.g.*, Gerechtshof Amsterdam, 14 juli 2020, ECLI:NL:GHAMS:2020:2032, at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHAMS%3A2015%3A1123> (accessed Aug. 4, 2021).

11 *C v. D*, HCCT 24/2020 HKCFI 1474, para. 42, at <https://arbitration.site/wp-content/uploads/2021/06/CvD-case.pdf> (accessed Aug. 4, 2021).

12 *NWA & Anor. v. NVF & Ors.*, [2021] EWHC 2666 (Comm.), at <https://www.bailii.org/ew/cases/EWHC/Comm/2021/2666.html> (accessed Feb. 25, 2022).

13 *Id.* para. 45.

Notably, the court provided a reasoning for such conclusion by stating, inter alia:

> "To give an arbitration clause such as this a commercial construction so that pre-arbitration procedural requirements are not jurisdictional is appropriate because, in most cases, if a dispute is not settled in the pre-arbitration procedure, it remains the same dispute, so non-compliance with the pre-arbitration procedure does not affect whether it is a dispute of the kind which the parties agreed to submit to arbitration."[14]

Sometimes, tribunals tend to abstain from concluding whether it is a jurisdictional or procedural requirement.[15] Although there is no consistency in practice, the procedural approach has become prevailing.

2. What Triggers a "Cooling-off Period"?

It mostly depends on the type of a clause. Most clauses refer to a written notice, while some others do not contain such a requirement and thus, the triggering instrument may be different from a written notice.

The first type may be illustrated by the Cyprus – Serbia BIT:

> "1. . . . Where possible, the parties shall endeavour to settle these disputes amicably.
>
> 2. If these disputes cannot be settled by *negotiations within six months from the written notification* under paragraph 1 of this Article, they may be submitted [to arbitration] . . ."[16]

Under some BITs, a party should even accompany the written notice with submissions in the form of a memorandum.[17]

Subject to specific BITs provisions, arbitral tribunals note that a written notice should contain the information about claimant and the investment, an allegation of a treaty breach,[18] and the claims' legal / factual background.[19]

For some arbitral tribunals, such a requirement obliges an investor to send a written notice of dispute to the other party. An investor can not commence arbitration without such notice.[20]

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14 *NWA, supra* n. 12, para. 54.

15 *See, e.g., Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, ¶ 357 (Jun. 15, 2018).

16 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments (2005), Art. 9, at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4766/download> (accessed Aug. 4, 2021).

17 Convention between the Belgo-Luxembourg Economic Union and the Republic of Burundi concerning the Reciprocal Promotion and Protection of Investments (1989), Art. 8, at <https://jusmundi.com/en/document/treaty/en-convention-between-the-belgo-luxembourg-economic-union-and-the-republic-of-burundi-concerning-the-reciprocal-promotion-and-protection-of-investments-bleu-belgium-luxembourg-economic-union-burundi-bit-1989-thursday-13th-april-1989> (accessed Aug. 4, 2021).

18 *Burlington*, *supra* n. 3, Decision on Jurisdiction.

19 *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (Sep. 18, 2018).

20 *Goetz*, *supra* n. 8, Award, ¶¶ 90–93 (Feb. 10, 1999); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (Jul. 23, 2001).

According to the opposite approach, the lack of compliance with a written notice does not prevent the tribunal from upholding its jurisdiction. In *Bayindir v. Pakistan*, the tribunal, *inter alia*, held that "the requirement of notice . . . should not be interpreted as a precondition to jurisdiction."[21] In other words, some tribunals consider such requirement as a procedural that does not impact their jurisdiction.

The latter approach prevails when clauses do not expressly provide for a notification through a written notice. The Albania – USA BIT may serve as an example:

> "Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration . . ."[22]

Dealing with the second type of clauses, tribunals define the moment when a dispute arises as one that triggers the "cooling-off period." In the overall number of cases, tribunals found that a dispute arises when the State is first advised of the alleged breach.[23]

In the words of the Tribunal in *Link-Trading v. Moldova* "formal complaint . . . represented the culmination, not the inception, of dispute."[24] Thus, an investor should, in some form, make an allegation of a Treaty breach, and only then the "cooling-off period" starts running as only then the State receives the opportunity to remedy a possible treaty breach and to avoid arbitration proceedings.

The Tribunal in *L.E.S.I. – DIPENTA v. Algeria* formulated this conduct:

> "What should be considered is the first moment at which the Claimant officially approaches the other party to advise it of its intent to seek payment, describing the general situation."[25]

Notably, at this stage, an investor is not required to formulate claims. This approach favors facilitation of open communications and the amicable settlement of a dispute.[26]

In one case, the tribunal found that the request for negotiations was enough.[27] In another case, the tribunal found that the moment when the dispute arose was when "the conflict of legal

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21 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 85 (Nov. 14, 2005).

22 Treaty between the Government of the United States of America and the Government of the Republic of Albania concerning the Encouragement and Reciprocal Protection of Investment (1995), Art. IX(3)(a), at <http://www.sice.oas.org/Investment/BITSbyCountry/BITs/US_Albania_e.asp> (accessed Aug. 4, 2021).

23 *Lauder*, *supra* n. 2, Final Award, ¶ 185; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, ¶ 83 (Mar. 5, 2013); *Burlington*, *supra* n. 3, Decision on Jurisdiction, ¶¶ 335–36.

24 *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Award on Jurisdiction, ¶ 6 (Feb. 16, 2001).

25 *Consortium Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, ¶ 32(iii) (Jan. 10, 2005).

26 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, ¶ 57 (Mar. 26, 2008); *Generation Ukraine, Inc. v. Ukraine, Award*, ICSID Case No. ARB/00/9, ¶ 14.5 (Sep. 16, 2003).

27 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (May 4, 2017).

views and interests came to be clearly established,"[28] particularly in the context of disinvestment proposals discussed between the parties.

We should thus conclude that a consistent and uniform approach has not developed. It is doubtful that it will ever happen.

3. Initiation of Arbitration before the "Cooling-off Period" Expires

Another practical question is whether it is possible to initiate arbitration before the "cooling-off period" expires. Interestingly, arbitral tribunals find that even if the "cooling-off period" has not expired, but the claimant proves that the negotiations became futile, then there is no impediment for tribunals to upheld their jurisdiction.[29] As the Tribunal in *Biwater Gauff v. Tanzania* observed:

> "Its ['cooling-off period's'] purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible."[30]

The doctrine supports this approach. As Professors Rudolf Dolzer and Christoph Schreuer stress:

> "There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations were obviously futile."[31]

Notably, this approach has become more popular in recent cases.[32]

It is for the claimant to prove that the negotiations were futile. A shred of evidence here can be a declaration from a State that it is no longer willing to participate in the dialogue or numerous attempts to enter into negotiations left unanswered.

4. Some Debatable Situations Arising in Practice

The first question that may occur is whether a party can incorporate a shorter "cooling-off period" from one of the State's BIT. One might say that it is possible to do that through a MFN clause.

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[28] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 98 (Jan. 25, 2000).

[29] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶ 129 (Dec. 21, 2012); *Link-Trading*, *supra* n. 24, Award on Jurisdiction, ¶ 6; *SGS*, *supra* n. 2, Decision of the Tribunal on Objections to Jurisdiction, ¶ 184; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 94 (Sep. 9, 2008).

[30] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 343 (Jul. 24, 2008).

[31] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 270 (2nd ed., Oxford University Press 2012). https://doi.org/10.1093/law/9780199651795.001.0001

[32] *Kompozit LLC v. Republic of Moldova*, SCC Emergency Arbitration No. EA (2016/095) & SCC Case No. 2016/113, Emergency Award on Interim Measures (Jun. 14, 2016); *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, ¶ 149 (Feb. 9, 2017); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction (Jun. 29, 2018).

Some tribunals find that the MFN clause enables investors to benefit from more favorable arbitration requirements. To be more specific, the Tribunal in *Maffezini v. Kingdom of Spain* stated:

> "... if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause ..."[33]

Some other tribunals went in the same direction.[34] Hence, a party can use this approach and try to incorporate a shorter "cooling-off period" from another BIT as a more favorable provision for the settlement of disputes.

However, this may be controversial as some tribunals find that a MFN clause cannot be used to import procedural rules unless clearly and expressly indicated to the contrary.[35]

Moving to the second unresolved situation, it concerns whether a shareholder of a company that participates in a consortium needs to initiate a "cooling-off period" once again, provided that the consortium already satisfied the "cooling-off period" in another dispute with a State.

The tribunal in *Murphy v. Ecuador* reviewed this case. The claimant invested in Ecuador through an SPV, which participated in a consortium operated by another entity – *Repsol*. Ecuador took steps to increase its participation in oil revenues and *Repsol* entered into negotiations under the Spain – Ecuador BIT. Murphy relied on *Repsol*'s negotiations to satisfy its own "cooling-off period" requirements under the US – Ecuador BIT.

The tribunal held that the negotiations were carried out *on behalf of the consortium members and not the shareholders* and further noted that the claims invoked arose under different treaties. The tribunal found that Murphy could not rely upon *Repsol*'s negotiations to satisfy its "cooling-off period" requirements.[36]

However, the opposite approach exists. In *Tokios Tokelės v. Ukraine*[37] the tribunal did find that negotiations conducted by the claimant's subsidiary, rather than by the claimant directly, could satisfy the requirements of the "cooling-off period."

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33 *Maffezini*, *supra* n. 28, Decision of the Tribunal on Objections to Jurisdiction, ¶ 56.

34 *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 31 (Jun. 17, 2005); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶¶ 52–66 (May 16, 2006); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶ 57 (Aug. 3, 2006); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 66 (Oct. 24, 2011).

35 *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, ¶ 112 (Feb. 23, 2018); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 215 (Feb. 8, 2005); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, ¶ 181 (Apr. 21, 2006); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶¶ 160–197 (Dec. 8, 2008).

36 *Murphy*, *supra* n. 3, Award on Jurisdiction, ¶¶ 120, 131–32

37 *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision of Jurisdiction, ¶ 103 (Apr. 29, 2004).

In *Abaclat v. Argentina*, the tribunal found that negotiations carried out by an entity representing a part of a bondholder group could satisfy the negotiation requirements in respect of claims by the whole group.[38]

Thirdly, a question arises whether a separate notification and a "cooling-off period" should be satisfied if new claims arise during an arbitration. In *Antaris v. Czech Republic*, the tribunal found that if such claims represent the same dispute in substance as contained in the notice of dispute, they do not require a separate notification and the "cooling-off period" satisfied.[39]

The tribunal took a similar approach in *CMS v. Argentina* assessing that if there is a single dispute that contains additional or incidental claims, such claims do not require a new request for arbitration or a new period for negotiation.[40]

5. Conclusion and "Cooling-off Period" Clauses in Recent BITs

The analysis of recent BITs shows that States tend to prescribe in detail what triggers a "cooling-off period" and what a party should do.

For instance, some BITs contain "cooling-off period" clauses not only obliging a party to send a notice of dispute but setting forth in detail what such notice should contain:

> "The notice of dispute shall: specify the name and address of the disputing investor or the enterprise, where applicable; set out the factual basis of the claim, including the measures at issue; specify the provisions of the Treaty alleged to have been breached and any other relevant provisions; demonstrate compliance with Article 15.1 and 15.2, where applicable; specify the relief sought and the approximate amount of damages claimed; and furnish evidence establishing that the disputing investor is an investor of the other Party."[41]

Japan – Morocco BIT, for instance, expressly provides that

> "the disputing investor has to deliver to the disputing Party a written request for consultation setting out a brief description of facts regarding the measure or measures at issue. The consultation shall be commenced no later than thirty days after the date of its receipt by the disputing Party."[42]

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38 *Abaclat*, *supra* n. 4, Decision on Jurisdiction and Admissibility, ¶ 559–62, 566.

39 *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, ¶ 260 (May 2, 2018).

40 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶ 123 (Jul. 17, 2003).

41 Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (2019), Art. 15.3, at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download> (accessed Aug. 5, 2021); *see also* Agreement between Japan and Georgia for the Liberalisation, Promotion and Protection of Investment (2021), Art. 23(5)–(6); Agreement between the Government of Japan and the Government of the Republic of Côte d'Ivoire for the Reciprocal Promotion and Protection of Investment (2020), Art. 23(3)–(4); Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (2020), Art. 15; Russian Federation Model BIT (2016), para. 42.

42 Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (2020), Art. 16(3), at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download> (accessed Aug. 5, 2021).

Some BITs even specify in which city the negotiations should take place.[43]

Moreover, a number of BITs shifted away from "cooling-off period" clauses and provided for a regulated and more predictable Dispute Prevention Procedure.[44]

Thus, parties moved away from vague "cooling-off period" clauses detailing the procedure instead. In some cases they have abandoned the clause altogether. In such a way, it will be difficult for an investor to prove that the tribunal has jurisdiction if it did not make any attempt to settle the dispute. It is more likely to prove that consultations and negotiations led nowhere and were futile.

The doctrine stipulates that another way for a person understanding that the "cooling-off period" is not satisfied is to file a claim, but then seek suspension of the proceedings. This will provide for additional time for negotiations to satisfy the "cooling-off" requirements.[45] This approach was taken in *Western NIS Enterprise Fund v. Ukraine*.[46]

But a tribunal is likely to favor such an approach only where there remains a potential opportunity to resolve the dispute amicably. Notably, tribunals who regarded the "cooling-off period" as a strict jurisdictional requirement did not seek to resolve the jurisdictional issue by ordering a stay – instead, they simply found that they did not have jurisdiction to resolve the dispute.[47]

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43 India – Kyrgyzstan BIT (2019), *supra* n. 41, Art. 15.4.

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45 Dolzer & Schreuer, *supra* n. 31, at 270; Zachary Douglas, The International Law of Investment Claims 160 (Cambridge University Press 2012).

46 *Western NIS*, *supra* n. 8, Order (Mar. 16, 2006).

47 *Burlington*, *supra* n. 3, Decision on Jurisdiction, ¶ 315; *Murphy*, *supra* n. 3, Award on Jurisdiction, ¶ 131.