

NOT HOT ENOUGH: COOLING-OFF PERIODS AND THE RECENT DEVELOPMENTS UNDER THE ENERGY CHARTER TREATY

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Abstract

Cooling-off provisions in international investment agreements guarantee that investors and host States resolve their disputes in the most efficient manner. Aimed at offering the parties the opportunity to amicably settle their differences, cooling-off provisions remain a controversial issue in the jurisprudence on international arbitral tribunals. Arbitral tribunals are still split between considering the cooling-off provision as a procedural requirement or as an admissibility or jurisdictional requirement. Each of these positions triggers different practical consequences, with serious outcomes for the arbitral process. This note addresses the latest developments concerning the cooling-off provision under one international investment agreement – the Energy Charter Treaty.

I. Introduction

Disputes between investors and States often reach the point where they must be submitted for resolution to an adjudicatory body, most likely an arbitral tribunal. This is sometimes preceded by intense negotiations between the parties with the purpose of having the dispute settled in their best interest, without incurring the additional costs and risks of an adjudicatory process. For this purpose, dispute resolution provisions in international investment agreements provide for a so-called “cooling-off period” during which the parties to the dispute attempt to settle their differences amicably. This is usually accompanied by the specification of a period of time during which such discussions are carried on. According to a 2012 OECD Study, “[a]lmost 90% of the treaties with ISDS [investor-State dispute settlement] provisions require that the investor respect a cooling-off period before bringing a claim”,¹ with an average waiting period of six months.² For example, Article 9 of the India-Romania BIT³ provides for the following:

“(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) If any such dispute cannot thus be settled within six months from the date on which the dispute was raised by one of the parties, it may be submitted:

(a) for resolution to competent judicial or arbitral bodies of the Contracting Party in whose territory the investment has been made upon request of the investor; or

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¹ Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 17 (OECD Working Papers on International Investment 2012/02, 2012).

² *Id.* ¶ 39.

³ In force since Dec. 9, 1999.

(b) for international arbitration according to the provisions of paragraph (3) of this Article by either party to the dispute.” (emphasis added)

The Energy Charter Treaty [the “**ECT**” or the “**Treaty**”] also contains a cooling-off provision. The original version of Article 26 of the ECT – (Article 32) – providing for the investor-State dispute resolution [“**ISDS**”] mechanism, referred, in paragraph 2, to “[a]ny such disputes which have not been amicably settled, shall, after a period of three months from the written notification of a claim, be submitted to the Secretariat by either party to the dispute” for conciliation.⁴ The final text of Article 26, as adopted, provides, *inter alia*, for the following:

“(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.”⁵

II. Arbitral Tribunals and the Interpretation of the Cooling-Off Provisions

Arbitral tribunals dealing with ISDS have had different approaches as to the nature of the cooling-off provision. Some were of the opinion that the failure to observe this provision would not be a bar to submitting the claim under the relevant treaty. As pointed out by the tribunal in *Biwater Gauff v. Tanzania*,

“[...] *this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this arbitral tribunal from proceeding.*”⁶

Other tribunals have held that the failure to observe the provisions of the cooling-off period clause would indeed have effects pertaining either to jurisdiction of the arbitral tribunal or to the admissibility of the claim. In *Guaracachi America v. Bolivia*, the arbitral tribunal came to the conclusion that, “*at least in this case, the “cooling off period” is a jurisdictional barrier conditioning the jurisdiction of the Tribunal rationae voluntatis, since it is not up to a claimant to decide whether and when to notify the host State of the*

⁴ Basic Protocol to the European Energy Charter Draft, art.32(2), Sept. 11, 1991, EEC 8/91, CS BP 2, Brussels, http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/1_-_Basic_Protocol.pdf.

⁵ Energy Charter Treaty art. 26, Dec. 17, 1991, 2080 U.N.T.S. 95, 34 I.L.M. 373 (1995).

⁶ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 343.

*dispute, just as it is not up to such claimant to decide how long they must wait before submitting the request for arbitration.*⁷ Contrary to this, the arbitral tribunal in *Alps Finance v. Slovakia* saw the objection of the respondent relying on the cooling-off period as pertaining to admissibility, or, as the tribunal put it, “*the tribunal does not see these perfectible defects as a deficiency which renders the State’s consent to arbitral jurisdiction ineffective.*”⁸

In any case, arbitral tribunals have held that:

“[...] *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 negotiations would succeed or not, the parties must first initiate them. The obligation to consult and negotiate falls on both parties.*”⁹

Previous ECT tribunals have touched upon the issue of the cooling-off period under Article 26 of the Treaty. In *Petrobart v. the Kyrgyz Republic*, the tribunal dismissed the claim of the Kyrgyz Republic that the amicable settlement requirement was not fulfilled by the claimant. In doing so, the arbitral tribunal held that “*the letters addressed and sent to the Prime Minister must be accepted as requests for amicable settlement for the purposes of Article 26(2) of the Treaty and that Petrobart therefore satisfied the condition laid down in that provision.*”¹⁰

In *RREEF v. Spain*, the tribunal devoted more space to the submission of the respondent concerning the failure of the claimants to comply with the amicable settlement requirement under the ECT. The claimants responded to the objection of the Kingdom of Spain by stressing that this “*is a question of admissibility, not jurisdiction.*”¹¹ The arbitral tribunal agreed with the statement of the claimants but stressed that “*the consequence of an inadmissible submission precisely is that the court or tribunal seized cannot exercise jurisdiction in respect of it – with, it is true, a significant difference when compared with a finding that it has no jurisdiction: when the circumstances at the origin of the inadmissibility of the claim have changed, it can be submitted anew and the court or tribunal concerned may exercise jurisdiction on the new claim.*”¹²

In a recent development in *Stati v. Kazakhstan* the Svea Court of Appeal¹³ rejected Kazakhstan’s request to set aside the arbitral award rendered in the dispute by an SCC arbitral tribunal.¹⁴ One of

⁷ Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17, Award (Jan. 31, 2014), ¶ 390 [*hereinafter* “Guaracachi America v. Bolivia”]. See also the conclusion of the tribunal in *Murphy Exploration v. Ecuador*, which held that the cooling-off period provision “*constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.*” And, by consequence, the tribunal rejected “*Claimant’s argument that the six-month waiting period required by Article VI(3)(a) does not constitute a jurisdictional requirement.*” (*Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010), ¶¶149 & 156 [*hereinafter* “Murphy v. Ecuador”]).

⁸ Alps Finance and Trade AG v. The Slovak Republic, Award (Mar. 5, 2011), ¶ 200.

⁹ *Murphy v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (Dec. 15, 2010), ¶ 135.

¹⁰ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award (Mar. 29, 2005), ¶ VIII-7.

¹¹ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction (June 6, 2016), ¶ 225.

¹² *Id.*

¹³ Svea hovrätt [HovR] [Svea Court of Appeal] 2016-12-09, case no. T 2675-14 (*The Republic of Kazakhstan v. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd*) (Swed.) [*hereinafter* “Kazakhstan v. Stati”].

¹⁴ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. The Republic of Kazakhstan*, SCC Case No. V. (116/2010), Award (Dec. 19, 2013) [*hereinafter* “Stati v. Kazakhstan Award”].

the issues raised by Kazakhstan referred to the cooling-off provision under the ECT. In essence, the Republic alleged that the conditions under Article 26 of the ECT were not met as the parties failed to first solve the dispute amicably during the three-month negotiation period.

In short, the facts of the case are thus. In 1999, Anatolie and Gabriel Stati acquired, through companies registered in Moldova and Gibraltar, two companies which held the licences in Borankol and Tolkynoil and gas fields in Kazakhstan. The claimants made considerable investments throughout the years until in 2008 when several governmental agencies carried out various inspections and audits of the claimants' companies, referred to by the claimants as "*a targeted campaign of intimidation and harassment designed to pressure Claimants into selling their investments to the state-owned oil company at a firesale price*".¹⁵ These investigations resulted in accusations directed at the claimants and their companies incorporated in Kazakhstan, and in a criminal prosecution against the general manager of these companies. In 2010, the Kazakh authorities seized claimants' investments.

The claimants filed for arbitration on July 26, 2010 and in their arguments submitted to the SCC arbitral tribunal, they stressed that the cooling-off period of three months under the ECT was duly observed by the claimants. As pointed out by the claimants, "*the waiting period runs from the date Kazakhstan became aware of the dispute, which Claimants (in an exercise of futility) raised on numerous occasions, starting at least in March 2009*".¹⁶ In addition, the claimants "*agreed to stay proceedings in February 2011 in order to give Kazakhstan an additional three month period. During that time, there were attempted settlement negotiations, which resulted in one meeting in London on March 10, 2011.*"¹⁷ The claimants highlighted that the cooling-off period "*is not a jurisdictional requirement, but rather is a procedural hurdle*" and "*[t]his solution is dictated by procedural economy, since denying jurisdiction would simply force a claimant to re-start proceedings a few months later – a solution that is in no party's interest.*"¹⁸ In the alternative, "*[s]hould the Tribunal consider that the requirement to observe a "waiting period" is not a procedural requirement, the most appropriate alternative characterization would be to regard the requirement as one of admissibility, not of jurisdiction.*"¹⁹ In contradistinction, Kazakhstan submitted that the cooling-off period under Article 26 of the ECT is a jurisdictional requirement. In the light of the rules of treaty interpretation as codified by the Vienna Convention on the Law of Treaties ["**VCLT**"],²⁰ Kazakhstan submitted to the arbitral tribunal that "*the primary goal of the dispute resolution mechanism [under Article 26 of the ECT] is settlement (disputes "shall...be settled amicably"). The word "shall" is not permissive, but mandatory and obligatory. This is clarified by the caveat ("shall, if possible"), which assumes that settlement may not always be forthcoming. In this case, where one party has requested amicable settlement and this has not been settled within three months of such notification, the Investor may submit the dispute for resolution in accordance with the terms of the remainder of the article. As to the nature of those settlement discussions, it is settled under international legal principles that they must be conducted in good faith*".²¹ As submitted by Kazakhstan, the first time it became aware of the dispute was with the

¹⁵ *Id.* ¶ 2.

¹⁶ *Id.* ¶ 818.

¹⁷ *Id.* ¶ 819.

¹⁸ *Id.* ¶ 815.

¹⁹ *Id.* ¶ 817.

²⁰ Vienna Convention on the Law of Treaties, (May 23, 1969) (entered into force on Jan. 27, 1980), 1115 U.N.T.S. 331.

²¹ *Stati v. Kazakhstan Award*, SCC Case No. V. (116/2010), Award (Dec. 19, 2013), ¶ 821.

receipt of the request of arbitration of the claimants and no attempts of amicable settlement were pursued by the parties in accordance with the provisions of the ECT.²²

The SCC arbitral tribunal agreed with the claimants' view that the cooling-off period under Article 26 is a procedural requirement and not a jurisdictional one:

*“By the express reference in subparagraphs (1) and (2) [of Article 26 of the ECT], it is clear that the intention of Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity.”*²³

Furthermore, the tribunal stressed that the failed settlement negotiations in 2010 would comply with the requirements of the ECT and since there is no prejudice to the parties, there is no reason why the tribunal should deny jurisdiction.²⁴

The SCC arbitral tribunal awarded almost USD 500 million in damages plus interest to the claimants and ordered Kazakhstan to bear three quarters of the arbitration costs and 50% of claimants' costs with legal representation.

The Svea Court of Appeal addressed the question related to the compliance with the three-month negotiation period and in particular whether this was an absolute prerequisite for the investors' right to commence the proceedings and, consequently, for the tribunal's jurisdiction. The Court proceeded to its analysis taking into consideration the provisions of Articles 31 and 32 of the VCLT and also the comparison between the provisions of Article 26 and Article 27 of the ECT (the last one concerning the dispute resolution provisions between the Contracting Parties to the ECT on the application and interpretation of the Treaty).²⁵ In the words of the Court of Appeal, the practice surrounding the nature of the cooling-off periods is not uniform and various positions were adopted by arbitral tribunals.²⁶ The Court, however, pointed out that in the jurisprudence concerning the application of Article 26 of the ECT, no arbitral tribunal denied jurisdiction on the basis of the failure to observe the cooling-off period provision.²⁷ Having noted this, the Court made clear that negotiations may be carried out within the framework of arbitration²⁸ and the three-month period for the amicable settlement of the dispute was not a condition affecting the jurisdiction of the tribunal.²⁹ It is also relevant to note that Judge Magnus Ulriksson dissented on the issue of cooling-

²² *Id.* ¶ 823 *et seq.*

²³ *Id.* ¶ 829.

²⁴ *Id.* ¶ 830.

²⁵ Svea Court of Appeal, Svea hovrätt [HovR] [Svea Court of Appeal] 2016-12-09, case no. T 2675-14 (Kazakhstan v. Stati) (Swed.), at 46 *et seq.*, ¶ 5.3.2.

²⁶ *Id.* at 50.

²⁷ *Id.* at 50.

²⁸ *Id.* at 51.

²⁹ *Id.*

off period and considered that this requirement was indeed one for the jurisdiction of the arbitral tribunal, but found that it was fulfilled by the parties to the dispute.³⁰

III. Conclusion

The interpretation of the cooling-off provisions in international treaties must be made in accordance with the customary rules of treaty interpretation as codified by the Vienna Convention on the Law of Treaties. The fact that such clauses are included in the text of the treaty triggers the conclusion that they are meant to be used for the specific purpose of proper settlement of disputes between investors and the host States.³¹ While different reasons might trigger the failure to reach an amicable settlement of a dispute, it is essential that the parties are directed to first try this option before proceeding to arbitration.³²

As to the nature of the treaty requirement, majority of arbitral tribunals tend to adopt a middle path with respect to these amicable settlement clauses. They recognise, on the one hand, that full effect must be given to these provisions in accordance with the rules of treaty interpretation, but on the other hand, that engaging the parties in formal, yet useless, negotiations would run contrary to the purpose of these treaties and their cooling-off provisions.

Where there is evidence that investors approached the host State with the clear intention of entering into amicable discussions, arbitral tribunals have dismissed claims concerning the failure to comply with the period for amicable settlement. For example, the tribunal in *SGS v. Pakistan* accepted that the claimant complied with the cooling-off provision even though the request for arbitration was submitted only two days after the notification of the respondent regarding the existence of the dispute and concluded that “consultation periods” are “directory and procedural” and not “mandatory and jurisdictional”.³³ Similarly, the SCC arbitral tribunal in *Stati v. Kazakhstan*, as well as the Svea Court of Appeal, came to the conclusion that the cooling-off provision sets a procedural

³⁰ *Id.* at 72 *et seq.*

³¹ As Vandeveldel explains,

“[The] waiting period provides the disputing parties with sufficient time to effect a negotiated settlement, A host state also may use this time to evaluate the claim against it and to prepare for arbitration, such as by collecting evidence, retaining counsel, and identifying potential arbitrators. Some states are especially reluctant to consent to investor-state arbitration and they seek a longer waiting period to provide the disputing parties with a more abundant opportunity to negotiate a settlement and avoid arbitration.” See KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 440 (2010).

³² It is generally considered that the host State has to be notified of the existence of the dispute and of the intention of the investor to begin the amicable settlement procedures. *See, e.g.*, the order of the arbitral tribunal in *Western NIS Enterprise Fund v. Ukraine*, where the absence of the amicable settlement requirement was seen as an admissibility issue and, further, the tribunal highlighted the importance of the “proper notice” of the dispute to the host State:

“Proper notice is an important element of the State’s consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations.” (*Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order (Mar. 16, 2006), ¶ 5).

³³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (Aug. 6, 2003), ¶ 184. It is interesting to note here that one year after the Decision on Jurisdiction the parties settled the dispute. This takes us back to the reasoning of the Svea Court of Appeal in *Kazakhstan v. Stati* where the Court stated that negotiations could be carried out during the arbitration proceedings.

requirement and not a jurisdictional one.³⁴ The voices expressing the view that the cooling-off provision is of jurisdictional nature remain isolated.³⁵

³⁴ See also the opinion of Dolzer and Schreuer:

“The view that periods foreseen for negotiations are not of jurisdictional nature is preferable. By the time the tribunal makes a decision on this issue, any waiting period is likely to have elapsed. Under these circumstances insistence on the compliance with the waiting period before the institution of proceedings would make little sense and would merely compel the claimant to start proceedings anew”. (RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 248-249 (2008).

³⁵ Besides *Guaracachi America v. Bolivia*, PCA Case No. 2011-17, Award (Jan. 31, 2014), see also *Enron v. Argentina*, where the arbitral tribunal determined that the negotiation period in the Argentina BIT is “*very much a jurisdictional one*” (*Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004), ¶ 88.

For a detailed analysis on the issues of jurisdiction and admissibility, including with respect to cooling-off periods, see Hanno Wehland, *Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules, in ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 227 *et seq.* (Crina Baltag ed., 2017).