

**AN ICSID TRIBUNAL DENIES
JURISDICTION FOR FAILURE TO SATISFY
BIT'S "COOLING-OFF" PERIOD: FURTHER
EVIDENCE OF A SEA CHANGE IN
INVESTOR-STATE ARBITRATION OR A
MEANINGLESS RIPPLE?**

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I. INTRODUCTION

On December 15, 2010, an International Centre for Settlement of Investment Disputes ("ICSID") Tribunal ruled that it lacked jurisdiction over an arbitral claim brought by U.S. energy company Murphy Exploration and Production International ("Murphy International") against the Government of Ecuador.¹ The tribunal ruled that Murphy International failed to satisfy the "cooling-off" period in the underlying treaty prior to filing its Request for Arbitration.²

The tribunal's decision will likely fuel an ongoing debate in the international arbitration community over the role of bilateral investment treaties ("BITs") in investor-state arbitrations. In the past, foreign states often found themselves on the losing end of these arbitrations, resulting in complaints that the system was unfair and tilted against them.³ The foreign states claimed the system favored foreign investors who had the advantage of unlimited financial resources and political

1. *Murphy Exp. & Prod. Co. Int'l v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶¶ 1, 44, 89 (Dec. 15, 2010).

2. *Id.*

3. See generally Christopher Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 353 (Kluwer Law International 2010).

support.⁴ Some countries went so far as to denounce the mettlesome treaties that bound them to international arbitration.⁵ More recent decisions, however, like the *Murphy International* jurisdiction award, have seemingly shifted the debate, and now it is the investors that have begun voicing concerns over the reliability and integrity of the system. Of course, there is no telling whether there has been an actual shift in treaty-based investor-state arbitration, or if such swings even exist outside the imagination of disgruntled parties. One thing, however, is certain: the *Murphy International* jurisdiction award, and other recent rulings against investors, will fuel continued debate within the international arbitration community and amongst investors about the future and integrity of treaty-based investor-state arbitration.

II. THE DISPUTE

In 1987, Murphy Ecuador Oil Company Limited (“Murphy Ecuador”) joined a consortium of parties to a service contract with Petroecuador on behalf of the Republic of Ecuador.⁶ Murphy Ecuador is controlled by Murphy International.⁷ Subsequently, Repsol YPF Ecuador SA (“Repsol”) acquired an interest in the contract and became the operator for the consortium.⁸ A dispute arose in 2006 when Ecuador amended its Hydrocarbons Law through the passage of Law 42-2006 (“Law 42”),⁹ This amendment (and subsequent related legislation) raised Ecuador’s economic participation in existing oil contracts held by its national oil company.¹⁰

Murphy International claimed this enactment violated the bilateral investment treaty between Ecuador and the U.S. (the “Ecuador-U.S. BIT”).¹¹ The alleged treaty violations caused

4. *Id.*

5. *See id.* at 353–54.

6. *Id.* at 7.

7. *Id.* at 10.

8. *Id.* at 7.

9. *Id.* at 4.

10. *Id.* at 8–9, 23–24.

11. *Id.* at 8–9 (Murphy International argued that because “Ecuador did not provide a fair and equitable treatment to its investment” and “breached the Contract” that they

serious economic damage to Murphy Ecuador, Murphy International's investment located in Ecuador.¹² The Ecuador-U.S. BIT calls for disputes arising from that treaty to be settled through international arbitration under the auspices of ICSID.¹³

When Ecuador passed Law 42, the consortium had been in discussions with Ecuador regarding its desire to raise its participation.¹⁴ Following passage of the Law 42, the U.S. Embassy in Ecuador publically criticized the legislation.¹⁵ On November 12, 2007, Repsol, on behalf of the consortium (of which Murphy Ecuador, but not Murphy International, was a member) submitted a letter to Ecuador notifying it that its acts constituted breaches of the Ecuador-U.S. BIT.¹⁶ On February 29, 2008, Murphy International notified Ecuador of an investment dispute arising under the Ecuador-U.S. BIT.¹⁷

Soon thereafter, on March 3, 2008, Murphy International filed its Request for Arbitration.¹⁸ Murphy International claimed Ecuador's alteration of its Hydrocarbons Law and related acts violated the Ecuador-U.S. BIT's guarantees of full protection and security, fair and equitable treatment, and non-arbitrary treatment of U.S. investments.¹⁹ Following the parties' initial submissions, Ecuador submitted its Objections to Jurisdiction on October 15, 2009, claiming the arbitral tribunal lacked jurisdiction to consider this dispute due to, among other reasons, Murphy International's failure to satisfy the notice and

had violated the BIT's umbrella clause).

12. *Id.* at 9.

13. Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., Sept. 27, 1993, S. TREATY DOC. NO. 103-15, *available at* <http://www.state.gov/documents/organization/43558.pdf> [hereinafter Ecuador-U.S. BIT].

14. *See* Murphy Exp. & Prod. Co. Int'l., *supra* note 1, ¶ 118 (noting that "the Consortium in which Murphy Ecuador was a member and to which Repsol was the operator, participated in negotiations with representatives of the government of Ecuador" due to the passage of Law 42).

15. *Id.* at 14.

16. *Id.* at 11, 29.

17. *Id.* at 11.

18. *Id.*

19. *Id.* at 9.

negotiation requirements of the Ecuador-U.S. BIT.²⁰

III. THE ECUADOR-U.S. BIT

A. *The Role of BITs in International Investor-State Disputes*

Many energy project investors have availed themselves to a network of specialized treaties that protect assets (investments) of one country's investors against improper actions by the other signatory country's government.²¹ Among these treaties, the role of BITs has grown prominently.²²

BITs are treaties between nations, "state parties," that set forth standards of conduct for the government of each state party toward investments of persons and companies of the other state party.²³ For example, the Ecuador-U.S. BIT regulates how the U.S. will treat Ecuadorian investors' investments in the U.S., and vice versa.²⁴

BITs offer investors protections under international law largely independent of a contract's specific provisions and local, host-state law.²⁵ BITs typically provide treatment protections including national and most-favored-nation status, fair and equitable treatment, various sorts of nondiscrimination, compensation for improper direct and indirect expropriations, and dispute resolution provisions.²⁶ Over 3,000 BITs presently exist.²⁷

20. *Id.* at 5, 10–12. (Ecuador's other objections to jurisdiction are not discussed or analyzed here).

21. Timothy J. Tyler & Richard D. Deutsch, *Structuring Energy Projects for Investment Treaty Protection: Pitfalls and Guidelines*, 2007 ROCKY MTN. MIN. L. INST. 23 (2007).

22. *See id.* (noting that the treaty network of BITs now includes over 3,000 bilateral investment treaties).

23. *Id.*; *see also* RUDOLF DOLZER & CHRISTOPHER SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 119, 149, 153, 162, 166, 172, 173, 178, 186, 191 (Oxford University Press 2008) (noting the ten different areas of conduct most bilateral investment treaties govern).

24. Ecuador-U.S. BIT, *supra* note 13, art. 11.

25. Tyler & Deutsch, *supra* note 21.

26. *Id.*

27. *See* International Centre for Settlement of Investment Disputes, *ICSID Database of Bilateral Investment Treaties*, <http://icsid.worldbank.org/> (last visited June 16, 2011).

B. BITs Offer Dispute Settlement Through ICSID Arbitration

Many BITs allow the investor to choose arbitration under the ICSID Convention. ICSID, whose stated purpose is “to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States,”²⁸ has become a preferred forum for disputes with foreign governments because of its enforceability provisions.²⁹ Each of the 147 ICSID state parties is obligated to enforce ICSID arbitration awards as if they were decisions from their own courts.³⁰ Also, ICSID’s affiliation with the World Bank is perceived as an incentive for states to pay arbitration awards.³¹ For these reasons, ICSID arbitration awards are deemed more enforceable than arbitral awards under the New York Convention.³²

C. Ecuador-U.S. BIT’s Prerequisites to Arbitration: “Cooling-Off” Period Prior to ICSID Arbitration

Like many BITs, the Ecuador-U.S. BIT offers the ICSID arbitration option for disputes arising out of this BIT.³³ Prior to such arbitration, however, the BIT encourages the parties to attempt to reach a resolution through negotiations.³⁴ Otherwise, six months after the dispute has arisen, it may be brought to arbitration.³⁵ These requirements are set forth in the following provisions:

- Article VI(2) of the BIT provides that the parties should attempt to settle disputes “through

28. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 1–2, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160.

29. International Arbitration Instruments, OECD, http://www.oecd.org/document/53/0,3343,en_39048427_39049329_39634165_1_1_1_1,00.html (last visited Feb. 19, 2011).

30. Convention on the Settlement of Investment Disputes, *supra* note 28.

31. Christopher Schreuer, *The World Bank ICSID Dispute Settlement Procedures*, <http://www.oecd.org/dataoecd/47/25/2758044.pdf>.

32. See CHRISTOPHER H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1121 (Cambridge University Press, 2d ed. 2009).

33. Ecuador-U.S. BIT, *supra* note 13, at art. 6(3)(a)(i).

34. *Id.* at art. 6(2).

35. *Id.* at art. 6(3).

consultation and negotiation” prior to submitting a dispute to arbitration:

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. . . .³⁶

- Article VI(3) provides that a party may submit its claim to arbitration for violation of the treaty once “six months have elapsed from the date on which the dispute arose.”

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 may choose to consent in writing to the submission of the dispute for settlement by binding arbitration³⁷

The potential claimant normally sends a notice, or “trigger” letter, to the State informing it that certain acts have violated specific provisions of the applicable BIT.³⁸ Then, after the time period set forth in the BIT has passed (the “cooling-off” period), claimant submits its request for arbitration.³⁹ For example, fictional U.S. Company X has an investment in the energy fields of fictional foreign nation, Tazgeria. Tazgeria’s recent and unexpected amendments to its hydrocarbons laws adversely affected Company X’s investment there. Company X decides these legislative changes constitute breaches of the BIT between the U.S. and Tazgeria. The U.S.-Tazgeria BIT requires a “cooling-off” period of six months before the parties’ attempt to resolve the disputes through negotiations. Company X, a company based in the U.S. and covered by the U.S.-Tazgeria

36. *Id.* at art. 6(2).

37. *Id.* at art. 6(3).

38. LUCY REED, ET. AL., GUIDE TO ICSID ARBITRATION 56 (Kluwer Law International 2004).

39. *Id.*

BIT, sends a notice letter to the Ministry of Energy and Mines of Tazgeria, informing it that these enactments violate the treaty's provisions regarding expropriation and discrimination. When negotiations fail during this six month period, U.S. Company X files its Request for Arbitration with ICSID for violations of the U.S.-Tazgeria BIT.

IV. ECUADOR'S OBJECTIONS TO JURISDICTION FOR FAILURE TO PROVIDE REQUIRED NOTICE

A. *The Parties' Jurisdictional Arguments*

Ecuador objected to the ICSID Tribunal's jurisdiction, claiming that Murphy International had prematurely filed its arbitral claim because it failed to satisfy the Ecuador-U.S. BIT's cooling-off requirements. Specifically, Ecuador claimed Murphy International failed to (1) comply with the consultation and negotiation prerequisite to filing arbitration, and (2) satisfy the six month notice requirement in the Ecuador-U.S. BIT.⁴⁰

Regarding the six month cooling-off requirement, Ecuador contended this never expired because Ecuador did not receive notice of a BIT dispute with Murphy International until February 29, 2008, when Murphy International sent its trigger letter.⁴¹ Murphy filed its Request for Arbitration on the next business day.⁴² Also, Ecuador argued Murphy International never participated in negotiations concerning the BIT dispute.⁴³ While Ecuador conceded that discussions had been ongoing for quite a while, it contended these talks did not directly address Murphy International's claims under the Ecuador-U.S. BIT.⁴⁴

Murphy International argued the BIT's six month cooling-off period started years prior to its February 29, 2008 trigger letter.⁴⁵ For Murphy International, the period began when Ecuador became aware of the dispute in 2006, not when Murphy

40. Murphy Exp. & Prod. Co. Int'l, *supra* note 1, ¶¶ 47–48.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 11, 23.

45. *Id.* at 14, 25.

International “formalized its claims” with the trigger letter.⁴⁶ According to Murphy International, the dispute first arose when Ecuador enacted Law No. 42 in April 2006.⁴⁷ Ecuador was aware of the dispute at that time because the U.S. Embassy in Ecuador had publicly criticized the law and members of the consortium (of which Murphy Ecuador was a member) had been negotiating with Ecuador.⁴⁸

This was followed by a November 12, 2007 letter from Repsol to Ecuador, on behalf of the consortium, notifying Ecuador of alleged breaches of Ecuador’s BIT with Spain.⁴⁹ Further, Murphy International was excused from continued negotiations after sending its February 29, 2008 trigger letter because any further negotiations with Ecuador would have proven futile.⁵⁰ Finally, Murphy International contended that the six month cooling-off period was not a bar to jurisdiction; it was a “procedural” requirement that would not impact the tribunal’s jurisdiction.⁵¹

B. The Tribunal’s Findings

Regarding the notice of a BIT dispute, the tribunal ruled the six month cooling-off period began when Ecuador was made aware of an alleged breach of the BIT:

The dispute that the tribunal must consider in order to establish if there has been a non-compliance with the six month waiting period as from the date it arose, is the “investment dispute” arising out of or relating to an alleged breach of any right conferred or created by the Treaty with respect to an investment.

The tribunal finds that in order for a dispute to be submitted to ICSID arbitration, in accordance with

46. *Id.* at 25.

47. *Id.* at 24.

48. *Id.* at 14, 23–25, 29.

49. *Id.* at 29.

50. *Id.* at 14, 23–24.

51. *Id.* at 24, 38.

Article VI of the BIT, a claim on an alleged breach of the BIT must previously exist.⁵²

Although the BIT did not impose a “formal notice requirement,” a dispute under the BIT could not be submitted to arbitration “without the prior allegation of a Treaty breach.”⁵³ Murphy failed to prove Ecuador’s awareness of a BIT dispute prior to the February 29, 2008 notice letter.⁵⁴ The November 12, 2007 letter from Repsol (on behalf of the consortium) to Ecuador notified Ecuador of a dispute arising only from the Ecuador-Spain BIT, not the Ecuador-U.S. BIT.⁵⁵

Regarding the question of whether the required negotiations occurred, the tribunal ruled that prior negotiations between the consortium and Ecuador did not apply to the present dispute. Specifically, any negotiations related to the dispute arising from the Ecuador-Spain BIT are inapplicable to the dispute arising from the Ecuador-U.S. BIT.⁵⁶

This tribunal holds that the negotiations and consultations entered into by Repsol, as the Operator of the Consortium, with Ecuador, are not the negotiations required by Article VI(2) of the BIT for this case. The negotiations and consultations of Repsol were prior to the date the dispute between Murphy International and Ecuador arose. Furthermore, it becomes evident that the negotiations and consultations between Repsol and Ecuador, pursuant to the Spain-Ecuador BIT differ, with regards to the parties and applicable law, from the dispute between Murphy International and Ecuador, which is governed by the US-Ecuador BIT.⁵⁷

The tribunal disagreed with Murphy International’s argument that it was excused from further negotiations with Ecuador “due to the futility” of prior negotiation attempts.⁵⁸ The

52. *Id.* at 27.

53. *Id.*

54. *Id.* at 27, 28.

55. *Id.* at 29–30.

56. *Id.* at 35.

57. *Id.*

58. *Id.* at 14, 21, 42–43.

tribunal said it is not possible to determine whether such negotiations would be futile without first initiating them.⁵⁹ Also, the fact that other companies had successfully negotiated disputes with Ecuador shows that negotiations may not have proven futile.⁶⁰ The tribunal deemed Murphy International's submission of its Request for Arbitration on the business day following its trigger letter a "grave breach" of the BIT.⁶¹

Finally, the tribunal rejected Murphy International's argument that, as a purely procedural issue, the cooling-off period had no impact on the tribunal's jurisdiction.⁶² The tribunal stated that the cooling-off period was "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."⁶³ For these reasons, the tribunal sustained Ecuador's objection to ICSID jurisdiction.⁶⁴

V. DOES MURPHY INTERNATIONAL REFLECT A SEA CHANGE IN
TREATY-BASED INVESTOR-STATE ARBITRATION OR A
SLIGHT RIPPLE?

A. *Have BIT Arbitrations Begun to Favor States Instead of Foreign Investors? Does This Favoritism Exist Outside of the Minds of Disgruntled Parties?*

This decision, and other recent awards against investors, will further fuel a debate brewing in the international arbitration community regarding the future of treaty-based investor-state arbitration. The volume of this debate increases every time tribunals rule differently on the same or similar issues.⁶⁵

59. *Id.* at 36.

60. *Id.* at 36–37, 37, 42–43.

61. *Id.* at 36.

62. *Id.* at 38.

63. *Id.* at 39–40, 42.

64. *Id.* at 44.

65. *See, e.g.*, THOMAS CARBONNEAU & MARY MOURRA, LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS 6 (Kluwer

The *Murphy International* jurisdictional award is the most recent in a spate of ICSID awards ruling against investors, and has led practitioners and scholars alike to ponder whether the time has come to consider alternatives to treaty-based investor-state arbitrations and ICSID arbitrations.⁶⁶ Does the *Murphy International* jurisdictional award mark a sea change in favor of host states and away from foreign investors in investor-state arbitration? Has the integrity of these arbitrations been compromised by cries in the international community that BIT arbitrations work a great disservice to developing countries?⁶⁷ On the other hand, perhaps there is no basis for such grumblings as tribunals continue to make responsible decisions, free of external influence or motivation.

It is ironic that this debate has arisen considering the previous heated criticism of BIT arbitration in the opposite direction. Until the early 2000s, ICSID arbitrations were few and far between, with less than 50 registered between 1989 and 1999.⁶⁸ That number is now reaching 400 due mostly to a spurt of claims from 2002 to 2007.⁶⁹ Nearly 70% of investor-state claims have involved countries in Latin America, Eastern Europe, and Sub-Saharan Africa,⁷⁰ while the vast majority of the arbitrators deciding those arbitrations came from North America and Western Europe.⁷¹ This drove some to question whether treaty-based investor-state arbitration was slanted against developing countries as it appeared that any change in

2008); TODD WEILER, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 509 (Cameron May 2005).

66. See MICHAEL WAIBEL, *et al.*, THE BACKLASH AGAINST INVESTMENT STATE ARBITRATION, xxxviii (Kluwer 2010).

67. See *id.* (providing overview of the points of debate).

68. *The ICSID Caseload - Statistics*, International Centre for the Settlement of Investment Disputes 7 (2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English> 12 (last viewed Feb. 19, 2011).

69. *Id.*

70. *Id.* at 11.

71. *Id.* at 15.

economic policies could trigger a round of arbitrations.⁷²

Critics pointed to the plight of Argentina following its economic collapse in the late 1990s and early 2000s, which resulted in 41 BIT claims brought against it since 2001.⁷³ Argentina rarely succeeded in defending itself.⁷⁴ This sparked complaints that BITs, instead of serving their purpose of drawing foreign investment by offering a secure investment environment, were working a harsh detriment to developing countries by exposing them to hundreds of millions of dollars of awards arising from their troubled economies.⁷⁵ In the eyes of one observer, “[t]he current system is unfair to developing countries in the short run. But it is worse in the long run - because it undermines the rules of law . . . [R]ight now the rule of law is seen as a game by which one party takes advantage of another.”⁷⁶

The debate may have begun to shift in 2007 when an ICSID annulment tribunal condemned (but did not annul) the original tribunal’s analysis of Argentina’s defense of necessity.⁷⁷ This was a surprising result as other tribunals had soundly rejected Argentina’s necessity defense. More recently, in June and July 2010, two ICSID annulment tribunals annulled initial awards against Argentina based on the first tribunals’ treatment of Argentina’s necessity defense.⁷⁸ These decisions erased \$235

72. See ARTHUR ROVINE, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2007 23 (Martinus Nijhoff 2008) (discussing the chilling effect that the threat of BIT claims may have on a country’s willingness to alter its social and economic programs); CARBONNEAU & MOURRA, *supra* note 65, at 18–20.

73. See International Center for the Settlement of Investment Disputes, *supra* note 27.

74. *Id.*

75. See Joseph Stiglitz, Columbia Univ., Ninth Annual Grotius Lecture, Multinational Corporations: Balancing Rights With Protections (Mar. 28, 2007).

76. *Stiglitz Hits Multinational Corporate Power*, 21 CORPORATE CRIME REPORTER 15 (Apr. 5, 2007); see also Stiglitz, *supra* note 75.

77. CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, ¶¶ 144–50 (Sept. 25, 2007).

78. *Sempre Energy Int’l v. Argentina*, ICSID Case No. ARB/02/16 (Annulment Proceeding), Decision on the Argentine Republic’s Request for Annulment of the Award, ¶¶ 222–23 (June 29, 2010); *Enron Creditors Recovery Corp., Ponderosa Assets LP. v. Argentina*, ICSID Case No. ARB/01/3 (Annulment Proceeding), Decision on the

million worth of damages against Argentina and sparked discussion on whether these decisions were a deliberate attempt to balance arbitration outcomes after a long line of decisions against governments.⁷⁹

Then, in a precursor to *Murphy International*, another ICSID tribunal ruled that a U.S. investor failed to provide Ecuador with proper notice of a dispute arising under the Ecuador-U.S. BIT by not fulfilling its obligations under Article VI.⁸⁰ The investor's arguments were nearly identical to those used by *Murphy International*.⁸¹

B. Murphy International Award In Relation to Other "Cooling-Off" Awards

Conspiracy theorists can add the *Murphy International* jurisdictional decision to the list of recent decisions against investors. This jurisdictional award is ripe for debate because the import of the cooling-off period has differed among tribunals and commentators alike.

For instance, whereas the *Murphy International* tribunal emphasized the importance of negotiations and the cooling-off period, the ICSID tribunal in *SGS v. Pakistan* denied Pakistan's objection that the investor had not complied with that BIT's twelve-month cooling-off period, ruling such requirements were not relevant to jurisdiction.⁸² "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."⁸³ Likewise, some arbitration practitioners have also viewed the

Application for Annulment of the Argentine Republic, ¶¶ 101–02 (July 30, 2010).

79. See CARBONNEAU & MOURRA, *supra* note 65, at 18.

80. Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶¶ 312–16 (June 2, 2010).

81. See *Murphy Exp. & Prod. Co. Int'l*, *supra* note 1, ¶ 27.

82. *SGS Societe Generale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 130–31 (Aug. 6, 2003).

83. *Id.* ¶ 184; see also *Lauder v. Czech Republic*, Final Award of UNCITRAL Tribunal (Sept. 3, 2001).

cooling-off period as merely procedural.⁸⁴

On the other hand, the ICSID tribunal in *Enron v. Argentina* found cooling-off periods, like the one in the Argentina-U.S. BIT, to be “very much a jurisdictional one.”⁸⁵ “A failure to comply with that requirement would result in a determination of a lack of jurisdiction.”⁸⁶ Likewise, the former Head of Legal Affairs and Secretariat of the Energy Charter Treaty views that treaty’s three month cooling-off period “as a precondition for a valid arbitration agreement.”⁸⁷

Regarding whether negotiations are required when they would likely prove futile, the ICSID tribunal in *Consortium Groupement L.E.S.I-DIPENTA v. Algeria* rejected Algeria’s jurisdictional objection that the claimants had failed to observe the cooling-off period in the underlying BIT, ruling that this period was not an absolute condition when it was obvious that any conciliation attempt would fail.⁸⁸ Some commentators do not believe there is a place in investor/state arbitration for mandatory conciliation.⁸⁹ One tribunal, refusing to dismiss a claim due to the claimant’s failure to observe a six month cooling-off period, reasoned that dismissing the claim on such a basis “would disserve, rather than serve, the object and purpose [of the treaty].”⁹⁰

84. See, e.g., REED, *supra* note 38; ALAN REDFERN & MARTIN HUNTER, *LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 476 (4th ed. 2004).

85. *Enron Corp. and Ponderosa Assets, LLP v. Argentina*, ICSID Case No. ARB/01/3, Decision of Jurisdiction, ¶ 88 (Jan. 14, 2008).

86. *Id.*

87. Adnan Amkhan, *Consent to Submit Investment Disputes to Arbitration Under Article 26 of the Energy Charter Treaty*, 3 INT. A. L. R. 65, 61 (2007).

88. *Consortium Groupement L.E.S.I-DIPENTA v. Algeria*, ICSID Case No. ARB/03/8, Award, ¶¶ 32–33 (Jan. 10, 2005).

89. As explained by one observer, participants in mandatory conciliation prior to arbitration have found it to be ineffective. See Jack Coe, *Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 38 (Fall 2005).

90. *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction, 38 I.L.M. 708, 725, 729 (June 24, 1998).

VI. CONCLUSION

It is unlikely that the jurisdiction award in *Murphy International* and other recent awards against investors will drive investors to seek other avenues to resolve their investor/state claims. In reality, treaty-based arbitrations have proven to be an extremely reliable method for settling disputes with foreign states in a neutral setting, whether it be ICSID or some other forum. In some instances, it is the only alternative for foreign investors.⁹¹ But as long as there are losing parties falling on the wrong side of real or fictional trends, there will be continued debate over the fairness and integrity of BIT arbitrations.

91. See Joe Nocera, *Guilty Verdict for a Tycoon and Russia*, N.Y. TIMES, Jan. 1, 2011, at B1.