Mediation in Future Investor-State Dispute Settlement

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1. Introduction[2]

The on-going discussions on the reform of Investor-State Dispute Settlement (ISDS), within UNCITRAL, shows that there is an appetite, from both investors and States, for prevention of disputes among them. Indeed, several States' submissions underline the importance of measures to prevent disputes from arising and address means to solve disputes through methods alternative to court and arbitration.[3] Investors, via the Corporate Counsel International Arbitration Group (CCIAG) and the United States Council for International Business (USCIB), have filed submissions for the UNCITRAL discussions and have indicated, via informal discussions with the authors of this paper and various interventions, that they are also inclined at favouring prevention and Alternative Dispute Resolution (ADR) to solve the differences that may arise with States.[4]

The third stakeholder in ISDS, i.e. civil society or citizens at large, may be more skeptical or concerned that the use of ADR may mean a higher degree of confidentiality and hence less citizens' awareness and control over the settlements occurring between the State and the investor in any given case. There is also a concern expressed that fundamental rights, if at stake in the dispute, cannot, by their very nature, be the object of mediation/conciliation. However, and although they do not address disputes arising with a State[5], the recently released Hague Rules on Business and Human Rights Arbitration, which include provisions on mediation, have not so far raised any notable opposition from the Human Rights community.[6]

This paper aims at (1) presenting an "état des lieux" of how prevention, mediation/conciliation have been used in practice including within the use of "cooling off" (BIT amicable settlement) periods; (2) analyzing the difficulties identified by stakeholders.[7]

The authors of this paper are aware that not all States and stakeholders have acquired experience and knowledge in the field.[8] However, this paper will not attempt to rehearse the

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[2] The literature available for the use of ADR in ISDS is already significant and has been listed by WP190 (footnote 4) prepared by the UNCITRAL Secretariat. In addition, in December 2019, the Negotiation Task Force of the Davis Center for Russian and Eurasian Studies at Harvard University convened an ISDS Mediation Colloquium to discuss the benefits and obstacles of using mediation and "guided diplomacy" to resolve Investor-State Disputes. The 2019 ISDS Mediation Colloquium Take-Aways and Suggestions, February 2020, are already publicly available. The full report will be available later this year.

[3] See the list of States' submissions in WP 190 prepared by the UNCITRAL Secretariat and available on the ISDS webpage.

[4] https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform.pdf. CCIAG and QMUL have also conducted a survey on investors view (see more information below).

[5] Eventhough they can be used in such disputes if chosen by the parties.

[6] The Hague Rules were officially launched at the Peace Palace, The Hague, in December 2019. The Rules and more informaton may be found here: https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/. Anne van Aaken is a member of the drafting team. Catherine Kessedjian participated in the panel discussion during the launch.

[7] Future work may propose potential remedies taking into consideration the different options identified by UNCITRAL WG III.

[8] The Energy Charter Secretariat, inter alia, has been very active in preparing, with the help of others, a set of papers. See, notably, the Guide on Investor Mediation adopted on 19 July 2016. See a comment of the guide, in M. Appel & J.M. Tirado; "Investor-State Mediation - New Tools for Policy Makers", TDM 2 (2020), https://www.transnational-dispute-management.com/article.asp?key=2727.

abundant set of publications which explain what is mediation, what are its advantages and inconveniences and, more generally, how it works, whether through the lens of law and economics analysis, or that of cognitive sciences and the like.[9] The authors are also aware that, in the context of the UNCITRAL negotiations, an Advisory Centre[10] may be formed in the future. If so, the Centre could be mandated to provide services for capacity building also in mediation/conciliation.[11]

The recent reforms of treaties signed by States, either in the form of an investment chapter of an FTA or as stand-alone BITs, show that mediation/conciliation is slowly getting attention and traction in treaty language. The UNCTAD Report for 2019 identifies a number of treaties signed in 2018, which do exactly that.[12] A review of these provisions show that the most advanced text is probably the agreement between the EU and Vietnam (not yet in force),[13] which includes a full Annex on mediation.[14]

In this paper, we will use the two terms of mediation and conciliation as equivalents, even though we are cogniscant that, both under domestic law of many States and under international law, the two ADR terms can be understood as different processes which carry different characteristics and may be used in several different formats. However, the work recently undertaken under the umbrella of UNCITRAL, that led to the Singapore Convention,[15] showed that the concept of "mediation" is better understood internationally and is more widely used nowadays, so much so that UNCITRAL has decided to substitute the concept of conciliation used in previous texts by that of mediation.[16] Conciliation is used in the UN Charter[17] and also in the ICSID Convention[18] and has been used more widely in the context of traditional public international law. In recent years and given that there are only few reported conciliation cases, mediation, a term most commonly used for commercial disputes, has acquired relevance and attention in the context of investment disputes.[19]

This paper analyses first how the cooling off periods may be used to give room for mediation (section 2). Second, the paper tries to draw lessons from the small amount of known cases which went to mediation (section 3). Third, the paper attempts to draw a list of common obstacles preventing the use of mediation in the investor-State context (section4). Finally, the

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[9] Such issues may be addressed at a later stage.

[10] See discussions during the 38th session of UNCITRAL Working Group III held at Vienna in October 2019.

[11] See also para 27 of WP 190.

[12] Argentina-Japan BIT, Argentina-UAE BIT, Armenia-Japan BIT, Australia-Peru FTA, Belarus-India BIT, Canada-Moldova BIT, Central America-Korea FTA, CPTPP, EU-Singapore IPA, Kazakhstan-UAE BIT, Singapore-Sri Lanka FTA, UEA-Uruguay BIT, USMCA.

[13] The text is available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

[14] Annex 15-C at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157378.pdf

[15] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"), signed in Singapore 7 August 2019.

[16] ICSID is in the process of adopting new rules for mediation, in addition to the conciliation rules that exists since the very start of ICSID.

[17] Article 33 Charter of the United Nations. See also United Nations Model Rules for the Conciliation of Disputes between States General Assembly resolution 50/50, done at New York, 11 December 1995.

[18] Chapters III and V to VII of the ICSID Convention and ICISD Concilation Rules. However, ICSID is now proposing rules on mediation.

[19] See, e.g, the IBA work on Investor-State Mediation and also the work and training provided by the Energy Charter Secretariat.

paper attempts to map future work which could be useful in the context of UNCITRAL negotiations towards the reform of ISDS.

2. Prevention - The use of cooling off periods[20]

There are many different measures a State can put in place in order to prevent disputes with investors. One of them is a system of early warning such that the dialogue between the State and the investor does not stop once the investment is initiated but continues throughout the life of the investment.[21] Several States have a formal Dispute Prevention Mechanism in the form of a state agency or an ombudsman.[22]

The UNCTAD Paper "Investor-State Disputes: Prevention and Alternatives to Arbitration"[23] explains that IIAs usually specify a "cooling-off period" to encourage negotiation before parties can initiate formal arbitration procedures. Conciliation is also regularly mentioned as an option, often next to arbitration. Brief reference to non-binding third party procedures is hence common in IIAs. It contains no more specific data. Cooling off periods can thus be a vessel which may contain mediation or conciliation or cooling off periods can stand next those mechanisms.

The UNCTAD mapping project contains no information on cooling-off periods.[24] The WTI EDIT project did not code cooling-off periods yet. Hence, the first coding exercise is the one undertaken for this paper.[25]

An UNCTAD database of 2577 mapped International Investment Agreements search shows[26]
- 627 treaties containing a provision for Voluntary ADR (conciliation / mediation)
- No treaty containing a provision for Compulsory ADR (conciliation / mediation)
- 1813 treaties containing no provision
- 2 treaties inconclusive

Hence, to the best of our knowledge, this is the first estimate of the usage of cooling-off provisions in international investment treaties.

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[20] This section uses data provided by José Reis (PhD student and RA at the University of Hamburg, Institute for Law and Economics) for which we are grateful.

[21] For example, a system of early warning has been used by Peru. See, C. J. Valderrama, « Peru – Best Practices for Confronting International Lawsuits Brought by Private Investors », *ICSID Rev.* vol. 33, n°1 (2018), pp. e1-e20. The author explains that Peru developed a Guidebook on International Agreements and Preventing International Investment Disputes as well as a presentation on dispute prevention for use in training sessions.

[22] See, e.g., the South Korean Korea Trade-Investment Promotion Agency (KOTRA), https://www.kotra.or.kr/foreign/kotra/KHENKT010M.html.

[23] UNCTAD, 2010, https://unctad.org/en/docs/diaeia200911_en.pdf.

[24] UNCTAD, IIA Mapping Project, https://investmentpolicy.unctad.org/uploaded-files/document/Mapping%20Project%20Description%20and%20Methodology.pdf, at p. 19: "Note: A compulsory period for consultations, negotiations or reaching an amicable settlement between the disputing parties, or a mandatory "cooling-off" period, are not considered to be ADR mechanisms in this section. If the treaty provides only for such procedures, it is marked "None"."

[25] See annex 1 below explaining the method used.

[26] https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

To obtain an estimate for the usage of "cooling-off" clauses in international investment treaties, we adopted a supervised machine learning approach based on the text of investment treaties[27]. Supervised machine learning refers to several techniques in which an algorithm learns patterns from a set of manually coded documents (the so-called training data)[28]. Using the text of 3,127 known treaties collected by WTI's EDIT project[29], we labelled several articles as "cooling-off" provisions or not and used them to train the model to identify patterns of words strongly associated with those categories. Using, *inter alia*, a random forests model, we identified 2183 cooling-off clauses in provisions of 2,885 treaties with strong accuracy[30].

We predicted whether or not the remaining provisions were "cooling-off provisions" using inter alia the random forests model[31] using text as well as grammatical information and named entities as the unit of analysis.[32] The model identified 2183 clauses as cooling-off provisions in the 3,127 treaties. It should be noted that these predictions are at the *article* level and that some treaties have more than one cooling-off provision.[33]

Cooling-off clauses identified

Provisions classified using a random forest model.
Model accuracy: 0.97. Cohen's Kappa: 0.93
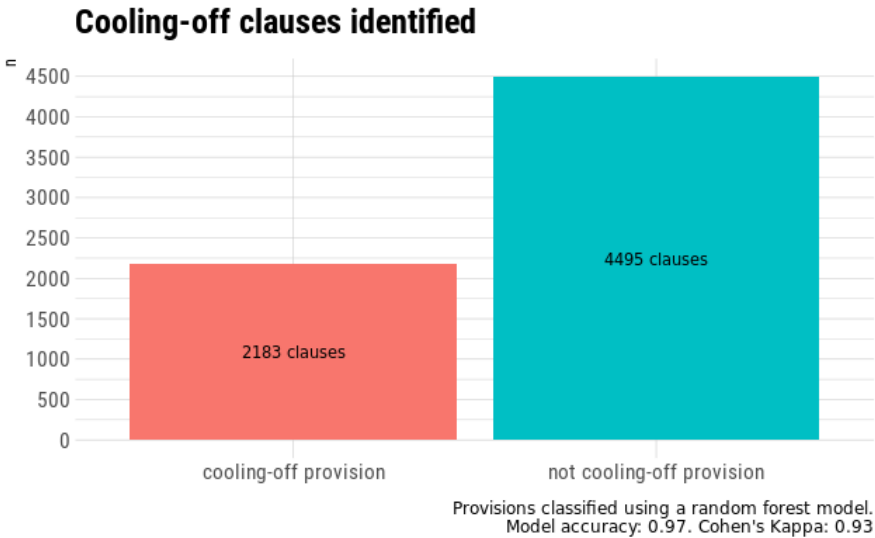
At *treaty* level, the model identified cooling-off provisions in 2,052 treaties. If we take the 2,885 treaties with ISDS-related articles identified, this would represent **71%** of the treaties.

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[27]For more details on text-as-data approaches to international economic law, see Alschner, Wolfgang, Joost Pauwelyn, and Sergio Puig. "The data-driven future of international economic law." *Journal of International Economic Law* 20.2 (2017): 217-231.

[28] Welbers, K., Van Atteveldt, W., & Benoit, K. (2017). Text analysis in R. *Communication Methods and Measures*, *11*(4), 245-265.

[29]We would like to thank the WTI and specially Wolfgang Alschner for granting us access to EDIT's database.

[30] More specifically, the model correctly predicted 0.97 of the observations in the evaluation dataset with a Cohen's Kappa of 0.93. For more details on the analysis, please see the annex.

[31] The random forest is a classification algorithm consisting of many decisions trees.

[32] See for details the Annex.

[33] E.g. the Spain-Argentine BIT which has 1 cooling off for inter-state (Art. IX) and two in the ISDS (Art X).

It should be noted that, as with any machine learning-based classification task, these values contain false-positives and false-negatives. If the evaluation dataset, which was randomly sampled from the main dataset, represents the data well, then we should expect around **3%**[34] of articles as possibly being false-negatives, that is actual cooling-off provisions classified as not being so. Similarly, by adopting the above-mentioned assumption, we should expect that around **4%**[35] of articles might be false-positives.

Cooling-off periods identified

Coded from a sample of 1566
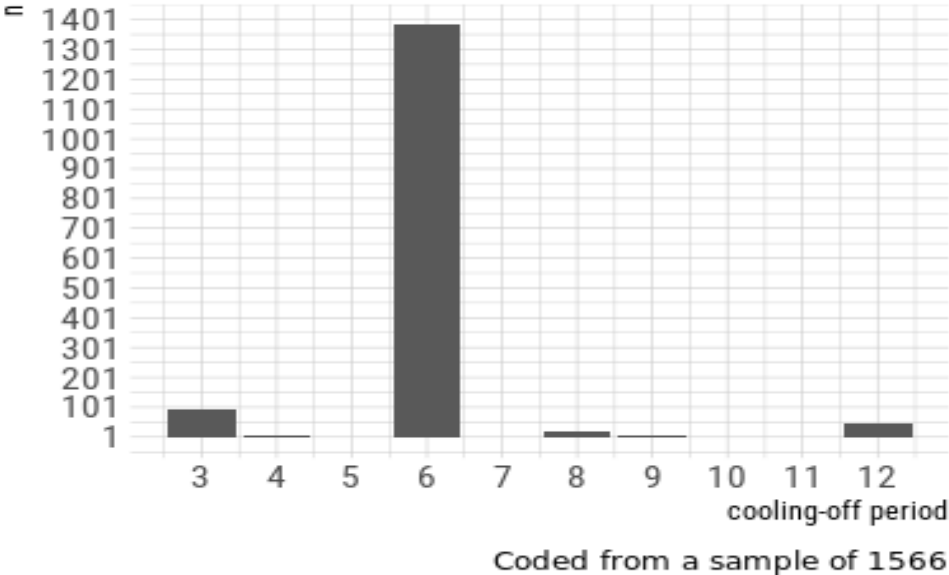
The UNCTAD Paper "Investor-State Disputes: Prevention and Alternatives to Arbitration"[36] finds that the "time frame of three to six months usually allocated" for the purpose of cooling off periods "is rather short". The paper also stresses that, frequently, States will need a substantial amount of time to discern the source of the breach and responsible institutions among a myriad of government agencies". However, if the cooling off period is combined with a constant dialogue with investors as mentioned above, six months may be sufficient. All depends, therefore, on how the State organises its governance of foreign investments.

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[34]Computed the specificity of the predictions. Specificity is defined as the proportion of actual negatives, which got predicted as the negative (or true negative).

$$Specificity = \frac{TrueNegatives}{TrueNegative + FalsePositive}$$

[35]Computed the sensitivity of the predictions. Sensitivity is a measure of the proportion of actual positive cases that got predicted as positive (or true positive).

$$sensitivity = \frac{TruePositive}{TruePositive + FalseNegative}$$

[36] UNCTAD, 2010, https://unctad.org/en/docs/diaeia200911_en.pdf

Type of ADR mentioned in IIAs (absolute numbers and Percent)

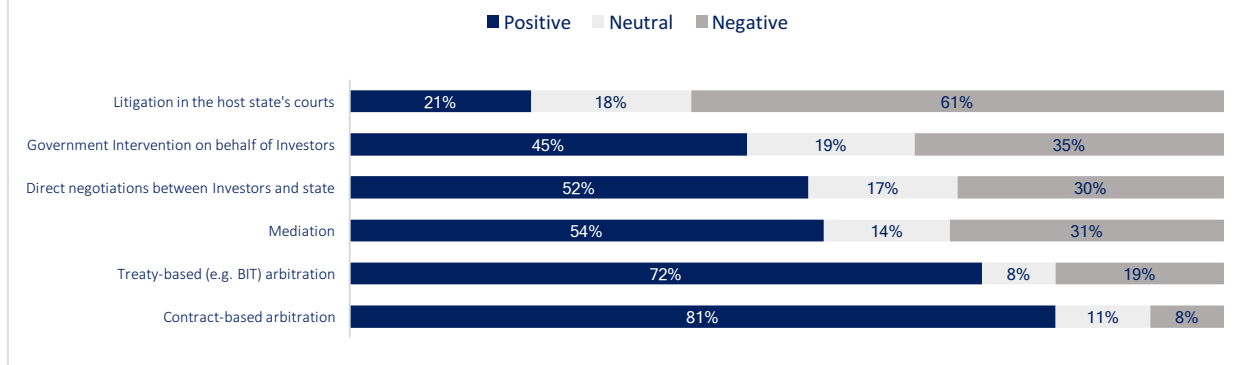Sample containing all coling-off provisions identified
(N = 2183)
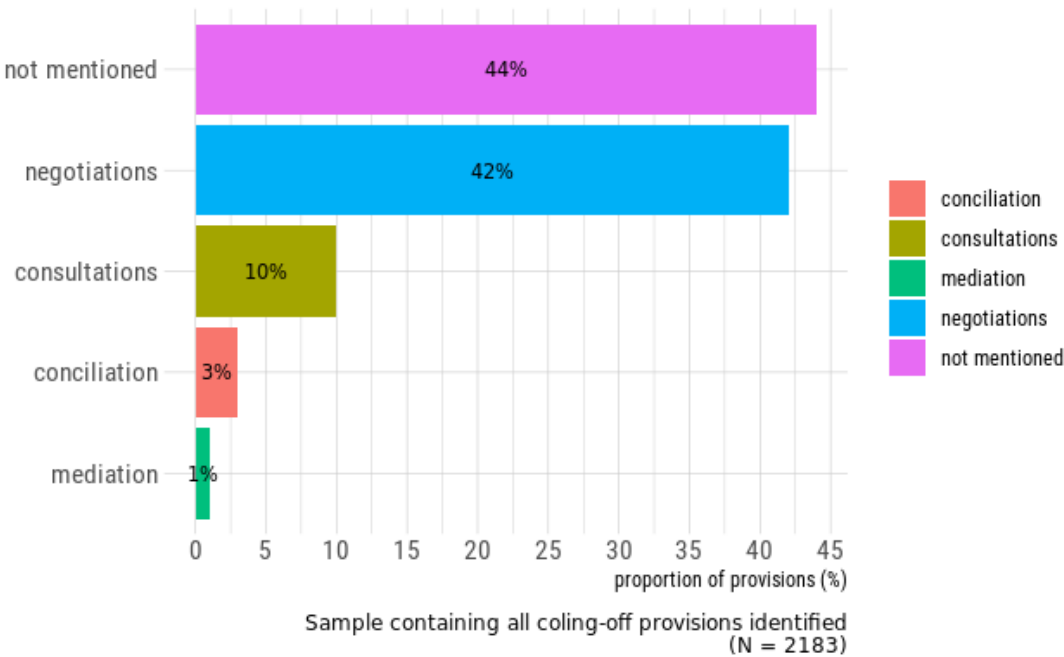
The information available for cooling off periods does not allow a more refined analysis, i.e. whether, when conciliation or mediation is contemplated, the resort to these mechanisms is mandatory or not. As such "cooling off" period are provided for in order to facilitate direct negotiations between investors and States, often with use of lawyers but they would not qualify as conciliation or mediation.

In the 2019/2020 QMUL investors' survey[37] already mentioned, investors stated that if cooling-off periods are provided for by treaties, mandatory mediation would be undesirable and constitute an unnecessary step for the parties towards the resolution of their dispute which would potentially lead to an increase in time and cost. In other words while investors do have a stong preference for dispute avoidance and ADR they do not appear to opt for a staged or multi-tiered approach which provides for a cooling off period first followed by mandatory mediation. The perception is that if amicable settlement during cooling off period does not produce settlement it is unlikely that mandatory mediation will and hence it appears to investors as a further delay before dispute resolution can start. This finding does not provide any guidance as to whether investors would favour a mandatory mediation as part of the cooling off period but it seems a reasonable conclusion to draw that they would prefer mandatory mediation in lieu of a cooling off period.

Chart 1 - Q4: Investor Views on Dispute Resolution Mechanisms

■ Positive ■ Neutral ■ Negative

Mechanism	Positive	Neutral	Negative
Litigation in the host state's courts	21%	18%	61%
Government Intervention on behalf of Investors	45%	19%	35%
Direct negotiations between Investors and state	52%	17%	30%
Mediation	54%	14%	31%
Treaty-based (e.g. BIT) arbitration	72%	8%	19%
Contract-based arbitration	81%	11%	8%

3. Cases where Mediation/conciliation or facilitated negotiations have been used[38]

It is very difficult to find out concrete information on the use of mediation/conciliation in investor/State disputes. When running an electronic check in all submissions by States the term "negotiation" results in thousands of hits. However, negotiation is a broad concept and no detail is available about concrete cases of negotiation. For example, we know that 71 new cases were launched in 2018.[39] But we have little information about these cases and what kind of efforts were made in the period preceding the launching of these cases. For example, in the ECT context[40] we know that ECT cases have used mediation/conciliation. The ECT published data on these cases. But an analysis of these processes has not been provided so far. Moreover, thanks to the UNCTAD 2019 Report, we know that 23% of all known cases (from

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[38] Several methods were used to inform this section. One of them is described as follows : To determine the practical use of mediation in ISDS, three strategies have been employed. A survey of available databases has been conducted investigating all cases that list or have indication of having been subject to mediation or arbitration. The second related method is a review of news articles in key online resources such as IAReporter, Investor-State Law Guide and ItaLaw. The third is a comprehensive electronic review of all available ISDS related documents.

Before addressing this method further, a significant caveat should be emphasised. The availability of detailed documentation of ISDS proceedings, despite being more voluminous than commercial arbitration cases, is limited, and the availability of documentation of mediation and conciliation is almost non-existent. Due to the lack of documentation, it is as such hard to determine at what frequency such methods are used in practise. The lack of documented occurrences could either mean that such practice is rare, or that documentation of such practice is not publicly available.

The currently available documentation consists of 4975 documents, containing in excess of 250 000 pages. The documents vary in their contents, covering awards, decisions, parties submissions, as well as transcripts and municipal court decisions. These documents have been processed for key terms by two different types of search engines. The first, is a traditional search engine where all documents where searched for a set of key terms related to mediation and conciliation. The second engine is one based on named entity recognition. This is a machine learning assisted method where the engine is trained on extremely large datasets, and where the system is able to find matches even if they are spelled differently, addressed indirectly or apply a synonym to the main search term.

The results from the engines was combined and manually reviewed to ensure that the results accurately represented an indication of conciliation/mediation.

[39] UNCTAD Report 2019, p. 102.

[40] The ECT experience is particularly significant since ECT cases count for around 15% of all ISDS known cases (source : UNCTAD Report).

1987 to 2018) have settled and 10% have been discontinued,[41] but there is no information available about the reasons for discontinuation and there is no precise information on the cases settled. More research is needed on this matter.

In the ICSID system, 12 cases have been reported under the ICSID conciliation rules,[42] out of these nine are concluded/settled, while three are still pending. Six of these cases are from the last ten years, while the remaining six spread from 1982 to 2007. Little is known of the results of these cases as the reports remain confidential.

Case No.	Claimant(s)	Respondent(s)	Status
CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H.	Democratic Republic of Madagascar	Settled
CONC/83/1	Tesoro Petroleum Corporation	Trinidad and Tobago	Concluded
CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie m.b.H.	Madagascar	Concluded
CONC/03/1	TG World Petroleum Limited	Republic of Niger	Settled
CONC/05/1	Togo Electricité	Republic of Togo	Concluded
CONC/07/1	Shareholders of SESAM	Central African Republic	Concluded
CONC/11/1	RSM Production Corporation	Republic of Cameroon	Concluded
CONC(AF)/12/1	Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited	Republic of Equatorial Guinea	Pending
CONC(AF)/12/2	Republic of Equatorial Guinea	CMS Energy Corporation and others	Concluded
CONC/16/1	Xenofon Karagiannis	Republic of Albania	Pending
CONC/18/1	Société d'Energie et d'Eau du Gabon	Gabonese Republic	Concluded
CONC/19/1	La Camerounaise des Eaux (CDE)	Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)	Pending

Table 1- List of ICSID conciliaton cases – retrieved 13.02.2020 from icisd.worldbank.org

This small number of ICSID conciliation cases does not include cases where a dispute may have settled amicably in the cooling off period and no such reliable data / statistics exist.

Beyond the cases that have entered formal conciliation we have identified ten cases where mediation/conciliation has been attempted. These can be divided into four main types of mediation/conciliation.

Parties	Case ID	Type of attempt
Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela	ICSID Case No. ARB/00/5	Non-ISDS conciliation attempt of underlying breach
Balkan Energy (Ghana) Limited v. Republic of Ghana	PCA Case No. 2010-7	Non-ISDS conciliation attempt of underlying breach
Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru	ICSID Case No. UNCT/18/2	Non-ISDS conciliation attempt of underlying breach
Italba Corporation v. Oriental Republic of Uruguay	ICSID Case No. ARB/16/9	Pre-ISDS conciliation
KBR, Inc. v. United Mexican States	ICSID Case No. UNCT/14/1	Non-ISDS conciliation attempt of underlying breach

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[41] See Figure III.10.
[42] See table 1.

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Maritime International Nominees Establishment v. Republic of Guinea	ICSID Case No. ARB/84/4	Pre-ISDS conciliation
Methanex Corporation v. United States of America	UNCITRAL	Non-ISDS conciliation attempt of underlying breach
Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad	ICSID Case No. ARB/05/12	Non-ISDS conciliation attempt of underlying breach
Olyana Holdings v. Rwanda		Non-ISDS local mediation
Pan African Burkina v. Burkina Faso		Paralell mediation and arbitration
Systra SA v. Philippines		Mediaton under IBA rules

Table 2 - List of non-ICSID conciliations/mediations, sources: The pitad.org database, ItaLaw and IAReporter

The first and most common scenario is where some form of mediation has taken place prior to the notice of arbitration. The common denominator is that the mediation is connected to the underlying conflict, rather than as a direct mediation between the investor and state on the basis of protections pursuant to the BIT. Through an analysis of the underlying documents we have found indications of such conciliation/mediation efforts in seven cases.

The second type of cases is where some form of pre-ISDS mediation/conciliation effort is started after notice of arbitration is served. Two such instances were found in the material, in the first an unsuccessful mediation lasting five hours was conducted. In the second, three mediation sessions where held before the endeavour was deemed unsuccessful.

The third type currently consists of one case heard by the ICC. The case between Systra and the Philippines was mediated under the IBA rules for investor-state mediation. The parties in this case have agreed to conduct mediation to avoid having to conduct a full arbitral proceedings. Little further is known of this case.[43]

The fourth type also consists of one case. In *Pan African Burkina and others v. Burkina Faso* the investors conducted mediation in parallel to pursuing arbitration. The investors had cited their lack of success in the mediation as one of the reasons for seeking arbitration.[44]

In addition, some states, notably Egypt and Argentina, engaged in settlement discussions after the arbitration has started. The common feature of these cases is that the States which have effectively used settlement discussion and mediation have made a decision to mediate and/or settle the case at the highest governmental level: either there was an inter-ministerial committee under the prime-minister or direct involvement of the head of state or a someone with delegated authority.

Queen Mary University of London conducted in December 2019 a survey to canvas the views of investors in respect of proposed ISDS reforms.[45] Several of these questions related to investor-state mediation. The background is that as mediation is increasingly thought about as a helpful mechanism to resolve, mitigate or prevent disputes it is useful to know what investor think. Hence the survey asked respondents their views on whether they would welcome the

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[43] https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/.
[44] https://www.iareporter.com/articles/icc-tribunal-refuses-to-grant-provisional-measures-absent-irreparable-harm/.
[45] See footnote 36.

introduction of a mandatory requirement to go through mediation before commencing arbitration proceedings. Respondents were given five options: 'strongly favour', 'somewhat favour', 'no view', 'somewhat oppose', 'strongly oppose'.

Overall respondents considered the introduction of such requirement favourably (64%), with 34% of respondents 'somewhat favouring' and 30% of respondents 'strongly favouring' the proposal.

Chart 19 - Question 29: Investors Views on Mandatory Requirements to mediate before commencing arbitration proceedings
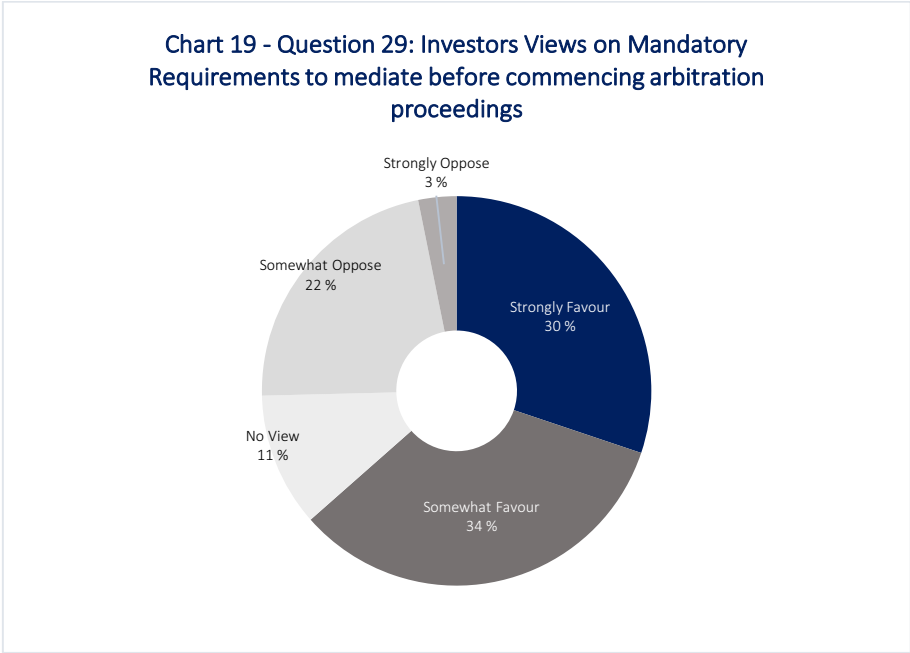
The interviews allowed the researchers to explore how investors might perceive the mediation of investment disputes. An interviewee expressed the view that mediation was not appropriate for all investment disputes and should therefore be available on a voluntary basis to the parties. The latter point was echoed by interviewees generally who said that mediation should not be forced upon the parties.
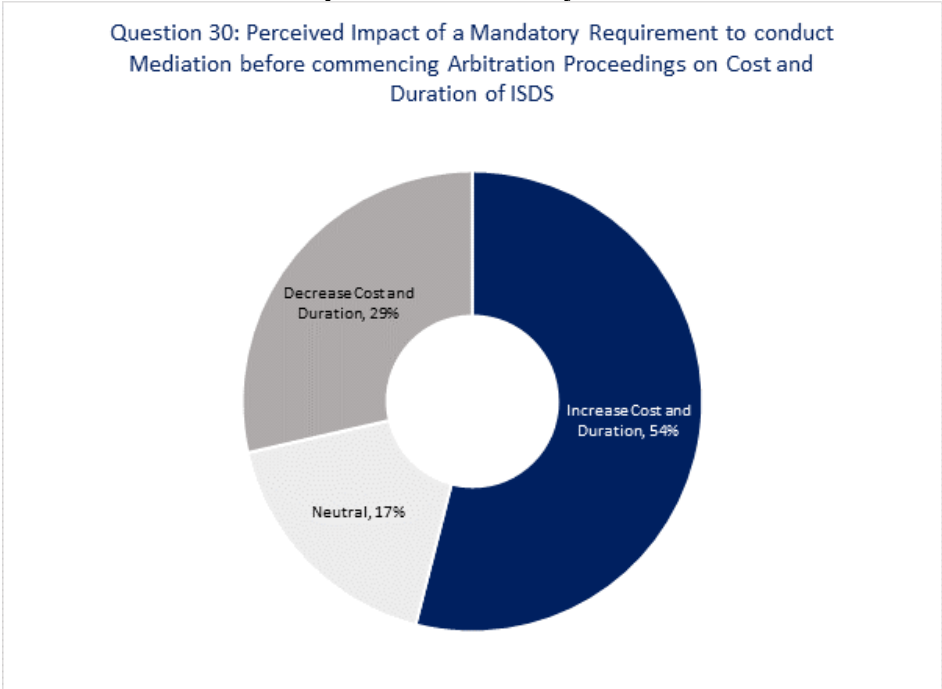
Other comments made by interviewees were that:
- mediation is better suited than formal means of dispute resolution to achieve the parties' commercial or business objectives as it has less of a negative impact on the parties' relationship;
- mediation may not be appropriate where there is an imbalance of power between the parties, as could be the case for smaller sized investors;
- the commencement of formal proceedings and the institution of an arbitral tribunal can be used as leverage by the investor to get settlement discussions started with the state; and
- a mandatory mediation phase could undermine the position of investors and not encourage fruitful discussions.

Finally, in this respect investors were asked what impact mandatory mediation would have on the cost and duration of ISDS proceedings on a scale from "0" (substantially reduce cost and duration) to "10" (substantially increase cost and duration). Respondents believed that the

introduction of mandatory mediation would lead to an increase on costs, with the majority of responses ranging between 6-10 (49%). This finding was confirmed by interviewees, who expressed their concerns over the introduction of mandatory mediation with respect to the potential increase of time and costs.

Chart 22: Perceived Impact of Mandatory Mediation on Cost and Duration of ISDS

Question 30: Perceived Impact of a Mandatory Requirement to conduct Mediation before commencing Arbitration Proceedings on Cost and Duration of ISDS

Decrease Cost and Duration, 29%

Increase Cost and Duration, 54%

Neutral, 17%

4. What are the obstacles for the use of mediation/conciliation?

There is no hard evidence, but only anecdotal evidence, on the obstacles preventing the use of mediation/conciliation. However, it is important to understand the different levels of obstacles so that the analysis is able to guide potential reform.

Civil society concerns

Civil society has expressed concerns about mediation not only because of the nature of the interests at stake,[46] but also because mediation is usually conducted with heightened confidentiality and opacity.[47]

State Governance

It is often posited that the main impediment to settlement in ISDS matters is that it is difficult within a state for any minister or public official to come forward with a settlement proposal which involves the state making a payment to an investor without a very complex and time-

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[46] See above, p.1 the example of Human Rights issues.
[47] Among the many papers published on these issues, see B. S. Güven, « Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes », CCSI blog, 3 January 2020.

consuming decision making and approval governmental process. Indeed, in mediation it is critical that those involved have an express authority to make a decision and settle the dispute. The examples of Egypt and Argentina appear to be notable exceptions.

Legislative impediments

It is a matter of further research whether States' legislation contains a prohibition for public authorities or their employees to mediate and settle dispute. In some instances, there may be an express provision in the legislation.

For example, in France, Article 2045 of the civil code provides: "Les établissements publics de l'Etat ne peuvent transiger qu'avec l'autorisation expresse du Premier Ministre". This provision is clearly not a prohibition *per se*. Requiring that a specific authorization be obtained is a matter of good governance to insure that the process through which settlement is reached complies with good administrative practice and the requirements of the law.

Some States may, instead of a specific provision, have to respect legislation dealing with accountability of public officials, need of transparency in the way public administrative tasks are discharged or anti-corruption laws.

Policy impediments – a matter of accountability

Countries may not have any legislative impediments, but still will be reluctant to go to mediation for at least the following reasons: (a) the need to prove to the citizens that they are acting in the best interests of the country; (b) the fact that it is easier for them to pay money out because there is a binding decision against the State instead of them giving money out willingly after an obscure process; (c) heightened confidentiality of the mediation process. There are several answers that can be developed to these arguments.

One of the options to alleviate the accountability of public servants is to entrust all negotiations and use of mediation/conciliation to a special, independent, body (accountable to the highest political body and certainly to the Parliament) so that no civil servant takes alone the responsibility to agree to a settlement with an investor.[48]

5. Some ideas for future work

Guidelines as to how to frame the mediation to make sure it fits the specific needs of States
- Timing of the mediation (very early and/or as the arbitration takes place). If mediation takes place at an early stage, the dispute is not crystalized and there are good reasons to believe that it may be easier to mediate the entire relation and not only the financial aspects. This is key to a long-term solution. But there are also

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[48] Valderrama (*supra* note 11) explains that this role was devoted to the Commission he chaired for several years in Peru. He further explains that the Commission did not hesitate to gather the assistance of well-known independent institutions such as the Mediation clinical program at Harvard Law School or the Columbia University's Center on Sustainable Investment. Another example is that of the Egyptian inter-ministerial committee which has both the support of the head of state and political accountability at the same time.

strong arguments to give mediation opportunities (windows) during the arbitration process.
- Line of authority
- Monitoring the work of the person(s) participating in the mediation
- Transparency and adaptation of the confidential parts of the process (see how we can import the Maurice Convention or part of it).

Guidelines as to how to frame the mediation to meet Civil society's concerns
One special feature of mediation (contrary to arbitration) is that all stakeholders may be heard and collaboratively included in the process. Some technics have been developed already (for example in collective labour mediation) to overcome the obstacle of confidentiality.

Guidelines as to what happens with the documents and arguments used during the mediation, if it is unsuccessful and the case proceeds to arbitration/litigation. In civil and commercial matters, these documents and arguments are strictly confidential and nothing said or done during the mediation can be used in the arbitration. Is there any reason to change that practice for investment? There may be issues if third parties have interests or there is a general public interest – the discussion would be along the lines of transparency in ISDS 15 years ago…

Enforcement
The 2018 Singapore Convention on International Settlement Agreements (already alluded to above) applies to settlements in an ISDS context. However, the negotiators granted States the right to make a reservation to the effect that a State "shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.[49] Consequently, the ISDS reform process undertaken within UNCITRAL has the capacity of fostering a culture through the creation of rules or through the capacity building of the Advisory Centre to change perceptions of States and significantly increase compliance with settlement agreements and by avoiding expressing any reservations to the Singapore Convention.

Link between Mediation and TPF
If the dispute is financed via a mechanism of TPF, the financier's interests (strictly financial) may become an obstacle for that party to accept a settlement. Work must be undertaken in order to put in place rules to avoid that unfortunate result.

Code of conduct for mediators
A code of conduct must be drafted for mediators. There are already many such codes of conduct. A future paper may compare these codes and provide some guidance about its drafting. One issue to cover could whether a mediator may accept *amici curiae* to understand the dispute better. Another issue would be to clarify whether a mediator may also assume the role of arbitrator and vice versa.

Cost and duration allocation
This is issue is important to clarify at the outset of the mediation process so that parties understand how the settlement will impact on their potential rights to cost shifting.

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[49] Art. 8. 1. (a).

The span of mediations/conciliations seen as a whole range from five hours to 1047 days.[50] As the available data on non-ICSID mediations/conciliation is scarce we have removed these from the following data.

For ICSID conciliation, the average time from registration to termination event (either the issuance of a report, or a settlement) is 541 days, with 173 days being the shortest and 1047 days being the highest. The median is 487 days.[51]

Case No.	Claimant(s)	Respondent(s)	Status	Length of proceeding registration toreport/settlement	Length of proceeding	Time from registration to constitution
CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H.	Democratic Republic of Madagascar	Concluded	258	258	
CONC/83/1	Tesoro Petroleum Corporation	Trinidad and Tobago	Concluded	824	691	133
CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie m.b.H.	Madagascar	Concluded	767	665	102
CONC/03/1	TG World Petroleum Limited	Republic of Niger	Concluded	487	487	
CONC/05/1	Togo Electricité	Republic of Togo	Concluded	321	197	124
CONC/07/1	Shareholders of SESAM	Central African Republic	Concluded	366	191	175
CONC/11/1	RSM Production Corporation	Republic of Cameroon	Concluded	631	480	151
CONC(AF)/12/1	Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited	Republic of Equatorial Guinea	Pending			
CONC(AF)/12/2	Republic of Equatorial Guinea	CMS Energy Corporation and others	Concluded	1047	1040	7
CONC/16/1	Xenofon Karagiannis	Republic of Albania	Pending			
CONC/18/1	Société d'Energie et d'Eau du Gabon	Gabonese Republic	Concluded	173	142	31
CONC/19/1	La Camerounaise des Eaux (CDE)	Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)	Pending		244	103

Table 3 - Length of conciliations under ICSID. Calculated based on data from icsid.worldbank.org

Parties	Case ID	Type of attempt	Length of mediation
Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela	ICSID Case No. ARB/00/5	Pre trial Conciliation attempt of underlying breach	Unknown

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[50] Mediation was attempted for five hours in Italba Corporation v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9. The longest is was held for 1047 days in *Republic of Equatorial Guinea v. CMS Energy Corporation and others* ICSID concilliation CONC(AF)/12/2. See table 4

[51] Based on data from the ICSID conciliaton cases database– retrieved 13.02.2020 from icisd.worldbank.org. See table 3.

Balkan Energy (Ghana) Limited v. Republic of Ghana	PCA Case No. 2010-7	Pre trial Conciliation attempt of underlying breach	Unknown
Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru	ICSID Case No. UNCT/18/2	Pre trial Conciliation attempt of underlying breach	Unknown
Italba Corporation v. Oriental Republic of Uruguay	ICSID Case No. ARB/16/9	Pre trial Conciliation attempt of underlying breach	Five hours
KBR, Inc. v. United Mexican States	ICSID Case No. UNCT/14/1	Pre trial Conciliation attempt of underlying breach	Unknown
Maritime International Nominees Establishment v. Republic of Guinea	ICSID Case No. ARB/84/4	Pre-ISDS conciliation	Unknown
Methanex Corporation v. United States of America	UNCITRAL	Pre trial Conciliation attempt of underlying breach	Unknown
Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad	ICSID Case No. ARB/05/12	Pre trial Conciliation attempt of underlying breach	Three sessions without result. Notified 23 November 2004. Mediation ended on 22 april 2005.
Olyana Holdings v. Rwanda		Pre-trial local mediation	Unknown
Pan African Burkina v. Burkina Faso		Paralell mediation and arbitration	Unknown
Systra SA v. Philippines		Mediaton under IBA rules	Unknown

Table 4 - Length of mediation/conciliation in cases not proceded under the ICSID conciliation rules. Source: documents retrieved from ITALaw and IaReporter.

The average number of days from registration to constitution of the conciliatory committee is 103 days, with the fastest coming a mere week while the slowest taking 175 days.[52]

The cost of these proceedings is currently unknown as the reports are not public. Pertaining to the non-ICSID cases, costs of mediation/conciliatory efforts are not discussed in any publicly available documents.

Effectiveness and rebounding of cases that have been mediated/conciliated

Out of the twelve cases conciliated under the ICSID, two cases have been settled without a report being issued.[53] Two cases where reports were issued, reappear later as investment arbitrations. In the remaining five cases the parties do not appear to pursue further ISDS litigation as of the time of writing. Presupposing greater availability of documentation, further research into the specifics of these cases, along with the larger corpus of settled cases may provide insight into how mediation contributes to the final outcomes.

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[52] Ibid.
[53] See table 3.

ANNEXE 1[54]

Remarks on method used

To obtain an estimate for the usage of "cooling-off" clauses in international investment treaties, we adopted a supervised machine learning approach based on the texts of the articles.[55] Supervised machine learning refers to several techniques in which an algorithm learns patterns from a set of manually coded documents (the so-called training data).[56] More specifically in our case, we labelled several articles as "cooling-off" provisions or not and used them to train the model to identify patterns of words strongly associated with those categories.

This analysis was done in three stages:
a) Identifying a relevant population of BITS and creating a corpus of documents with the requisite provisions;
b) Labelling some provisions as "cooling-off" provisions or not in order to train the models;
c) Evaluating the models' performance in classifying the text, i.e. assessing how accurately a model predicts a "cooling-off" provision in comparison to the actual hand-coded classification; and
d) Selecting the model with best performance and classifying the provisions to generate a database.[57]

1) Creating the corpus

We were granted access to the text of 3,127 treaties collected by WTI's EDIT project.[58] The text of each treaty was prepared by first splitting each treaty by article. Then, all articles not containing words associated with disputes[59] and with time units[60] were removed. This streamlines the dataset to 7,095 provisions belonging to 2,885 treaties. Finally, the text was cleaned by turning all words into lower-case, removing punctuation, identifying the syntactic function of each word and named entities[61] as well as by stemming each word.[62]

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[54] This annex is provided by José Reis.

[55] For more details on text-as-data approaches to international economic law, see Alschner, Wolfgang, Joost Pauwelyn, and Sergio Puig. "The data-driven future of international economic law." *Journal of International Economic Law* 20.2 (2017): 217-231.

[56] Welbers, K., Van Atteveldt, W., & Benoit, K. (2017). Text analysis in R. *Communication Methods and Measures*, *11*(4), 245-265.

[57] The software for processing the text and the data analysis were written in Python (version 3.7.3) and in R (version 3.5.3) programming languages.

[58] We would like to thank the WTI and specially Wolfgang Alschner for granting us access to EDIT's database.

[59] E.g., words such as dispute, claim or arbitration.

[60] E.g. words such as "months" or "days".

[61] For this, we used the "spacy" python module (https://spacy.io/). Spacy's named entity recognition algorithm encompasses categories such as "date", "person", or "law".

[62] Stemming is the process of reducing words to their word stem, base or root form. For example, the word "interpretation" becomes "interpret". This reduces word variance by removing, for example, plurals or verb conjugations.

2) **Labeling the data**

For a machine-learning classification model to "learn" how to classify a provision, it needs to be provided with examples of articles coded as "cooling-off" provisions and some coded as "not cooling-off provision". This essentially means that hand-annotated articles are required to train the model. The larger the target text, the more training examples one needs to feed into the model in order to increase the accuracy of its predictions. Due to the large size of the text at hand, an approach combining hand coding with regular expressions and topic modelling[63] was adopted. Articles mostly composed by words associated with unrelated topics, such as public procurement, application of the treaty or trade policy, were coded as "not cooling-off provision". The remaining were coded as "cooling-off" provision or not on a case-by-case basis with the help of regular expressions. We labelled 6,687 articles.

3) **Training the models**

The 6,687 labelled articles were then used to train several different machine learning-based text classification models. First, each article was turned into a "*bag of words*" where each word is represented by a numerical value. This numerical representation can take values such as 0 or 1, depending on whether the word is present in the document or not, the amount of times a word is present in the document, or other metrics. For our analysis, we represented words by their "term frequency–inverse document frequency" (TF-IDF) which is similar to measuring term-frequency in a document but also weighting the word's frequency by the (logarithmically scaled) inverse fraction of the documents that contain the word.[64] This metric measures how idiosyncratic a word since it proportionally "reduces" the weight with respect to how frequently it appears in the corpus. For performance comparison purposes, the "*bags of words*" were created using two different text units of analysis. In the first one, our unit of analysis was each word in the corpus (hereinafter "cleaned" approach); in the second, each word was concatenated with its syntactic function and, where existing, named entity type identified (hereinafter "postag&entities" approach).

In the analysis, a random sample of 80% of the data was used for training the model and the remaining 20% to evaluate the different models' performance (hereinafter "evaluation dataset"). The following models[65] were used: support vector machines,[66] naive bayes,[67] logitboost,[68] and random forest.[69]

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[63] For the topic model, we resorted to the "correlated topic model", Blei, David M., and John D. Lafferty. "A correlated topic model of science." *The Annals of Applied Statistics* 1.1 (2007): 17-35, in its implementation in the "stm" package for R, Roberts, Margaret E., Brandon M. Stewart, and Dustin Tingley. "stm: R package for structural topic models." *Journal of Statistical Software* 10.2 (2014): 1-40.

[64] Obtained by dividing the total number of documents by the number of documents containing the term, and then taking the logarithm of that quotient.

[65] All models were fitted using their implementation in the "caret" package for R, Kuhn, Max. "Building predictive models in R using the caret package." *Journal of statistical software* 28.5 (2008): 1-26.

[66] See Cristianini, Nello, and John Shawe-Taylor. *An introduction to support vector machines and other kernel-based learning methods*. Cambridge university press, 2000. For an intuitive explanation, see also: https://medium.com/machine-learning-101/chapter-2-svm-support-vector-machine-theory-f0812effc72.

[67] See Raschka, Sebastian. "Naive bayes and text classification i-introduction and theory." *arXiv preprint arXiv:1410.5329* (2014).

[68] See Kotsiantis, Sotiris B. "Logitboost of simple bayesian classifier." *Informatica* 29.1 (2005).

[69] See Breiman, Leo. "Random forests." *Machine learning* 45.1 (2001):

After training the models, we evaluate their performance by comparing the predicted classifications, "cooling-off provision" or not, with the manually labelled ones. The plot below shows two very relevant metrics. The accuracy of the classifier, i.e., the ratio of number of correct predictions to the total number labels; as well as each model's Cohen's Kappa,[70] a metric that compares an observed accuracy with an expected accuracy (random chance). The plot below suggests that the model that better predicted the labeled data was the random forests using text as well as grammatical information and named entities as the unit of analysis. Under this specification, the random forests correctly predicted 0.97 of the observations in the evaluation dataset with a Cohen's Kappa of 0.93.
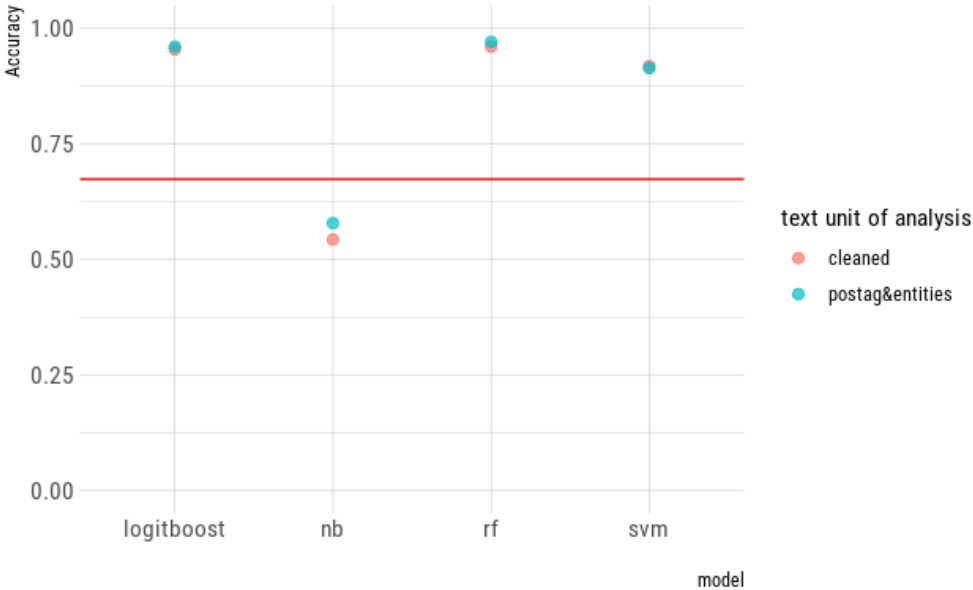
[70]Landis, J.R.; Koch, G.G. (1977). "The measurement of observer agreement for categorical data". *Biometrics* **33** (1): 159–174 .
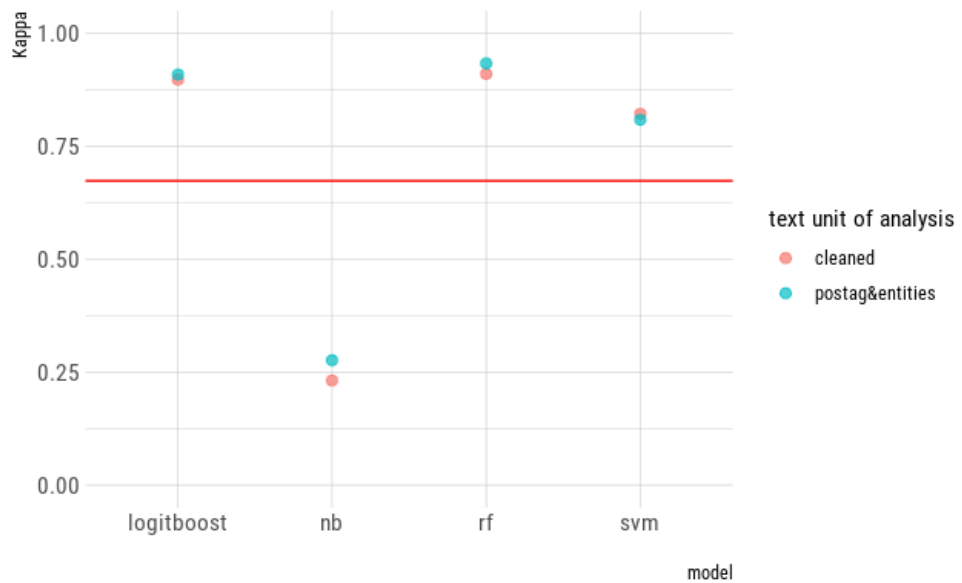
More specifically, in the random forests model, using text, grammatical information and named entities as the unit of analysis, correctly predicted 417 articles of the evaluation dataset as cooling-off provision and, similarly, its predictions matched the "not cooling-off" provisions in 875 of the cases. In 19 cases, it classified incorrectly "cooling-off provisions" as not "cooling-off provisions". In 24 cases, it incorrectly classified not "cooling-off provisions" as "cooling-off" provisions.

correctly identified: cooling-off	false negatives	false positives	correctly identified: not cooling-off
417	19	24	875