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Abstract

This paper is a study of the cooling-off or waiting period clauses embedded in the majority of Bilateral Investment Treaties. Based on an analysis of applicable legislation, investment arbitration case law and doctrine, this paper evidences the existence of three conflicting trends with respect to the existence and nature of any obligations arising out of the cooling-off period clauses. Interpreting article 31 of the Vienna Convention of the Law of Treaties convention this paper concludes that cooling-off period clauses involve a best efforts obligation by the parties to engage in good faith negotiations. To determine the nature of the said obligation and based on negotiation theory, this paper draws on the substantive and formal issues involved in investor-State conflicts. Finally, and contrary to the prevailing trend, this paper concludes that arbitral tribunals should resort to negotiation theory-focused-approaches when determining parties’ compliance with cooling-off period obligations, analyzing each case in a separate and flexible manner.
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1. Introduction

Investment treaty arbitration, even when considered in some doctrines as an Alternative Dispute Resolution (ADR) method, shares an array of features with normal litigation proceedings, as both are adversarial approaches decided by a third-party neutral.\(^1\) As a result of this situation, 90 percent of Bilateral Investment Treaties (BITs), the primary source for investment-treaty arbitration agreements, include in their texts what has been called a “cooling-off period”, also known as “waiting period”, –hereinafter used as synonyms—, under which a party seeking to initiate arbitration proceedings has to wait a previously-established period of time –mostly between three to twelve months— before filing a request for arbitration.\(^2\) For example, the text of Article VI(2) of the U.S.-Ecuador BIT reads:

> In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution (...).\(^3\)

Complementing this clause, Art. VI(3) establishes:

> Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned

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may choose to consent in writing to the submission of the dispute for settlement by binding arbitration (...)\(^4\)

As we can see from these provisions, the waiting period starts when the aggrieved party notifies the other about the existence of the controversy. This notification or “trigger letter” has to be sent to the correspondent signatory State stating the acts that the investor considers to have violated the State’s obligations under the BIT. \(^5\) This notification, as decided in *Western NIS Enterprise Fund v Ukraine* \(^6\) is paramount, since it signals the existence of a controversy to the State and provides with a general perspective of its content, thus permitting government officials to activate the channels necessary to attempt to negotiate with the investor.

The phrasing of the provision establishing a cooling-off period varies from BIT to BIT; however, scholarly works consistently establish that the main intention of the clause is to incentivize the parties to come together and try to negotiate an agreement that prevents the initiation of an arbitral proceeding. \(^7\) Scholars have also unanimously sustained that these consultations and negotiations between the parties have to be developed seriously and in good faith. \(^8\)

Nevertheless, arbitral tribunals have struggled when attempting to determine the nature of the obligations – if any—of waiting period clauses. Three trends have arisen.

\(^4\) *Id.* at art. VI(3).


\(^6\) *Western NIS Enterprise Fund v Ukraine*, ICSID Case No. ARB/04/2, Procedural Order, ¶5 (Mar. 16, 2006) (The Tribunal held that: “proper notice is an important element of the State’s consent to arbitration, as it allows States, acting through its competent organs, to examine and possibly resolve the disputes by negotiations.”).


The first one establishes that during the cooling-off period, parties have a positive obligation to resort to negotiations so as to try to reach a settlement that prevents arbitration. The second trend asserts that the cooling-off periods are facultative, and that, therefore, parties can decide whether or not they want to resort to other forms of ADR to avoid arbitration. However this trend does bind the parties to wait for the previously fixed period of time before requesting the initiation of the arbitration proceedings. The third trend challenges the existence of an obligation to negotiate or wait by arguing that in cases where the negotiations have become futile, parties can skip the cooling-off period and resort directly to arbitration.

In all cases of dispute over the significance of the waiting period clauses, arbitral tribunals have used litigation-focused approaches to reach their conclusions. The main purpose of the present paper is to bring a new ingredient to the table, by studying the cooling-off period institution through the lens of negotiation theory. This paper shows how negotiation-focused-approaches can assist arbitral tribunals in deciding upon parties’ compliance with the waiting-period clauses by providing a solid procedural and substantive framework with regard to investor-State conflicts.

To reach this objective, the first section of this paper analyzes the current state of thinking about the cooling-off period. Through a study of the case law, this segment addresses the different and sometimes contradictory trends and theories arbitration tribunals have relied on when dealing with issues regarding the waiting-period clauses under a BIT, especially with regard to their nature, effects and scope of application. This

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9 See infra section 2.1
10 See infra section 2.2
11 See infra section 2.3
12 See infra section 2.3
section emphasizes the nature of the arguments raised by tribunals when dealing with situations where parties have claimed a breach of obligations under waiting-period clauses.

The second section of this paper studies the investor-State conflicts through a perspective founded in negotiation theory. Based on real cases, this section analyzes the common barriers investor-State conflicts deal with when struggling to reach a negotiated agreement. This section also addresses the main issues that parties to an investor-State conflict should consider with regard to the process and substance of the negotiation.

Finally, the third segment proposes ways the tribunals should address and evaluate the scope of the cooling-off period pursuant to the application of the framework developed in section two. Combining the study of doctrine and investment-treaty arbitration awards, this section will analyze the nature of the obligation existent in cooling-off period clauses and the benefits of resorting to negotiation principles while construing them.

2. The waiting periods: a legal perspective

As expressed above, investment-treaty arbitration case law has not been unanimous when deciding upon the scope of application of the cooling-off periods. Interpretations given by arbitral tribunals have varied in significant ways. However, I find that a common factor can be found in all of the decisions that have dealt with issues related to this institution: none of them has analyzed the negotiation-related duties from a specialized perspective, but rather through a litigation-focused approach. Under this section, I will explore the different tendencies that arbitral tribunals have followed when
having to decide upon the nature, effects and scope of application of the waiting periods under a controversy covered by a BIT.

2.1. Consultations and negotiations as an obligation, jurisdictional effects

A number of decisions dealing with disagreements between the parties with regard to the ambit of the cooling-off period have recognized that BIT clauses containing them oblige parties to attempt to negotiate their treaty-related controversies before filing a request for arbitration. For example, in *Murphy Exploration & Production Company International v. Ecuador* the Tribunal established that the cooling-off period is “something much more serious” than a “mere formality”: it is “an essential mechanism enshrined in many bilateral investment treaties, which compels parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.”

Under this theory, BITs including a waiting period provision establish a two-tier dispute settlement clause, under which the first tier –negotiation— has to be exhausted in order to access the second –arbitration. Parties’ failure to comply with this obligation trumps the possibility of their request to initiate arbitration, on the grounds that the arbitral tribunal will lack jurisdiction to decide on the merits of the controversy. In contrast, if the tribunal considers that parties have complied with their obligation under

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14 *See Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶149 (Dec. 15, 2010), (when the Tribunal says: “This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, “a procedural rule” or a “directory and procedural” rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules”).
the BIT by engaging in unsuccessful negotiations after the notification of a controversy during the time fixed in the treaty, it will proceed to rule on the merits of the case.\(^\text{15}\)

As the above-cited decisions show, the judgment on whether the obligation established under the cooling-off period was fulfilled ultimately relies on the judgment of the tribunal, which has to base it on the evidence provided by the claimant. This procedural burden on the claimant raises the question of whether the obligation under study really rests on both parties or just the claimant—in most cases the investor. This is so, provided that is not uncommon to find a case where even when one of the parties, after notifying the other of the existence of the controversy, has tried to start a negotiation, but has received no response at all.

In my opinion, the obligation to engage in negotiations when a controversy arises under the treaty, reaches both parties in light of the commitments to which both signatory States—and the investors in addition—are bound under the BIT. However, the claimant in an arbitration proceeding will have a procedural burden to demonstrate the fulfillment of that obligation, which, in the case of a reluctant State, could be done by means of showing the attempts conducted by the claimant to reach the respondent.\(^\text{16}\)

There is still a doubt remaining with regard to the legal nature of the obligation enshrined in the cooling-off period clause. An argument can be made that the case law deciding on the matter\(^\text{17}\) enlighten us as to the fact that the obligation under analysis falls under the category of “best efforts” or “means” covenants, in contrast with provisions

\(^{15}\) See AMT v. Zaire, Award, 21 February 1997, 36 I.L.M. 1531, 1545 (1997), See also Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶55 (Dec. 8 2003).
\(^{16}\) Kılıç İnşaat Ithalat Ihracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, ¶ 6 (Jul 2, 2013).
\(^{17}\) See LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 96 (2004).
requiring one of the parties a specific result under a contractual relation.\textsuperscript{18} Therefore, as stated above, if the tribunal considers that the parties had seriously engaged in consultations and negotiations without success, it will ultimately consider that the duty to recourse to negotiation has been fulfilled.

2.2. Consultations and negotiations as a discretionary power. Requirement to wait for the fixed period of time.

What will happen if the party claiming a breach from the host State does serve notice to the correspondent authorities about the existence of the controversy but fails to conduct any attempt to engage in negotiations? Will an arbitration tribunal facing this situation deny its authority to rule on the merits of the case arguing lack of jurisdiction?

A case deciding this situation has not arisen yet. However, from the decision in the NAFTA case \textit{Ethyl Corp v Canada}\textsuperscript{19} we can presume that the answer to this question is negative. The \textit{Ethyl Corp} case involved a controversy between the parties in which \textit{Ethyl Corp} believed Canadian government’s position to be narrow. This situation led the claimant to file a request of arbitration five days after the trigger letter.\textsuperscript{20} In the decision on jurisdiction based on the futility argument, the Tribunal asserted competence over the claim, but it also held that “[h]ad Ethyl first awaited Royal Assent to Bill C-29, and then bided its time another six months, the Tribunal would not have been required to deal with this issue”\textsuperscript{21}. Building on this reason, the Tribunal ordered Ethyl to pay for the costs of

\textsuperscript{18} See \textit{Murphy Exploration and Production Company International v. Republic of Ecuador}, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶135 (Dec. 15, 2010).
\textsuperscript{20} See Schreuer \textit{supra} note 7, at 234.
the proceeding related to the discussion upon the existence and fulfillment of the cooling-off period obligation.\textsuperscript{22}

From the plain reading of the decision, it appears that the \textit{Ethyl Corp} Tribunal considered that the cooling-off period did not carry an obligation to attempt to negotiate seriously and in good faith, but only a procedural requirement that the parties wait for the period of time fixed by the signatory states in the BIT to pass.

Under this tendency, engaging in negotiations after a controversy arose under the scope of the BIT is discretionary for the party seeking to initiate arbitration proceedings, whose only obligation before filing the correspondent request, will be to wait for the time agreed upon in the BIT to run. Parties’ failure to respect this fixed period before requesting the initiation of an arbitration proceeding will result in the tribunal’s lack of jurisdiction to hear the merits of the case. Citing the decision in \textit{Ethyl Corp v Canada}, the Arbitral Tribunal in \textit{Enron v Argentina} explained:

\begin{quote}
\textit{(…)} the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.\textsuperscript{23}
\end{quote}

The Tribunal was clear to determine the binding authority of parties’ obligations under the cooling-off period clauses, but limited it to a temporal application, where they were


only required to wait for the fixed period of time to pass but not to engage in consultations and negotiations.

2.3. Futile negotiations, procedural nature of the waiting periods

As the contradictory trends shown above reveal, there is no consensus in investment-treaty arbitration case law on how the cooling-off period, ought to be interpreted. Even when the extant tendencies are strongly grounded, arbitral tribunals dealing with the same issues have recently taken a different path when ruling that parties under a BIT involving a cooling-off period need not to engage in negotiations, nor wait for the fixed period of time to pass by, so long as they prove that negotiations are futile, and, thus, it would not be efficient to force parties into complying with the waiting period.24

Supporters of this position have directed their efforts to rediscover the nature of the waiting period’s scope of application. Challenging the jurisdictional nature proposed by the Murphy and SCS decisions, recent arbitral awards have contended that cooling-off periods agreed under the scope of a BIT only have a procedural nature rather than a jurisdictional one; therefore, failure to comply with them cannot trump a party’s right to enforce the arbitration agreement and initiate the correspondent proceedings.25

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25 See, e.g., SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 184 (Aug 6 2003) (when establishing: “Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction ... there was little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.”); See also Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, ¶187 (Sep. 3, 2001).
The practical sense of this line of argumentation, as explained by REED when commenting the *Biwater Gauff v. Tanzania*\textsuperscript{26} case, is that requiring parties to engage in negotiations “would have curious effects”, including “forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason” and “forcing the claimant to recommence an arbitration started too soon”.\textsuperscript{27}

Some scholars, however, have advocated for a more conservative perspective, which, without denying waiting periods’ great importance as part of the dispute settlement mechanism agreed under the treaty – and perhaps assuring its inherent jurisdictional nature—, has left the door open for an exception when consultations between the parties are proven futile and impossible.\textsuperscript{28}

There has been very little case law rebutting the futility approach. Only a few cases can be counted in which the tribunal expressly denied the futility defense and established that the cooling-off period had been breached denying the tribunal’s jurisdiction to decide on the merits of the case.\textsuperscript{29} For example, in *Murphy Exploration & Production Company International v Ecuador* the Tribunal held:

(...) the obligation to negotiate is an obligation of means, not of results. There is no obligation to reach, but rather to try to reach, an agreement. To determine whether

\textsuperscript{26} *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (Jul 24, 2008).

\textsuperscript{27} See REED *supra* note 17, at 97; see also *Wena Hotels Ltd. v. Arab Republic of Egypt*, Decision on Jurisdiction, 25 May 1999, 41 I.L.M. 881 (2002) stating: (“As Respondent appropriately noted, even if these procedural objections were granted, they could have been easily rectified and would have had little practical effect other than to delay the proceedings. Accordingly, the Tribunal accepts Respondent’s offer to forgo these objections.”).

\textsuperscript{28} See REED *supra* note 17, at 238.

\textsuperscript{29} See, *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, ¶ 90-93 (Jun 21, 2012); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶135 (Dec. 15, 2010); *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, § 6 (Jul 2, 2013).
The obligation to consult and negotiate falls on both parties, and it is evident that there were none in this case (…). This decision has been criticized by legal scholars, who believe it to be a type of “one hit wonder” award that will not deter future investors from resorting to the arbitration remedy directly without exhausting the cooling-off period first, as international arbitration has proven to be a very efficient method to solve investor-state international disputes when they become complicated.

However, the “one hit wonder” decision was further developed by the award in the case Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan, where the Tribunal, building on the exhaustion of local remedies’ tier, limited the interpretation of the futility defense by stating that investor’s unilateral interpretation of the term “futile” cannot trump the host State’s condition stated in the offer to arbitrate expressed in the BIT.

Additionally, according to RUFF the Tribunal determined a strict test for the claimant arguing futility (as a reason for not complying with the agreed precondition to request the initiation of the arbitral proceedings). The test is composed of three prongs. First of all, claimant has to prove an effortful attitude towards complying with the tier, in this case to engage in active negotiations. This seems to agree with the previously cited

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30 Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶135 (Dec. 15, 2010).
31 See Deutsch supra note. 5, at 604.
32 Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, § 6 (Jul 2, 2013)
34 Id. at 38.
statement made by the Tribunal in the *Murphy* case.\textsuperscript{35} Second, the burden to prove the futility of the agreed precondition lays on the claimant’s shoulders and requires demonstration of the unavailability or futility specifically under the circumstances and with relation to the matters in controversy\textsuperscript{36}—in this case with regard to the “trigger letter”. Finally, the evidence of futility cannot rely on external or third party reports about failures in other cases, but that a personalized demonstration was required.\textsuperscript{37}

In conclusion, an argument can be made that arbitration tribunals dealing with cooling-off periods have been unable to reach a consensus with regard to their nature and application.\textsuperscript{38} However, it is undisputed that when deciding on this topic, none of them has considered the negotiation as a complex and principled area of study. The arguments wielded by both the parties and the arbitral tribunals have focused on legalese – the discussion between the procedural or jurisdictional nature of the waiting periods— rather than on the principles of negotiation.\textsuperscript{39}

In the next section, we will address investor-State conflicts and the cooling-off periods from a negotiation perspective. There, we will draw a proposed framework that develops a specialized framework to address the waiting period’s scope of application and the way the “best efforts” or “best means” obligation fulfillment can be evaluated.

\textsuperscript{35} See *supra* note 30.
\textsuperscript{36} *Id.* at 38.
\textsuperscript{37} *Id.* at 38.
\textsuperscript{38} *Id.* at 37.
\textsuperscript{39} See *supra* sections 2.1-2.3.
3. Cooling-off period: a negotiation perspective

The ambiguity with regard to the interpretation of the cooling-off or waiting period clauses starts with their denomination.\textsuperscript{40} This ambiguity is worsen of due to the phrasing of cooling-off clauses in the BIT, which seem to be more interested in deterring parties from taking the arbitral path rather than to incentivizing the creation of negotiated agreements.\textsuperscript{41} As noted above, this period is not merely designed to cool-off or to wait. Contrarily, it requires positive efforts from the parties to try to reach a settlement.\textsuperscript{42} These situations, together with the tribunals’ failure to consider specialized criteria on negotiation, have contributed to arbitral awards to decide investor-State cases relying on litigation-focused approaches.

3.1. Investor-State conflicts: current state, nature and common barriers to a negotiated agreement.

Negotiation and ADR have demonstrated great efficiency as methods to solve conflicts arising out of a Bilateral Investment Treaty.\textsuperscript{43} Unfortunately, due to the fact that negotiated settlements conducted before the start of the arbitration process—mainly during the cooling-off period—are covered under the confidentiality obligation, no data exists to determine their efficiency as of out-of-arbitration settlements.\textsuperscript{44} However, it is fair to imply that the number of them in the last two decades outnumbers the estimated number total of 229 arbitrations that have been instituted before ICSID.\textsuperscript{45}

\textsuperscript{40} See Schreuer supra note. 7, at 238.
\textsuperscript{41} See UNCTAD supra note. 8, at 41.
\textsuperscript{42} Id.
\textsuperscript{43} Ucheora O. Onwumaegbu; The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience 1 TDM 1, 1 (2007).
\textsuperscript{45} Id.
Furthermore, as Schreuer points out, negotiation is possible not only before the institution of the arbitral proceedings, but also when arbitration proceedings have started. Moreover, settlement once arbitration proceedings are pending has demonstrated notable efficiency, considering that one-third of the arbitrations requested before ICSID resulted in a negotiated agreement rather than an arbitral award.

Still, negotiations conducted before the institution of the arbitration are thought to be more effective than those established once the proceedings commenced. This is because the BIT’s cooling-off period has a practical intent, which is to help parties reach a negotiated agreement before positions are revealed publicly and become entrenched.

Additionally, in my opinion, once an arbitral process has started, parties tend to focus more on the positions they would legally defend in it—in a zero-sum approach—, rather than in a collaborative approach for the purpose of reaching a win-win solution.

Furthermore, I consider that even when an agreement is reached while the arbitration process is pending, the outcome will be influenced by the positions parties are taking in their respective briefs and will not necessarily accomplish their interests and could even cost them more than an agreement reached before the request of arbitration. Moreover, this situation tends to be aggravated when an arbitral tribunal rendered an award and parties later come close to reach a settlement agreement.

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48 See Reed Supra note. 17, at 96.
49 See Reed Supra note. 17, at 96.
50 See infra note. 54.
For example, in the famous *Pyramids Case*\(^{51}\) which after getting through an arbitration in the International Chamber of Commerce, the courts of France and an ICSID arbitration resulted in an award for the plaintiff for US$ 27.6 million and US$ 5 million in costs and fees.\(^{52}\) The award was later moved for setting aside proceedings in the courts of the seat of arbitration.\(^{53}\) However, what the case doesn’t tell us is that the parties reached a US$ 10 million negotiated settlement before the institution of the arbitral proceedings, but was repudiated in a last-minute call by the Egyptian Prime Minister for political reasons.\(^{54}\) Finally, after the award was rendered, parties were able to reach a negotiated agreement of US$ 17.5 million.\(^{55}\)

The example of *Pyramids case* shows us that investor-State conflicts are complex controversies. Additionally investor-State conflicts include certain special nature, factors and barriers, which have to be considered when trying to reach a negotiated agreement. In the next section we will deepen in these particularities.

### 3.1.1. Nature of investor-State conflicts under a BIT

As SALACUSE suggests, investor-State controversies are often more political than legal.\(^{56}\) This phenomenon arises considering the participation of other actors such as the public, political groups and the media; which are often fully involved and can influence the decision-making process of government officials in charge of negotiating a conflict of

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\(^{54}\) See Salacuse supra note. 44, at 150.


\(^{56}\) See Salacuse *supra* note. 44, at 149.
this nature. Furthermore, decision makers are also worried about the consequences of their choice to settle, since it is not uncommon to for this third actors to imply the existence of corruption, “selling out to foreigners”, or even negligence.

The *Pyramids Case* cited above is a clear representation of this situation. The facts of the case included an investment project proposed by Southern Pacific Properties to build a luxury resort near the Gyza Pyramids. The government initially approved the project; however, due to external pressure by the opposite political groups and the media, it was finally cancelled. This provoked the controversy in which first a negotiated agreement was reached; but, as noted above, the agreement was eventually repudiated by the Egyptian Prime Minister, who preferred to submit it to the decision of an arbitral tribunal rather than to be subject of criticism and discredit from third parties involved.

All the above-mentioned examples are, to varying degrees, examples of barriers to conflict resolution. A thoughtful negotiator or third party participating in the facilitation should assess these barriers before when addressing investor-State controversies.

### 3.1.2. Common barriers to a negotiated agreement in investor-State conflicts

As Mnookin et al. propose, when a conflict arises, parties often must deal with barriers to reach negotiated agreements namely: strategic, physiologic and structural barriers.

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57 See Salacuse *supra* note. 44, at 149
58 See Salacuse *supra* note. 44, at 149
59 See Salacuse *supra* note. 44, at 150
60 See Salacuse *supra* note. 44, at 150
61 See Salacuse *supra* note. 44, at 150
62 See ROBERT H. MNOOKIN ET AL, BARRIERS TO CONFLICT RESOLUTION 3-10 (1995)
Strategic barriers arise out of parties’ tactics involved when dealing with a controversy including for example; a unilateral position looking to reach immediate gains and results, a party’s failure –because of fear or other causes— to reveal information necessary to determine his interests in the negotiation or even the use of intimidating actions to influence the other party at the negotiation table. Most of the times, these barriers arise from parties’ intent to maximize their slice of the pie. In investor-State conflicts, these barriers can be seen in parties’ reluctance to make concessions as a tactic of not showing weakness to the other party or anchoring the negotiation very high since the beginning so as to reach a beneficial agreement.

Then, how strategic barriers can be overcome? Skillful negotiators or even neutral third facilitators will help parties involved to switch from focusing on the size of the slice to concentrating in maximizing the pie size. This could be fulfilled by digging into the parties’ real interests, needs and priorities; and looking for creative combinations in which parties can syndicate their resources and opportunities to reach more favorable outcomes.

Psychological barriers on the other hand, relate to “cognitive and motivational processes of human beings” that influence the way parties interpret the conflict and deal

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63 Id.
64 Id at 8
65 See Salacuse supra note. 44, at 159
66 See MAX BAZERMAN, NEGOTIATING RATIONALLY 43 (1994)
67 See MNOOKIN supra note 62, at 22, See also section 3.1.4.2.
68 See MNOOKIN supra note 62, at 22
69 See Salacuse supra note. 44, at 159
with emotional ingredients present in the negotiation, such as, feelings of gain or loss\textsuperscript{70} and perceptions of the legal culture of the parties involved.\textsuperscript{71}

In investor-State conflicts, these barriers can be seen when there is a history of hostility between the investor and the government of the host State\textsuperscript{72}, as was the case in the \textit{Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador}\textsuperscript{73} with relation to a previous arbitration between the same parties.\textsuperscript{74} As a result of that said previous case, the investor firmly believed there was a political persecution against the company; not only by the Ecuadorian government, but also from popular indigenous movements who claimed the contract cancellation and the subsequent exit of the company form Ecuador.\textsuperscript{75}

Also, from the \textit{Pyramids Case}, it follows that there was a psychological barrier shown in the Prime Minister’s decision to submit the controversy to arbitration so as to avoid any retaliation by third parties involved.\textsuperscript{76} Certainly, the Prime Minister feared that a settlement with Southern Pacific Properties could cause a collateral damage in the public opinion, which would have affected his actual government and political career.\textsuperscript{77}

When dealing with these types of barriers negotiators pursuing a negotiated agreement will have two consider two basic insights. The first one is to assess the

\begin{itemize}
\item \textsuperscript{70} See Salacuse supra note. 44, at 158.
\item \textsuperscript{71} See ROBERT H. MNOOKIN, SCOTT R. PEPPE, & ANDREW S. TULUMELLO. BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 156 (2000)
\item \textsuperscript{72} See Salacuse supra note. 44, at 159.
\item \textsuperscript{73} Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct, 5, 2012).
\item \textsuperscript{74} Occidental Exploration and Production Company v The Republic of Ecuador, LCIA Case No. UN3467, Final Award (Jul. 1, 2004).
\item \textsuperscript{76} See Salacuse supra note. 44, at 159.
\item \textsuperscript{77} See Salacuse supra note. 44, at 159.
\end{itemize}
cognitive and emotional processes that affect the already existent strategic barriers.\textsuperscript{78} The second is to understand that these barriers can transform in structural barriers as a counterforce to the frustration felt by one of the parties.\textsuperscript{79} An efficient way to overcome these barriers requires negotiators third neutral facilitators to help parties involved to understand that past negative sentiments need to be defeated so as to reach future possible gains by a negotiated agreement.\textsuperscript{80} Useful tactics to reach this outcome include empathy – putting in the other’s shoes— and assessing the costs associated with other choices different from negotiating.\textsuperscript{81}

Finally, structural barriers are the ones affecting the basic organization of parties involved in a specific controversy; mainly, with regard to the commitment element of the negotiation – who has the authority to make the agreement.\textsuperscript{82} Then, these barriers reflect that conflicts do not involve the parties only, but also other individuals and other interested groups.\textsuperscript{83} Political constraints, bureaucratic hindrances, red tape and other formal obstacles to reach an agreement are examples of structural barriers.\textsuperscript{84}

In investor-State conflicts these barriers are common considering that the decision making process involves more than one Ministry in the host State.\textsuperscript{85} For example, in the \textit{Pyramids Case} the political environment opposing the project and the pressure by divergent political parties in the legislative branch were certainly a structural barrier for

\begin{footnotesize}
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\item \textsuperscript{78} See MNOOKIN supra note 62, at 10-11.
\item \textsuperscript{79} See MNOOKIN supra note 62, at 10-11.
\item \textsuperscript{80} See MNOOKIN supra note 62, at 22.
\item \textsuperscript{81} See MNOOKIN supra note 62, at 23. See also section 3.1.4.1.
\item \textsuperscript{82} See Salacuse supra note. 44, at 159.
\item \textsuperscript{83} See MNOOKIN supra note 62, at 19.
\item \textsuperscript{84} See MNOOKIN supra note 62, at 3-10.
\item \textsuperscript{85} Barton Legum, The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward A Complementary Use Of Conciliation In Investor-State Disputes - A Preliminary Sketch' \textit{1} TDM \textit{2} (2007).
\end{itemize}
\end{footnotesize}
the negotiation process conducted in the first place.\textsuperscript{86} A skillful tactic to overcome this barrier will be to ensure that parties participating in the negotiation have sufficient authority, knowledge of the controversy and willingness to search for negotiated solutions.\textsuperscript{87}

In conclusion, as we can conclude from these examples, strategic, psychological and structural barriers might arise in investor-State conflicts. Therefore, in order to reach a successful outcome, negotiators involved can resort to the specialized techniques shown above to overcome them. However, structuring an orderly process and developing skillful strategies with regard to the substance of the negotiation is the cornerstone of a beneficial negotiated outcome. Here we will analyze a suggested procedural and substantive framework for that purpose.

3.1.3. Investor-State negotiation: process

Due to the fact that investor-State conflicts have a particular nature, parties may improve their chances of success by assuring the conduction of an orderly process where communication between them is correctly directed.\textsuperscript{88} For this purpose, it is useful for parties to determine previously fixed framework to govern the negotiation process.

Among others, this framework should include basic procedural rules of order as for example, privacy, confidentiality, venue and agenda for the meetings, the objectives of the reunion form each part, the possibility of parties to caucus separately. This will help all parties to be on the same page with regard to the mechanics of the negotiation

\textsuperscript{86} See Salacuse \textit{supra} note. 44, at159.
\textsuperscript{87} See MNOOKIN \textit{supra} note 62, at 23. See also section 3.1.3.
\textsuperscript{88} See Salacuse \textit{Supra} note. 44, at 151.
and therefore, to have a same north and to know how to proceed and what to expect during the negotiation process.

Also, considering the intrinsic existence of structural barriers in these types of conflicts, especially from the State’s side due to its complex structure\textsuperscript{89}, parties need to ensure the existence of a correct process of communication. A first step towards this goal can be reached by designation by each party of an authorized person, collegiate body or governmental agency –preferably a specialized one— to be in charge of managing the negotiation process,\textsuperscript{90} and if necessary to have the sufficient authority to close a negotiated agreement.\textsuperscript{91} For example, Peruvian governmental agency Proinversión is in charge of the promotion of investment and has sufficient decision-making powers with regard to issues in which foreign investors are involved. Furthermore, in the case where these types of agencies don’t have expressed authorization to reach an agreement on behalf of the State, it will be helpful to grant them that power so as to prevent the dilution of the positive work conducted by parties in the negotiation process.

This, alongside with techniques studied above\textsuperscript{92}, will help to the elimination of this barrier, while at the same time guaranteeing the concentration of the negotiation in personalized and authorized bodies, which at the same time, will avoid any intervention of external participants that many times delay the negotiation or worsen conflicts with investors.\textsuperscript{93} For this reason, it is also important to inform governmental agencies involved or potentially involved in the investor activities about the State’s treaty obligations and

\textsuperscript{89} See Salacuse supra note. 44, at 159.
\textsuperscript{90} See Salacuse supra note. 44, at 166.
\textsuperscript{91} See Legum supra note. 85, at 2.
\textsuperscript{92} See supra note. 87.
\textsuperscript{93} See Salacuse supra note. 44, at 166.
the effect of their breach. 94 Another important factor to assure a great communication process by the parties involved in the negotiation—which relates to the definition of objectives previously mentioned—is to enlist the issues to be discussed during the negotiations, since this will facilitate parties’ discovery and later focus on each other’s main interest in the negotiation. 95

3.1.4. Investor-State negotiation: substance

3.1.4.1. Evaluating your BATNA and the reservation value

With regard to the substance of the negotiation, parties in an investor-State conflict under a BIT should initially analyze their BATNA—best alternative to a negotiated agreement—which in both cases, is submitting their controversy to the decision of an arbitral tribunal. Certainly, arbitration has proven to be a consistent method to solve disputes of this nature. 96 However, in studying their alternatives, parties should also analyze the disadvantages of arbitration before deciding to drop the idea of settling the controversy through negotiation.

First of all, arbitration is a costly method for resolving disputes that involves administrative costs charged by institutions administering the arbitration, arbitration fees and attorney’s fees. 97 Secondly, arbitration is a process that takes time to reach a final result, which, even when final, sometimes has to deal with another adversarial process to enforce the decision. 98 Finally, arbitration, like a trial, often destroys the relation existent

94 See Salacuse supra note. 44, at166.
95 See Salacuse supra note. 44, at166.
96 See Deutsch Supra note. 5, at 604.
98 Id.
between the parties, which in many cases took a lot of time and resources to be built and that can be saved through the use of other ADR.\textsuperscript{99}

Failure to conduct this assessment will result in an unfavorable outcome for the parties as was shown in the \textit{Pyramids Case}.\textsuperscript{100} Another example is the case of Argentina, who after the 2002 crisis—in which Argentina experienced hyper-inflation, devaluation of currency, collapse of financial institutions, public trade deficit and massive nationalizations of different economic sectors—was party to thirty two investment-treaty arbitration claims, with the two first awards totaling more than US$ 300 million, without considering the other thirty claims, the costs incurred when building the contractual relationship with the claimants and the lost of international credibility as a country attracting investment.\textsuperscript{101}

A case with a positive outcome in this regard, was the famous \textit{Dabhol Project}, which involved US$ 2 billion investment conducted by the U.S. Enron Corp. in India through a contract with the Maharashtra State Electricity Board by which Enron was to produce electricity purchased in its totality by Maharashtra.\textsuperscript{102} When a new government reached the power, it cancelled the project arguing it to be contrary to India’s interests.\textsuperscript{103} As a result, Enron brought a claim in arbitration.\textsuperscript{104}

\textsuperscript{99} See Salacuse \textit{supra} note. 44, at 153.

\textsuperscript{100} See \textit{Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Supra} note. 33 (Egypt ended up agreeing to pay SPP US$ 17.5 million dollars as a way of settlement after the Tribunal awarded US$ 27.6 million for damages plus US$ 5 million in costs and fees to SPP; however, before the initiation of the arbitral proceedings parties previously reached a US$ 10 million agreement, but the Egyptian Prime Minister preferred to go to arbitration.).


\textsuperscript{103} Id. at 1351

\textsuperscript{104} Id. at 1353
The evaluation of their BATNAs led both parties to an agreement. On Enron’s side, after evaluating the possibility of investing in other projects in India it concluded that its relationship with the country was more favorable than an award. Likewise, after Enron cut Maharashtra’s power supply, Maharashtra saw that no third local or international party would be interested in continuing the project, and that they would be forced to face a US$ 300 million dollar arbitration claim, which is why they become more open to look to its real interests and further reaching for a negotiated agreement.105

Finally, as we can attest from the Dabhol Project case, by assuring a correct evaluation of the BATNA’s costs, parties guarantee a precise determination of the reservation value—the minimum amount to be accepted by a party before deciding to leave the negotiation table—. This situation also helps to avoid a party having unrealistic expectations or overestimating their arbitration claim.

3.1.4.2. Resorting to criteria and creating value (making the pie bigger)

In a negotiation based in principles, as MNOOKIN says, value creation means “reaching a deal that, when compared to other possible negotiated outcomes either makes both parties better off or makes one party better off without making the other party worse off.”106 In other words, value creating refers to a process were parties work together to maximize the benefits—or make the pie bigger— they can get from a negotiated agreement. To reach this outcome parties often need to resort to criteria before proposing settlement formulas.107 By resorting to criteria I mean that parties should consider

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105 See Salacuse supra note. 44, at 167-68.
106 See MNOOKIN supra note. 72, at 12.
objective standards when promoting a negotiated agreement so as to avoid any unilateral perception by each of them.  

As an example, we can cite the case between Vattenfall, a Swedish state-owned electricity company, and Polskie Sieci Elektroenergetyczne ("PSE"), a Polish integrated electricity company. The facts of the case included an energetic crisis in Poland, where PSE, as the entity in charge of providing electricity, fearful of scarcity, entered into a contract with Vattenfall who was willing to develop an export market for electricity. The contract established Vattenfall’s obligation to invest and build a US$300 million undersea interconnector connecting both nations. As consideration, PSE obliged itself to buy the entire production of electricity from Vattenfall during a period of twenty years. 

The contract worked perfectly the first decade, but then, because of Poland’s electricity oversupply and consequent lowering of prices, the Polish electricity market changed dramatically. This hardship situation made the contract economically unviable for PSE. As a result, PSE reached Vattenfall in order to renegotiate the contract, but they didn’t reach an agreement, apparently because parties’ contended positions –PSE asked for a diminution in price. Finally, with help from an ICSID conciliator, parties

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108 Id.
110 Id.
111 Id.
112 Id.
114 Id.
115 Id.
were able to see options that created value, and therefore reached a win-win solution, where the excess of production was to be sold in Sweden.\textsuperscript{116}

3.1.5. What about mediation?

According to Onwuamaegbu, there is no reason why, if mediation or conciliation have been successful methods for dispute in other contexts, they couldn’t be applied to investor-State conflicts.\textsuperscript{117} In fact, the author proposes the creation of a mediation system under the sponsorship of the World Bank for ICSID filed arbitrations which will focus on a “voluntary process allowing parties to discuss their differences confidentially with the help of an independent third party, who may or may not have subject-matter expertise, with a view to arriving at an amicable resolution of the dispute.”\textsuperscript{118}

In my opinion, the presence of a mediator in investor-State conflicts will surely help parties to reach beneficial agreements, considering that a mediator could facilitate the elimination of the above-mentioned barriers and also support parties in setting an orderly process and conducting a fruitful negotiation in the substance. However, that would certainly depend on the phrasing of the dispute settlement clauses under the BIT, which as the Model U.S. BIT,\textsuperscript{119} should include a provision expressly allowing the use of other ADR during the cooling-off period.\textsuperscript{120}

In essence, a successful negotiator in an investor-State conflict will necessarily have to consider certain formal and substantive principles to facilitate its settlement

\textsuperscript{116} Id.
\textsuperscript{117} See Onwuamaegbu, supra note. 43, at 1.
\textsuperscript{118} See Onwuamaegbu supra note. 43, at 1.
\textsuperscript{119} 2004 US Model Bilateral Investment Treaty, art. 23, \url{http://www.state.gov/documents/organization/117601.pdf} (establishing: “[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.”).
\textsuperscript{120} See Munir A.F.M. Maniruzzaman, Resolving International Business and Energy Disputes in Asia - Traditions and Trends 5 TDM 1, 16 (2011).
through a negotiated and more beneficial agreement.\textsuperscript{121} Also, a mediator can help to maximize the process’ efficiency.\textsuperscript{122} However, in any case, an investor-State conflict should not be seen as a heavy burden, but rather a positive situation from which, if managed correctly, both parties can have a substantial gain\textsuperscript{123} from innovating in commercial, social and political sectors\textsuperscript{124}, renegotiating more beneficial agreements\textsuperscript{125}, investment incentivizing\textsuperscript{126}, and, in my opinion, fortifying the relation between the parties.

4. What should arbitral tribunals do?

As we were able to attest from the various theories expressed in section two of the present paper, it seems investment-treaty arbitration case law is still undefined with regard to cooling-off period clauses’ nature and effects.\textsuperscript{127} In this regard, tribunals have failed to determine if the cooling-off period actually entails an enforceable obligation of the parties to engage in negotiations seriously and in good faith.\textsuperscript{128}

In my opinion, denying the nature of legal and enforceable obligation to the cooling-off period will necessarily contradict art. 31 of the Vienna Convention of the Law of Treaties. This provision when referring to the interpretation of international treaties, establishes the obligation parties have to construe treaty provisions safeguarding the principle of good faith and insuring that the “meaning to be given to the terms of the

\textsuperscript{121} See Salacuse \textit{supra} note. 44, at 160.
\textsuperscript{122} See Onwuamaegbu \textit{supra} note. 44, at 1.
\textsuperscript{124} See Franck \textit{Supra} note. 101, at 174.
\textsuperscript{125} Kevin E. Joyce, \textit{Stop the Fight Without Throwing in the Towel}, LEGAL MGMT, 58–60 (2002).
\textsuperscript{126} Id.
\textsuperscript{127} See \textit{supra} sections 2.1-2.3.
\textsuperscript{128} See \textit{supra} sections 2.1-2.3.
treaty [will respect] their context and the light of its object and purpose.” It is my belief that, when signatory states of BITs, drafted cooling-off period clauses with mandatory phrases as “should initially seek” or “if the disputes cannot be resolved in an amicable manner within six months” among others, they intended to oblige parties to at least try to negotiate and reach an amicable settlement before intending the arbitral path. In my opinion, failure to reach to this conclusion will contradict the principle of effective interpretation, under which, a contract must be interpreted systematically, giving a useful effect to every provision in the contract. Hence, tribunals should repudiate any interpretation by the parties seeking to deny the value of a particular clause of that systematic body.

Consequently, if the obligation established in the first tier of a two-tier arbitration clause is breached, it is fair to conclude that an arbitral tribunal could not enforce the agreement and assert jurisdiction over the claim, since by doing that it will be contradicting the will of the parties and breaching its mandate. Furthermore, I agree with the decision by the arbitral Tribunal in Murphy Exploration & Production Company International v Ecuador where the arbitrators established that the discussion over the nature of the waiting periods –procedural or jurisdictional— was unfruitful, since in both circumstances, their breach can have adverse effects with regard to the Tribunal’s jurisdiction over the claim.

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130 See supra note. 3, at art VI(2).
132 See Murphy Exploration and Production Company International v. Republic of Ecuador, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶149 (Dec. 15, 2010) (when the Tribunal said: “The Tribunal also does not accept the consequences Claimant seeks to derive between “procedural” and “jurisdictional” requirements. According to Murphy International, “procedural requirements” are of an inferior category than the “jurisdictional requirements” and, consequently, its non-compliance has no legal consequences. It
Nevertheless, the question that remains unanswered is how the tribunals should enforce the obligation stipulated in the cooling-off period. Previously, we have concluded that the cooling-off period poses a “best efforts” or “means” obligation on the parties’ shoulders.\textsuperscript{133} This type of obligations, contrary to “specific result” obligations do not burden parties to reach a prefixed outcome – which in this case would be to reach an agreement— but to use all the possible means a reasonable person or a \textit{bonus pater familias} under similar circumstances would use to achieve the common objective of the parties.\textsuperscript{134} Additionally, we have analyzed how an optimal negotiation in an investor-State conflict should be conducted in accordance to negotiation theory.\textsuperscript{135}

Hence, should arbitration tribunals determine that a party breached its best efforts obligation under the cooling-off period if it failed to conduct the negotiation in accordance with the negotiation principles theory? My answer tends to be negative because of several reasons.

The first one is a legal reason. The reasonability test – reasonable person under similar circumstances— by its nature is a subjective test that analyzes every situation in a case-by-case basis. As Salacuse says, “[a]s no two investor-State disputes are identical, no two investor-State disputes face the same barriers”\textsuperscript{136} and circumstances. Therefore, in my opinion, it would be improper for arbitral tribunals to judge all investor-State conflicts pursuant to a strict set of negotiation principles.

\textsuperscript{133} See supra section 2.1.
\textsuperscript{135} See supra section 3.
\textsuperscript{136} See Salacuse supra note 44, at 159.
The second reason is a more practical one, because continuing with the above-mentioned analogy, as no investor-State conflict is the same, no negotiator deals with conflicts in the same manner. In my opinion, the negotiation theory is not a rigorous script to be followed, but a tool to resort to. In this sense, I think tribunals should follow the same path, and look at the negotiation theory – especially the principles developed above with regard to investor-State conflicts— as a resource to rely on in their decisions dealing with the breach of the cooling-off period obligations.

Therefore, reliance on this guide of principles should not be used to punish different good-faith negotiation styles, but to sanction non-serious attempts to negotiate as for example, a simple interchange of letters, a single phone call, etc. Furthermore, the negotiation theory should be used by arbitral tribunals as a specialized tool to repudiate parties’ attempt to disown the existence of the cooling-off period when arguing the futility defense.

As we were able to attest from the cases cited above, parties arguing the futility defense often rely, as arguments for assuring the impossibility of a negotiated agreement, in narrow statements or actions conducted by government officials of host States.\textsuperscript{137} However, as we had the opportunity to discuss when dealing with conflict barriers, most of these situations are in effect either a structural, psychological or strategic barriers put by the State, which, if managed skillfully can certainly be overcome.\textsuperscript{138}

It is my belief that futility cannot be considered a general rule, but rather an exception. Hence, there could be exceptional cases, as discussed previously in this paper, in which one of the parties has activated all the negotiation channels without success due

\textsuperscript{137} See supra notes 27- 29.
\textsuperscript{138} See supra section 3.
to the other party’s reluctance to negotiate in good faith.\textsuperscript{139} However, in those cases, as sustained in \textit{Kilic}\textsuperscript{140}, the party claiming the futility defense would have a heavy burden to objectively demonstrate to the tribunal, the impossibility to either start a negotiation or to reach and agreement in the fixed period.

An example of this situation was seen in the already cited \textit{Murphy Exploration \& Production Company International v. Ecuador}.\textsuperscript{141} The argument raised by claimant as the principal evidence of futility of the negotiation, was twofold. First, it relied on the enactment by the Ecuadorian legislature of “Law 42”.\textsuperscript{142} This statute amended the Ecuadorian Hydrocarbons Law and introduced a fifty percent participation—in the already existent profit sharing contracts with petroleum companies—of Ecuador in the sales profit of the crude.\textsuperscript{143} This measure was taken by Ecuador as a windfall profit tax to ensure its participation in the revenue resulting from the oil price increase.\textsuperscript{144} Second, claimants argued that futility arose also because of President of Ecuador, Rafael Correa’s statement expressing that the only way a negotiated agreement could be reached, would be to transform the oil contracts from a profit sharing type to a services type— which would deny any participation of oil companies in the revenues of the sales profit of the crude and only recognize a fee for the services provided— or the change of the sharing

\begin{itemize}
  \item \textsuperscript{139} See supra section 2.3.
  \item \textsuperscript{140} See supra note. 33, at 37.
  \item \textsuperscript{141} See \textit{Murphy Exploration and Production Company International v. Republic of Ecuador}, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶136 (Dec. 15, 2010).
  \item \textsuperscript{142} See \textit{Murphy Exploration and Production Company International v. Republic of Ecuador}, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dissenting Opinion by Porf. Horacio Grigera Naon, ¶¶2-4 (Dec. 15, 2010).
  \item \textsuperscript{143} See \textit{Murphy Exploration and Production Company International v. Republic of Ecuador}, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dissenting Opinion by Porf. Horacio Grigera Naon, ¶¶2-4 (Dec. 15, 2010).
  \item \textsuperscript{144} See \textit{Murphy Exploration and Production Company International v. Republic of Ecuador}, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dissenting Opinion by Porf. Horacio Grigera Naon, ¶¶2-4 (Dec. 15, 2010).
\end{itemize}
percentage from a 50%-50% ratio to a 99%-1% ratio in favor of Ecuador. Correa’s main argument was that natural resources, as well as the profits derived from them, were property of the Ecuadorian citizens. The Tribunal denied the futility exception brought by the claimant considering that other companies in similar circumstances were able to reach a negotiated agreement in the same issue.

Definitely, President Correa’s statement can be considered a structural, strategic and even a psychological barrier to an agreement. However, as seen before, the Tribunal dismissed the futility argument based on an analogy, which at plain sight seems a fair argument. Nevertheless, resorting to the negotiation theory in investor-State conflicts can give tribunals a more consistent method to rely on so as to assess controversies related to the obligations under the cooling-off period in a specialized and more accurate manner. For example, in the Murphy case the Tribunal could have secured a more accurate argument – in addition to the analogy drawn— by analyzing the nature of the existent barriers and the sufficiency of the means used by parties to overcome them (and even

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145 See *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dissenting Opinion by Prof. Horacio Grigera Naon, ¶¶22 (Dec. 15, 2010).
146 See *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dissenting Opinion by Prof. Horacio Grigera Naon, ¶¶22 (Dec. 15, 2010).
147 See *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶136 (Dec. 15, 2010) (when the Tribunal said: “Moreover, what happened to other foreign oil companies does not support Murphy International’s position that the negotiations with Ecuador would have been fruitless because of the impossibility to reach an agreement. On the contrary, the facts contradict this statement: in August 2008, City Oriente reached an agreement with the Republic of Ecuador and withdrew its ICSID claim; Petrobrás and Andes Petroleum also negotiated their disputes with Ecuador and signed with the Republic contracts different from the ones in existence. Repsol itself, the operator of the Consortium of which Murphy Ecuador was a member, reached a preliminary agreement with the Republic of Ecuador on March 12, 2009, and, as stated by Ecuador in its Memorial on Objections to Jurisdiction “...the Consortium and the Republic entered into the previously-negotiated Modification Agreement on March 12, 2009, the same day as the sale of Murphy Ecuador to Repsol.”).
drawing the same analogy with regard to the methods used by other parties to overcome the barriers."

Finally, this situation can also help the development of a new set of cooling-off period clauses, which have often been criticized for their lack of clarity.\footnote{See Franck Supra note. 101, at 174.} By resorting to several principles in the negotiation theory applied to investor-State conflicts, legislators and government officials participating in the negotiation of BITs—or local investment contracts—can include in their texts a specified negotiation mechanism (procedural and substantive) that will contain especial provisions regarding overcoming barriers, cases of futility and other considerations.

Furthermore, as proposed above, the dispute settlement clause can include the participation of a mediator to facilitate the conclusion of a beneficial agreement for both parties. In my opinion, this situation will benefit both, the parties to fulfill their interests, and the tribunals that will have a more solid and reliable base to deal with when a conflict involving the issue of compliance of cooling-off period obligations arises.

5. \textbf{Conclusion}

As of now, international arbitration tribunals have not been able to reach unanimity with regard to treatment and interpretation of the cooling-off clauses agreed in almost all existent BITs. This lack of uniformity has been aggravated because tribunals have reached contradictory decisions with regard to these clauses’ nature and effects. From assuring the existence of an obligation to engage in negotiations, to accepting defenses of futility to avoid the waiting periods, arbitration tribunals are still undecided about the
matter. Furthermore, in the way of construing these clauses, arbitration tribunals have limited their scope of analysis to black-letter-law arguments, mainly focusing on the dichotomy between the jurisdictional or a procedural nature of the cooling-off period.

After the analysis conducted in the three sections of the present paper and once all the trends that arbitral tribunals have taken with regard to the scope of the waiting periods were examined; we have been able to conclude that under international law expressed in the Vienna Convention of the Law of Treaties, cooling-off periods agreed in BITs oblige parties to engage in good faith negotiations when a conflict arises. The scope of this obligation rather than requiring an specific result, entails parties under a BIT to use all the reasonable means available under the circumstances to try to reach an agreement before requesting the initiation of arbitration.

Additionally, I conclude that these reasonable means to reach an agreement can be improved if managed in conjunction with the principles of the negotiation theory. Understanding the main barriers that arise in investor-State conflicts is a key tool to start the negotiation process of these types of conflicts. Also, setting an organized process to govern the negotiation will favor the correct development of the negotiations. This arrangement will include agreeing on rules of procedure, methods of communication and the establishment of parties’ interests to be discussed. Substantive considerations are also important to develop an efficient negotiation process in investor-State conflicts and should include the analysis of the BATNA, as well as the assessment of their costs and the relation with the reservation value. Value creating and resorting to criteria play a transcendental role in the negotiation of investor-State conflicts especially because it helps the parties reach a win-win solution.
Finally, we feel that tribunals interpreting cooling-off period clauses should nurture from the principles of the negotiation theory so as to reach a more specialized interpretation of the clause. This does not mean that tribunals would have to respect the theory of negotiation as a script of black-letter law, but rather to resort to it as better method to assert the very nature of the obligations under the cooling-off periods and help future BITs develop a more integrative framework that will benefit both: the parties and arbitral tribunals.

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