UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

# Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection

RESEARCH ARTICLE

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## ABSTRACT

Most of International Investment Agreements (IIAs) contains a cooling-off period provision requiring both parties to an investment dispute to make an attempt to settle their differences amicably within a clear time frame, before initiating arbitration. The cooling-off period is triggered by the notice of dispute sent by the investor to the host-State and can range from several months up to one year. At times arbitral tribunals have considered this provision as an optional procedural requirement, others, as a condition precedent for tribunals' jurisdiction. In either case, tribunals have exclusively focused on the consequences for the investor, whenever the investor had not complied with this waiting period by filing the arbitration prior to its elapse. However, can the cooling-off provision be construed as a procedural standard of investment protection whenever the Respondent-State does not comply with this provision by refusing to engage in consultations with the investor? This article argues so by examining the function, character and content of this provision and by shifting the focal point of arbitral precedents. Indeed, from the investor's perspective, this provision may well be a treaty-based procedural standard of investment protection to find a cost-effective and prompt solution to a dispute whose breach may call for redress.

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KEYWORDS:
cooling-off provision; investment arbitration; procedural standard of investment protection

TO CITE THIS ARTICLE:
Danilo Di Bella, 'Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection' (2021) 36(1) *Utrecht Journal of International and European Law* pp. 1–10. DOI: *https://doi.org/10.5334/ujiel.523*

# I. INTRODUCTION

This article theorizes the cooling-off provision as a hidden, or at least overlooked, procedural standard of investment protection. It draws attention to the potential consequences of a host State that does not comply with the obligations stemming from the cooling-off period prior to an investment arbitration. Investment arbitrations are treaty-based proceedings in which a foreign investor can bring an international complaint against the host-State. Specifically, such arbitrations are based on bilateral or multilateral investment treaties whose main purpose is twofold: to attract foreign direct investments, while at the same time protecting nationals' investments abroad against political risks. In this article, Bilateral Investment Treaties (BIT) and Multilateral Investment Treaties (MIT) will be collectively referred to as International Investment Agreements (IIAs).

90% of IIAs contain a cooling-off period provision[1] requiring both parties to an investment dispute an attempt to settle their differences amicably within a clear time frame, before initiating arbitration (or conciliation). This interval of time – during which disputing parties' efforts should aim at an amicable settlement – ranges from two (2) to twelve (12) months, depending on the applicable IIA. Arbitral tribunals have diverged on the interpretation of this provision. At times, it has been considered as an optional procedural requirement,[2] others, as a condition precedent for tribunals' jurisdiction.[3] Much of the debate has focused on the consequences for the moving party in filing an investment arbitration, i.e. the investor, whenever it had not complied with this waiting period. Existing literature has addressed the question of an investors non-compliance with the cooling-off provision and has settled the debate by treating this provision as a procedural *requirement* affecting the admissibility of claims, rather than constituting a bar to arbitral tribunals' jurisdiction.[4] But what if the Respondent State does not fully comply with this provision?

This article may spark a new debate by treating the cooling-off provision as a procedural *standard of investment protection*, rather than as a mere procedural requirement. As such, the article argues that this provision may provide for an additional cause of action for an investor in the event of a host-State who is unwilling to engage in pre-arbitration consultations. This way the article addresses the common and recurrent problem of host-States declining to hold consultations with foreign investors in order to find an amicable settlement to a dispute and thus avoid the need to resort to the arbitration. In many of these instances, foreign investors are indeed tempted to skip the cooling-off period and go straight to arbitration only to see their claims contested by the host-State at a later stage in front of the arbitral tribunal for not having complied with the cooling-off provision, the very same provision the host-State unfulfilled in the first place by refusing to entertain any negotiations prior to the arbitration.

This work is divided in three main Sections. The first Section delves into the function, character and content of a cooling-off provision. In this Section the author establishes the efficiency-oriented purpose of this provision, its compulsory nature, and its clear content by interlinking each sub-section with the following one in a cause-effect relationship. The Second Section pulls all these cause-and-effects relations together to apply them to the relevant case-law by mirroring the investor's position with the stand of the host-State. As a result of this mental exercise, a *hidden treaty-based procedural standard* seems to emerge and whose breach may well be contended. Consequently, the third Section addresses how such breach may and should be grappled by arbitral tribunals, according to their powers as defined by the applicable procedural rules, coupled with dispute prevention policies and case management considerations.

The methodology adopted in this article concentrates on treaty interpretation – according to the 1969 Vienna Convention on the Laws of Treaties (VCLT) – for the first Section, case-law analysis for the second Section, application of relevant procedural frameworks for the third Section, and writings of highly qualified publicists throughout the article.

# II. FUNCTION, CHARACTER AND CONTENT OF THE COOLING-OFF PROVISION: A HIDDEN PROCEDURAL STANDARD

The cooling-off period is triggered by the notice of dispute sent by the disgruntled foreign investors to the host State. The notice opens up a predetermined window of time during which both parties will have to settle amicably their investment dispute.

## 1) AN EFFICIENCY-DRIVEN FUNCTION

The rationale behind a cooling-off period is self-evidently efficiency-driven, as such period allows the disputing parties to avoid altogether expensive and extensive arbitral proceedings through informal negotiations. Accordingly, this provision translates into a *right to find a cost-effective and prompt solution* to an ongoing dispute. French novelist and playwright Honoré de Balzac said it best: '*un mauvais arrangement vaut mieux qu'un bon procès*'[5] (a bad agreement is better than a good trial). Indeed, although constantly praised for their efficiency, not even investment arbitrations – just as any legal proceedings – are immune from long delays, excessive costs and ineffective solutions.[6]

It is difficult to discern how many investment claims are settled as a result of the cooling-off provision, due

to the confidentiality that permeates such settlements.[7] Nevertheless, there exists statistics available on investment arbitrations that have been settled once the proceedings had already begun. According to the UNCTAD, by the end of 2018, almost a quarter out of the 602 known concluded cases were settled.[8] Whereas according to ICSID statistics, 35 per cent of its concluded cases as of 2019 were settled (or otherwise discontinued).[9] This goes to show that it is fairly likely that an investment arbitration is resolved through negotiations.[10] Needless to say, had these negotiations taken place fruitfully prior to the institution of such proceedings during the cooling-off period, both parties would have probably saved themselves time and financial resources. Yet, such high rate of successful negotiations may be indicative that a few settlements must have occurred also during the cooling-off period, before such arbitrations could have even been registered and, thus, become public record.

In less optimistic scenarios where no overall settlement can be struck, a cooling-off provision may anyway contribute to reducing the scope of the contentious issue – since parties may find a partial agreement on some of the disputed questions – and, accordingly, reducing the total costs and time of the ensuing arbitration. Arguably, a dispute whose scope its smaller will consume less time and resources to be solved by a tribunal.

Consequently, either the disputing parties reached a comprehensive agreement or a partial settlement, the cooling-off period represents *a valuable opportunity* each party should not be deprived of because of the other party's fault, be it the investor or the Respondent State. The Tribunal in *Burlington Resources v Ecuador* put it down very clearly: '[t]he purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration.'[11] It is possible to agree upon this view to a great extent. However, to consider that the cooling-off provision is a right granted *exclusively* to the host State would be a stance inconsistent with the way this provision is commonly phrased, as it is usually addressed to all parties concerned by an investment dispute (not just to the Respondent State).[12] Hence, to put it more accurately, it is a right granted to *both* the investor and the host State on the basis of which each party should not deprive the other of the opportunity to reach a pre-arbitration settlement. To each right, there is a correlative obligation to which it corresponds.

## 2) A MANDATORY CHARACTER

Much like a State may not revoke unilaterally its consent to arbitration (see e.g. Article 25(1) ICSID Convention),[13] a State should not unilaterally refuse to hold consultations with the investor. After all, both arbitration and pre-arbitration negotiations are alternative dispute resolution (ADR) tools aimed at resolving Investor-State disputes and both tools are granted to a foreign investor by virtue of the very same International Investment Agreement (IIA). Just as an investor would not have access to a direct international arbitration with the host State, if it wasn't for that IIA, nor would it have access to direct negotiations with the government of the host State. The access to a direct arbitration with the host State should not overshadow the access to direct negotiations with the host State's government. The latter holds as much importance and uniqueness as the former. This is very much so that pre-arbitration negotiations and arbitration are always inevitably found in the exact same dispute resolution provision of every IIA. Therefore, it would be nonsensical to hold a part of the same provision compulsory (the one on arbitration), while ignoring the other part (the one on pre-arbitration negotiations). This entails that in principle both parties will have to engage actively in good faith consultations before resorting to arbitration.

This view is buttressed by State *opinio juris* as reflected by State-to-State dispute resolution provisions in international agreements (including those in IIAs), as well as by State practice adhering to this type of provisions. Indeed, the duty to engage in good faith consultations prior to arbitration to reach a friendly settlement of disputes arising under international agreements is commonly laid out in State-to-State dispute resolution provisions. These provisions make arbitration available subject to a mandatory attempt of a friendly settlement by diplomatic consultations. State-to-State dispute resolution provisions are almost identical to the Investor-State multi-tiered dispute resolution clauses. In both clauses, be it diplomatic consultations (in the case of State-to-State disputes) or regular consultations (in the case of Investor-State disputes), negotiations will take place before arbitration. Hence, the unquestioned mandatory character of pre-arbitration consultations in State-to-State disputes should also apply by analogy to Investor-State disputes.

As to the State practice, customary international law since the end of the 18th century shows clearly that States usually attempt a friendly settlement of the dispute through negotiations, before initiating any international arbitration against another State.[14]

Of course, every treaty has to be interpreted independently and much will depend on how a cooling-off provision is drafted. In conformity with Article 31(1) of the VCLT, "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*." Formulas such as "for the purpose of solving disputes…consultations *will* take place between the parties concerned"[15] or "the parties concerned *shall* endeavour to settle their disputes amicably through negotiations"[16] denote the mandatory character of such provision (as opposed to the use of verbs such "may" or "should").[17] As a result of the terms used, an obligation upon both parties to try to negotiate a friendly settlement of the dispute may clearly derive from a cooling-off

provision. Accordingly, although largely overlooked, such provision may actually be construed as a procedural standard of investment protection for all intents and purposes from the investor's perspective.

### 3) A WELL-DEFINED CONTENT

This procedural standard of investment protection has a well-defined content that can be effectively fulfilled by 1) holding fruitful consultation meetings between the disputing parties, and 2) exchanging meaningful written communications.

The *United States vs France Air Services Agreement case*[18] well exemplifies the content of such obligation concerning pre-arbitration negotiations. In that case, the USA explained the duty under international law to engage in good faith pre-arbitration consultations with a view towards resolving differences that arise under an international agreement and acknowledged that in that case such duty was met by consultations held in Paris and Washington on April 24, 1978, June 1–2 and 28–29, and July 10–11, as well as by the written communications which had been exchanged from March 22 on between the disputing parties.[19]

The *United States vs France Air Services Agreement case* exemplifies how to comply with a cooling-off provision and, by extension, its content. This case helps indeed to pinpoint the twofold material component of pre-arbitration negotiations: 1) holding fruitful consultation meetings between the disputing parties; 2) exchanging meaningful written communications. Both elements are fundamental for the discharge of this obligation in good faith. By way of illustration, an outright refusal to hold a consultation meeting or written communication constantly postponing or eluding a meeting and delaying the proceedings would not properly comply with this obligation in accordance with good faith.

If consultations are mandatory, by all means each party has the obligation to try to enter into negotiations effectively with the opposing party. Therefore, either party's failure to meet this obligation cannot be without consequence.

Needless to say, as far as the establishment of an international tribunal's competence is concerned, estoppel considerations would prevent a State from relying on its own failure to enter into negotiations with the investor in order to allege that the tribunal lacks jurisdiction because State's consent was conditional on those very negations that never took place.

As it will be discussed further below the failure to honour the cooling-off provision may and should have a direct bearing on the costs of the arbitral proceedings.

## III. CHANGING ANGLES

Case-law is abundant of precedents where tribunals reprimand investors for not complying with the obligation stemming from the cooling-off provision. The same reprimands may be equally directed at any Respondent State for failing to engage in fruitful negotiations with the investor during the cooling-off period (of course, provided that the investor has invited the State to hold such consultations). By mirroring the same line of reasoning adopted by many tribunals, a State that does not make a genuine effort to engage in good faith consultations during the stipulated cooling-off period would not be less reprehensible than an investor filing its request for arbitration before the end of that same period.

For example, by applying to a State – that ignored or refused the offer to enter into negotiations by an investor during the cooling-off period – the reasoning of the ICSID tribunal in *Murphy vs Ecuador*[20] (where the investor failed to make a genuine effort in negotiating with the host State on the assumption that it would have been futile), a tribunal may get to a three-fold conclusion. Firstly, in order to know that the negotiations would have been futile, the State should have at least first tried once.[21] The content of the obligation to try to negotiate is an obligation of means, not of result, but in order to determine whether negotiations would have succeeded or not, the parties had to initiate them first. Secondly, '[t]he obligation to consult and negotiate falls *on both parties*,' hence including the Respondent State.[22] Thirdly, the State's unilateral decision to completely obviate the possibility of an amicable settlement prior to the arbitration would constitute a grave non-compliance with the relevant International Investment Agreement.[23]

Likewise, by applying the reasoning in *Kiliç vs Turkmenistan*[24] to a State not willing to enter into negotiations with the investor based on their futility, a tribunal may find that a State cannot alter the terms of the consent given.[25] In such a hypothesis, a State should show that it made efforts towards complying with the obligation to negotiate and it should bear the burden of demonstrating the probable failure of the negotiations, had they been initiated.

If these precedents are tied in with the decision in *Ethyl Corp vs Canada*[26] (where the tribunal assumed jurisdiction, but awarded partial costs against the investor for not complying with the cooling-off period),[27] then it is possible to get to the conclusion that the State failing to hold consultation meetings should bear the costs of the entire arbitration. Rightly so, in *Ethyl Corp vs Canada* the Tribunal deemed appropriate that the party who gave origin to the jurisdictional proceedings should be responsible for the costs of those proceedings, which could have been obviated, had consultations taken place in observance of the cooling-off provision.[28] By the same token, the State who gave origin to the arbitral proceeding should be responsible for the costs of that proceeding, which could have been obviated, had consultations taken place during the cooling-off period. This is the natural conclusion that simply flows from borrowing the

tribunal's reasoning in case of a non-compliant investor towards the cooling-off provision to have that same maxim applied to a Respondent State defaulting on its obligations set by the very same provision.

In author's experience (both with European and Asian countries) as well as in the experience of many fellow practitioners, the host-State often does not comply with the cooling-off provision in that it ignores the notice of dispute triggering the cooling-off period and the inherent obligation to engage in pre-arbitration consultations aimed at finding a mutually agreeable solution to an ongoing investment dispute. At times, the host-State even refuses expressly to participate in such pre-arbitration consultations. Arguably, many arbitrations could have been averted, but for the Respondent State's lack of a genuine effort to engage in negotiations with the investor, who is often left with no other option than to file the arbitration in order to present its case. Thus, a State's failure to abide by the cooling-off provision may effectively make unavoidable the commencement of an otherwise *unnecessary* arbitration. The abovementioned statistics shows that between one-quarter and one-third of investment arbitrations are settled, indicating that if both parties truly commit to reach a settlement, most likely, they will (making those arbitrations "unnecessary").

Alternatively, another more lenient approach may consider appropriate that a Respondent State failing to comply with pre-arbitration consultations may have to bear, if not the entire cost of an arbitration, a more substantial part thereof. On the other hand, making the Respondent State bear the entire costs of an arbitration that could have been averted, but for the State's grave non-compliance with the cooling-off provision – although it is a stricter approach – it would be more in line with Article 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts.[29] In enshrining the full reparation principle, the application of this article commonly requires a 'but-for analysis'[30] which would lean towards the stricter approach. Hence, the full reparation should remove the unlawful act by putting the investor in a scenario in which the host State did engage in good faith consultations.

## IV. BREACH OF THE COOLING-OFF PROVISION AND ITS ADEQUATE COMPENSATION: THE IMPACT ON COSTS

### 1) POWERS OF ARBITRAL TRIBUNAL

Arbitrators' power to allocate the costs of the proceedings – commonly found in most institutional and *ad hoc* rules – may award costs against a non-compliant Respondent State with the cooling-off obligation. For example, Rule 28 of the ICSID Arbitration Rules[31] as well as Article 42 of the PCA or UNCITRAL Arbitration Rules[32] recognise the power of tribunals to weight carefully this kind of circumstances when apportioning the costs of the arbitration.

Normally, if a party to the proceedings fails to cooperate in an arbitration by failing to enter an appearance or by not producing requested documents, a tribunal may draw adverse inferences and award cost against that party. Likewise, a tribunal may equally draw adverse inferences or make an adverse cost award in case a State fails to cooperate in the pre-arbitration consultations during the cooling-off period.

Tribunals have the power to take into account such circumstance when allocating the costs of the arbitration, either at the end of the arbitration in the final award or – pending the arbitration – by ordering a provisional measure to the effect that the Respondent State shall bear entirely any advance payments.

In UNCITRAL arbitrations[33] the latter option may become available pursuant to Article 26(1) of the UNCITRAL Arbitration Rules.[34] This option is also available in ICSID arbitrations pursuant to Article 47 of the ICSID Convention[35] and Rule 39(1) of the ICSID Arbitration Rule.[36] Arguably, this remedy would be more adequate, as opposed to allocating the costs at the end of the proceedings, since it would preserve the right of a claimant to present its case, whereas an adverse cost award against the respondent may arrive just too late. Of course, a party seeking such provisional measure has to specify the right to be preserved and the circumstances that warrant such measures.

In a circumstance where the Respondent State did not comply with its international obligations stemming from the cooling-off provision – consisting in holding consultation meetings and exchanging constructive communications with the view of solving a dispute – the investor may have plausibly been severely impaired in its *right to be heard* and its *right to find a cost-effective and prompt solution* during the cooling-off period because of the uncooperative State. If these rights are not properly preserved in the course of the arbitration, the claimant may suffer an irreparable harm, if it had to withdraw from the proceeding for not being able to meet the advance payments for the tribunal and the arbitral institution. Probably, only a provisional measure requesting the Respondent State to cover all advance payments – or at least, to bear a greater share – may preserve the right to be heard and the right to find a cost-effective and prompt solution to the dispute.

Furthermore, given its intrinsic features, the breach of the cooling-off provision can be easily spotted and assessed early on in any arbitral proceeding. Accordingly, it is reasonable that the tribunal tackles such breach in the form of a procedural order issuing the corresponding interim relief at the very beginning of the proceeding, or – even better – in the form of an interim award as envisaged by Article 26(2) UNICTRAL Arbitration Rules.[37] The advantage with this interim award *finally* asserting

the breach of the cooling-off provision by the host State is that this award could be enforced pending the arbitration (in case the State refuses to comply with it). Thus, even if the Respondent State refused to bear all, or most of, the advance payments, the investor would still have the means to proceed with the arbitration by enforcing the interim award so as to cover the advance payments. In case of a Respondent State not complying with a procedural order requesting it to advance the arbitration costs, instead, the investor and the tribunal would be stuck with no executable instrument. So, the proceeding may be doomed to be discontinued.

As an alternative to provisional measures on advance payments issued in a procedural order or an interim award, a tribunal may suspend the proceeding and order the Respondent State to hold a series of consultation meetings with the claimant, thus reinstating the investor in its original right to negotiate a settlement with the Respondent State. For example, in *Western NIS Enterprise Fund vs. Ukraine*, the tribunal suspended the proceeding so that the investor – who did not give proper notice of the dispute to the host State – could adhere to the appropriate procedure by giving proper advance notice to the State and a six-month period to find a settlement to the dispute.[38] This measure may be appropriate where the investor did not comply with the cooling-off period. In case, instead, the investor did comply with the cooling-off period, such measure may further impair the investor who had unsuccessfully invited the host State to negotiate a settlement based on the premise of a prompt and cost-effective solution. Additionally, such measure would benefit the non-compliant Respondent State by stretching and delaying further the proceeding. Thus, it would unfairly reward the party who did not comply with the cooling-off provision in the first place, while damaging further the party who suffered the breach thereof. So, it is preferable a provisional measure ordering the defaulting Respondent State to bear the advance payments to cover the tribunal costs of both disputing parties. Importantly, such a measure would not prejudge the merits of a dispute, as at the end of the proceeding the tribunal may award damages and apportion costs differently according to its final findings (for example, if the conduct of the claimant during the arbitration has been in turn improper).

This is not to say that the damages resulting from the breach of the cooling-off provision should be dependent on the outcome of the arbitration. Obviously, the analysis on the damages ensuing from the breach of the cooling-off provision is run independently of the analysis for the reparation due for the breach of any other standard of investment protection which can be claimed by an investor. In other words, the breach of each standard and its consequences should be assessed independently.

For example, if an investor claims the violation of three different treaty-based standard of investment protection – the fair and equitable standard (FET standard), the unlawful expropriation "standard", and the "cooling-off standard" – and the tribunal finds the Respondent State in breach only of two standards (the FET and the cooling-off standards), then the compensation due should be commensurate to the damages suffered as a consequence of the breach of these two standards. In case where a tribunal has issued a procedural measure to make the Respondent State bear all the advance payments in light of the State's breach of the cooling-off provision, then the investor would have been already compensated. So, the final award should only account for the damages originating from the FET breach.

Furthermore, the analysis on the damages resulting from the breach of the cooling-off provision is not dependent of the chances of getting to a settlement in the consultations period. As for the violation of the denial of justice (another procedural standard of investment protection), the breach consists in depriving the investor of its right to be heard, regardless of the investor's actual position, substantive grounds for its action, and chances of having its claims upheld.[39]

As to the allocation of costs in the final award, the prevailing approach in investment arbitration – contrary to commercial arbitration – is to follow the rule 'each party bears its costs.'[40] However, this approach is adjusted whenever it is needed to respond to bad faith conducts. Arguably, a Respondent State who has ignored its obligation to carry out pre-arbitration consultations with the investor cannot be regarded as an example of good faith.[41]

Similarly to cases concerning the breach of other procedural standards of investment protection – such as the denial of due process, failure to provide the investor with effective means of asserting claims and enforcing contractual rights, denial of justice or judicial expropriation,[42] where essentially the investor is deprived of the right to be heard either at the hand of the administration or the judiciary of the host-State – the remedy for the breach of the cooling-off procedural standard is to put the wronged party in the position it would have been in had the wrongful conduct not occurred, in line with the *Chorzów* Factory principle. Thus, the remedy has to wipe out the effects of the procedural breach.

In cases where the impugned act is an action (either an administrative decision or a judicial ruling), this is achieved by declaring that act a nullity for the purpose of international law and by repairing the prejudice it has caused with an adequate compensation to keep the investor unharmed.[43] In cases where the impugned act is an omission that has deprived the investor of its treaty-based right to assert its claims in order to obtain a cost-effective solution, full reparation may be achieved by allowing the investor to present its case in a cost-effective manner – if not during the pre-arbitration consultations – at least during the arbitration. Hence, the remedy for the violation of the cooling-off procedural

standard has a direct link with the intrinsic costs of an investment arbitration.

Although costs orders and damages are two separate concepts, where the damages suffered derived from the procedurally obstructing or uncooperative conduct of the counterparty resulting into the denial of the right to be heard and to find a cost-effective and prompt solution during the cooling-off period, the distinction between the two concepts may blur into tribunals' power to sanction improper conduct or procedural inefficiencies in interim or final awards.[44]

Hence, the consequence of breaching the cooling-off procedural standard – which aims at protecting parties' right to a cost-effective solution obtainable in the consultations period – is having to pay the costs of the arbitration (preferably in the form of advance payments). Effectively and logically, the appropriate reparation due for deprivation of a cost-effective solution prior to the arbitration corresponds to the costs incurred in the arbitration itself. Consequently, the best evaluation of the compensation due for the violation of the cooling-off procedural standard corresponds to the costs of the arbitral proceeding.

## 2) DISPUTE PREVENTION POLICIES AND EFFICIENT CASE MANAGEMENT CONSIDERATIONS

Unfortunately, States often disregard altogether their pre-arbitration procedural obligations, thus missing out on the opportunity to prevent disputes from escalating into international legal proceedings. Erroneously, also investors sometimes underestimate the advantages provided by the cooling-off provision. A more effective conduct of the amicable settlement phase may avert the need to resort to an investment arbitration in the first place. During the cooling-off period, the disputing parties retain control over the outcome of the dispute. On the other hand, once an arbitration begins, the parties' control over the dispute is limited by the tribunal's powers. Hence, both parties may risk being subjected to unpredictable rulings. On several occasions, indeed, inconsistent decisions by arbitral tribunals have taken parties by surprise and fed uncertainty among the international investment law community.

Moreover, a pro-active management of the amicable settlement period may have the advantage of turning a legal dispute into a renewed mutual relationship between the foreign investor and the host-State involved.[45] By contrast, an arbitration will most likely prompt the foreign investor to divest from the host-State, and accordingly, will defeat the purpose of investment promotion and attraction. In several circumstances, an ensuing award will not only negatively affect the relationship between the foreign investor and the host State, but it will have a negative impact on the investment climate and the general perception of the host State as a reliable investment destination. That's why the prevention and management of investor-State disputes may contribute to improving the investment climate and fall within investment promotion policies.[46] An increasing number of countries have indeed implemented dispute prevention policies to adequately address investment disputes as a means to promote foreign investments.

In this respect, Peru is regarded as an example of best practice by the UNCTAD, having set up a Special Commission (SICRECI)[47] tasked, *inter alia*, with opening a dialogue with the foreign investor during the cooling-off period in search of a feasible settlement.[48] Such proactive and farsighted involvement of the host-State in the early stages of an investment dispute may help avoiding many investment arbitrations.

To promote this best practice, tribunals may allocate the costs against the host-State that disregarded the cooling-off provision. Thus, in the long run States will be incentivized to actually engage in fruitful negotiations before an investment arbitration. This way, indirectly, tribunals will also value the efforts of States who do commit resources to implement dispute prevention policies, conducive to a friendly-investment climate.

Instruments such the IBA Rules for Investor-State Mediation and the recent Singapore Convention on Mediation may revamp the interest for faster, more flexible, and less costly alternatives to arbitration aimed at finding an amicable ground for settlement between investors and States, permitting the parties to continue a working relationship.[49]

While touching upon efficient case management, one final remark on the impact of improved telecommunications tools on pre-arbitration negotiations might be due as well. Modern communication technologies – that have been put to a test during the COVID-19 pandemic – have shown how easy is to hold remote hearings in international arbitrations in order to overcome travel restrictions and social distancing measures.[50] If a hearing can be held remotely without violating or curbing the right to be heard, *a fortiori*, also pre-arbitration consultation meetings could be cost-effectively arranged remotely.[51] Any excuse of having to mobilize substantial resources to carry out consultation meetings could not be raised anymore, when the meeting with the other party is just a click away. Consequently, these costs and time saving technologies could and should be deployed more frequently also in pre-arbitration consultation meetings during the cooling-off period to give full effect to a too-often over-looked procedural standard. As is often the case, in the rare instances in which a host-State replies to a notice of dispute (instead of ignoring the notice altogether), the host-State frequently decides to avoid any consultation meetings on the false premise that arranging these simple meetings would require a lot of resources. The inexpensiveness of modern remote communication technologies dispels such ungrounded excuses.

## V. CONCLUSION

The cooling-off period is more than just a *waiting room*. It is an opportunity for both parties to hold good faith consultations in order to avert the need to resort to arbitration or, at the very least, a chance to reduce the scope of the contentious issue, by reaching a partial settlement. The investor that loses altogether this opportunity because of the host State's refusal to engage in negotiations should not be deemed to be at fault.

More correctly, it is even more than just an opportunity, it is a right that is granted by virtue of an International Investment Agreement both to the investor and the host-State. The correlative obligation of this right consists in a twofold obligation of means over a pre-stipulated period of time: firstly, to hold consultation meeting with the opposing party, secondly, to exchange constructive communications to try to reach an amicable settlement before initiating the arbitration. Hence, the investor who has suffered a breach of such obligation because of the host-State's refusal to engage in negotiations should be able to claim a proper redress.

Borrowing the same arguments used to reprehend an investor for not complying with the cooling-off provision, a State refusing to hold any negotiations with the investor may have to bear the entire costs of an arbitration, that could have been averted, but for the State's grave non-compliance with the cooling-off provision. Tribunals have the power to take into account such circumstance when allocating the costs, preferably, during the arbitration itself by issuing a procedural order to the effect that the defaulting Respondent State should bear all, or most of, the advance payments for the tribunal and the arbitral institution. Hence, it is possible to effectively construe the cooling-off provision as an additional procedural standard of investment protection. It is foreseeable that commendable dispute prevention policies and efficient case management will likely increase States' compliance with this standard.

## NOTES

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3 *Enron v Argentina,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 88 <*https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf*> accessed 6 July 2020.

4 Gary Born and Marija Šeki, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp', in David Caron, Stephan Schill, Abby Smutny, and Epaminontas Triantafilou (eds) Practising Virtue: Inside International Arbitration (OUP Oxford 2015).

5 Honoré de Balzac, *Les Illusions perdues*, Paris, Gallimard, 1843, 730. This proverb is present in different cultures, for example: in Spanish language the expression '*más vale un mal acuerdo que un buen pleito*' is commonly used as well as in Italian the expression '*meglio un magro accordo che una grassa sentenza.*' Less used, yet present also in the German language ('*Ein magerer Vergleich ist besser als ein fetter Prozess*') and in Portuguese ('*mais vale um mau acordo que um bom pleito*').

6 See also Adam Raviv, 'Achieving a Faster ICSID' in Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*, (Leiden, Netherlands: Konindlijke Brill, 2015), at page 660, where he makes reference to lengthy investment arbitrations, including the Victor Pey Casado v. Chile saga, which span for more than two decades through numerous stages (revision, supplementary revision, and resubmission of the proceedings). Here is available a procedural history of this never-ending case: <*https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/98/2*> accessed 6 July 2020.

7 David A. Pawlak and José Antonio Rivas, 'Managing Investment Treaty Obligations and Investor-State Disputes: A Guide for GovernmentOfficials' in Thomas E Carbonneau, Mary H Mourra (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts*, (Austin, Wolters Kluwer Law & Business, 2008), 183.

8 Fact Sheet on Investor-State Dispute Settlement Cases in 2018 [IIA Issues Note, No. 2, 2019] (UNCTAD/DIAE/PCB/INF/2019/4), 4. <*https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf*> accessed 6 July 2020.

9 The ICSID Caseload – Statistics (Issue 2020–1) 13, <*https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf*> accessed 6 July 2020. Unfortunately, ICSID Statistics do not distinguish between when a case is settled or simply discontinued. A case is settled when the disputants have reached an agreement on the subject-matter of the dispute, whereas a case is discontinued when the disputants have simply agreed on the discontinuance of the proceeding, pursuant to ICSID Arbitration Rule 44. Anyway, the discontinuance of the proceeding cannot necessarily rule out *per se* that the parties have not reached a settlement on the dispute, as it allows the parties to keep the existence itself of a settlement confidential.

10 Jeswald Salacuse, *The Law of Investment Treaties,* (OUP 2015, 2nd edn), 406.

11 *Burlington Resources v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para 315. Emphasis in the original <*https://www.italaw.com/sites/default/files/case-documents/ita0106.pdf*> accessed 6 July 2020.

12 See, for example, Article 10(1) of the Switzerland-Hungary BIT about the Settlement of disputes between a Contracting Party and an investor of the other Contracting Party stipulates *in fine* "consultations will take place between the parties concerned," rather than the State has the right to carry out consultations with the investor.

13 ICSID Convention Article 25(1) *in fine*: 'When the parties have given their consent, no party may withdraw its consent unilaterally.'

14 Linos-Alexander Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4(1) EJIL, 349.

15 See for example, Article 10(1) of the 1988 Agreement between the Swiss Confederation and the Hungarian People's Republic on the Reciprocal Promotion and Protection of Investments.

16 See, for example Article 11(1) of the 2009 Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Spain on The Promotion and Reciprocal Protection of Investments.

17 See, for example Article 23, Section B, of the 2008 Treaty between the Government of the United States of America and the Government of the he Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment.

18 *Case concerning the Interpretation of the Air-transport Services Agreement between the United States of America and France*, Award, 22 December 1963 <*https://legal.un.org/riaa/cases/vol_XVI/5-74.pdf*> accessed date 6 July 2020.

19 Digest of United States Practice in International Law, (1978) 773–774 <*https://heinonline.org/HOL/LandingPage?handle=hein.intyb/duspil1978&div=1&src=home*> accessed date 6 July 2020.

20 *Murphy Exploration and Production Company International vs. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 <*https://www.italaw.com/sites/default/files/case-documents/ita0547.pdf*> accessed date 6 July 2020.

21 ibid, para 135.

22 ibid.

23 ibid, para 157.

24 *Kiliç naat thalathracat Sanayi Ve Ticaretanonim irketi vs Turkmenistan*, ICSID Case no. ARB/10/1, Award, 2 July 2013 <*https://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf*> accessed date 6 July 2020.

25 Ibid, para. 6.2.2.

26 *Ethyl Corporation vs Canada*, NAFTA-UNCITRAL Case, Award on Jurisdiction, 24 June 1998 <*https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf*> accessed date 6 July 2020.

27 ibid, paras 88 and 92.

28 ibid, para 92.

29 Article 31 (Reparation) on Articles on the Responsibility of States for Internationally Wrongful Acts: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

30 Ian A. Laird, Borzu Sabahi, Frederic G. Sourgens, Nicholas J. Birch, 'International investment law and arbitration: 2010 in review' in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010–2011* (New York, OUP, 2012), 99.

31 Rule 28(1) (Cost of Proceeding) of the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) reads as follows: "(1) Without prejudice to the final decision on the payment of the cost of the proceeding, *the Tribunal may*, unless otherwise agreed by the parties, *decide*: (a) *at any stage of the proceeding, the portion which each party shall pay*, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre; (b) *with respect to any part of the proceeding, that the related costs* (as determined by the Secretary-General) *shall be borne entirely or in a particular share by one of the parties*."

32 Article 42(1) (Allocation of costs) of the UNCITRAL Arbitration Rules (on which the Permanent Court of Arbitration ("PCA") Arbitration Rules are based) reads as follows: "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties". However, *the arbitral tribunal may apportion each of such costs between the parties* if it determines that apportionment is reasonable, taking into account the circumstances of the case.

33 "UNCITRAL arbitrations" are either ad-hoc or institutional arbitrations conducted under the UNCITRAL Arbitration Rules, whereas "ICSID arbitrations" are institutional arbitrations administered by the ICSID and conducted under the ICSID Convention and the ICSID Arbitration Rules.

34 Article 26(1) UNCITRAL Arbitration Rules: 'At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable good.'

35 Article 47 ICSID Convention: 'Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party.'

36 Rule 39(1) ICSID Arbitration Rules: 'At any time during the proceedings a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.'

37 Article 26(2) UNCITRAL Arbitration Rules in the relevant part: 'Such interim measures may be established in the form of an interim award.'

38 *Western NIS Enterprise Fund vs. Ukraine*, ICSID Case No. ARB/04/2, Procedural Order, 16 March 2006, paras. 5–8 <*https://www.italaw.com/sites/default/files/case-documents/ita0905.pdf*> date accessed 6 July 2020.

39 *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award in Resubmitted Proceeding, 31 May 1990, para. 174 <*https://www.italaw.com/sites/default/files/case-documents/italaw8885.pdf*> accessed date 6 February 2020; Jan Paulsson, Expert Opinion in *Phillip Morris v. Uruguay*, 27 February 2014 para 51 <*https://www.tobaccocontrollaws.org/files/uruguay/expert_reports_witness_exhibits/CWS-011%20Paulsson.pdf*> date accessed 6 February 2020.

40 Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 125 <*https://www.italaw.com/sites/default/files/case-documents/ita0076_0.pdf*> accessed date 6 July 2020.

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42 Berk Demirkol, "Redressing Wrongful Judicial Acts in Investment Treaty Arbitration," Judicial Acts and Investment Treaty Arbitration (Cambridge University Press 2018).

43 Jan Paulsson, Expert Opinion in *Chevron v. Ecuador*, 12 March 2012 paras 83–100 <*https://www.italaw.com/sites/default/files/case-documents/ita0176_0.pdf*> date accessed 6 February 2020.

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45 Jack J. Coe, Jr., 'Toward a complementary use of conciliation in investor-State disputes: A preliminary sketch' (2005) 12 Journal of International Law and Policy (University of California, Davis), 24.

46 "Investor–State Disputes: Prevention and Alternatives to Arbitration", (2010), UNCTAD Series on International Investment Policies for Development UNITED NATIONS New York and Geneva, 2010 p 65–98 <*https://unctad.org/en/Docs/diaeia200911_en.pdf*> accessed 10 July 2020. See also the presentation submitted by Peru during the Capacity Building Workshop on Investor-State Dispute Settlement Prevention and Management Washington, D.C., United States, on 3–6 October 2017<*http://mddb.apec.org/Documents/2017/IEG/WKSP1/17_ieg_wksp_006.pdf*> accessed 6 July 2020.

47 *Sistema de de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión* (SICRECI) established in 2006 by Law No. 28933. See Ricardo Ampuero Llerena, 'Peru's State Coordination and Response System for International Investment Disputes' (*International Institute for Sustainable Development,* 14 January 2013*)* <*https://iisd.org/itn/2013/01/14/perus-state-coordination-and-response-system-for-international-investment-disputes/*> accessed 10 July 2020.

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## COMPETING INTERESTS

DB often advocates for foreign investors in international investment arbitrations, therefore, may have a competing interest in supporting the views expressed in this article.

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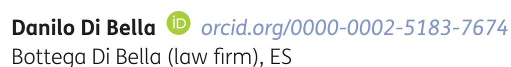
**Danilo Di Bella**  *orcid.org/0000-0002-5183-7674*
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TO CITE THIS ARTICLE:
Danilo Di Bella, 'Theorizing the Cooling-Off Provision as an Additional Standard of Investment Protection' (2021) 36(1) *Utrecht Journal of International and European Law* pp. 1–10. DOI: *https://doi.org/10.5334/ujiel.523*

Submitted: 27 November 2020 Accepted: 23 February 2021 Published: 10 March 2021

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