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Investor-State Mediation - New Tools for Policy Makers

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Investor-State Mediation - New Tools for Policy Makers

Mark Appel[1] and Joe Tirado[2]

Introduction

With Investor-State dispute settlement ("**ISDS**") reform very much in the public eye[3] global inter-governmental organizations, including the United Nations Commission on International Trade Law ("**UNCITRAL**"), the International Centre for Settlement of Investment Disputes ("**ICSID**")/World Bank and the Energy Charter Conference ("**ECC**") have staked out a leadership position in promoting and encouraging the use of early and effective conflict management techniques, including mediation, to better manage the inevitable disputes that arise in the course of Investor-State ("**IS**") relations.

The Energy Charter Secretariat ("**ECS**"), in particular, has produced several valuable "how to" documents, making it easy for States to educate State representatives and benchmark their mediation efforts against accepted standards. Importantly, they also provide helpful advice regarding how best to organise the State's approach to conflict management, mediation and arbitration.

This article will focus on two conflict management and dispute resolution documents, the Energy Charter´s Model Instrument on Management of Investment Disputes Model (the "**Model Instrument**")[4] and the Energy Charter´s Guide on Investment Mediation (the "**Guide on IM**").[5]

Better known as the motto of the international scouting movement, "be prepared" could serve as a call to action for States faced with the inevitable disputes which flow from international investment contracts. Too frequently, States faced with their first (or first series) of investment claims have lacked a fully integrated IS conflict management plan, with unfortunate consequences occasioned by information not gathered, communications not had and deadlines missed or ignored entirely.

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[3] See: "The arbitration game – Governments are souring on treaties to protect foreign investors", The Economist, Oct 11, 2014. See also United Nations Commission on International Trade Law – Working Group III: Investor-State Dispute Settlement Reform; https://uncitral.un.org/en/working_groups/3/investor-state

[4] Model Instrument on Management of Investment Disputes.
https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes

[5] Guide on Investment Mediation:
https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf

The Energy Charter's Model Instrument on Management of Investment Disputes

In 2017 the ECS surveyed its membership in an attempt to identify obstacles to the use of investment mediation. Survey results identified a deeper, underlying concern of member States. Government representatives acknowledged an absence of clear domestic legal frameworks for addressing IS disputes. This absence of an ISDS framework created ambiguity regarding authority to even engage in negotiation and created additional fears surrounding the potential abuse of power, possible allegations of corruption and the absence of funding.

In response to these concerns the ECS organised a series of workshops and seminars, inviting State representatives, IS institutional representatives and ISDS experts to exchange concerns and ideas. As a result of these discussions the ECC asked the ECS to draft a model instrument that could be voluntarily utilised by States, either by way of implementing a domestic IS dispute resolution framework or serving as guidance concerning the practical and legal issues that should be considered in implementing a comprehensive conflict management plan for investment disputes.

In drafting the model instrument, the ECS worked with a specially formed sub-committee of the International Mediation Institute's Investor-State Mediation Taskforce6 ("IMI Taskforce") made up of counsel with considerable experience representing States in IS matters, government representatives and leading IS mediators and arbitrators. The ECS also looked to existing State instruments and continued its discussions with IS institutions and government officials.

The Model Instrument delivers the promised comprehensive approach to IS conflict management requested by the ECC. It is accompanied by an Explanatory Note which makes it clear that implementing States need to adapt the Model Instrument in keeping with their unique administrative needs and that further, additional domestic legislation may be necessary. What follows is a discussion of several core issues addressed by the Model Instrument.

1. Embrace Early and Effective Conflict Management

As previously noted, the absence of a clear framework for addressing IS conflict management creates problems (e.g. uncertainty, fear of exceeding authority, fear of exposure to political backlash) for government officials. The Model Instrument includes a Preamble making clear why IS conflict management is necessary and the goals of establishing a State conflict management policy:

> *"II. Foreign Investment disputes, if not addressed early and adequately, may implicate important public policies, political and financial considerations, legislative and regulatory activities, and possibly the international reputation of (X).*

[6] See more information regarding the International Mediation Institute (IMI) Investor-State Mediation Taskforce at https://www.imimediation.org/about/who-are-imi/ism-tf/

III. (X) is committed to preventing and managing foreign investment disputes before formal dispute resolution becomes necessary, by facilitating efficient and coordinated inter-institutional actions; and to effectively and efficiently resolving such disputes."[7]

The Model Instrument also provides, as part of an Article 1 Declaration of Public Interest (the "Declaration"), that prevention and management of IS disputes and actions necessary to ensure the State's adequate defence are matters of public interest. The Declaration goes on to summarise outcomes desired in effective IS conflict management including:

(a) An early warning mechanism;
(b) Allocation of responsibilities;
(c) Preliminary assessment;
(d) Legal representation and experts;
(e) Budgeting;
(f) Support for negotiated outcomes if possible;
(g) Transparency and confidentiality.

Some public representatives have argued that legislation isn't necessary, that government doesn't need permission to engage in negotiation and effective conflict management, but history suggests otherwise. By way of example, it was the absence of effective conflict management policy and practice that motivated passage of the Administrative Disputes Resolution Act (1990)[8] in the US and the Woolf Reforms (1998)[9] in the UK. It also led to the UK Government ADR Pledge. The Lord Chancellor's March 2001 Pledge[10] committed government departments and agencies to the following:

- ADR will be considered and used in all suitable cases where the other party accepts it;
- Departments will provide appropriate clauses in their standard procurement contracts;
- Central government will produce procurement guidance on the options available;
- Departments will improve flexibility in reaching agreements on financial compensation;
- Departments will put performance measures into place to monitor the effectiveness of this undertaking.

2. Address Legislative Scope

Not surprisingly, given its' legislative nature, the Model Instrument takes a broad view of both investment-related disputes and public entities.

Investment disputes are differentiated, with Investment Contracts ("**ICs**") and International Investment Agreements ("**IIAs**") addressed separately. This dual approach recognizes that the State is likely to face actions grounded in both contract and treaty. Of course, how those distinguishing factors are managed is another matter entirely (see below).

[7] Model Instrument, op cit, P. 2
[8] The Administrative Disputes Resolution Act of 1996 (US), Pub. Law 104-320 (amending Pub. Law 101-552 and Pub. Law 102-354). The ADRA was originally passed in 1990.
[9] The Woolf Reforms and Civil Procedure Rules 1998 (UK) (Amended December 2010)
[10] The Lord Chancellor's ADR Pledge, March, 2001; UK laws, Chapter 1 at 1.28

If effective management of investment disputes is the goal, then an expansive description of public entities is required. Early communication, coordination, strategy and action require the participation of every sector and every level of government. "Public Entity", for purposes of the Model Instrument includes State government, including its' Ministries; other central government public entities; the Office of the President; the Parliament; the Courts and State Prosecutors; regional/local public entities; municipalities; and, State-owned enterprises.[11]

Further to both coordination and communication the Model Instrument defines an "Involved Public Entity" as those entities:

(a) Expressly mentioned in the notification of the dispute;
(b) Involved in the drafting, negotiation, conclusion or execution of the IIA or IC from which the dispute derives; and,
(c) Directly or indirectly involved in the adoption and/or implementation of the measures that form the subject matter of the dispute.[12]

3. Put Somebody In Charge

Efficient and effective management starts with the allocation of responsibility. As mentioned earlier, the Model Instrument provides separate approaches for disputes arising out of contractual obligations and investment agreements. In the case of contractual disputes, the "Responsible Body" is the Public Entity that negotiated or signed the contract with the investor.[13] In the case of investment agreements, the Responsible Body is either a designated Ministry or Intra-Institutional Commission.[14]

In a brief footnote, the Model Instrument suggests another choice, putting the same Responsible Body in charge of all international disputes without making a distinction as to whether they arise out of ICs or IIAs.[15]

Requiring that a single body represent the State in all IS matters, whether arising out of contract or investment agreement, could provide multiple benefits including:

- One comprehensive repository for the State's IS procedural and substantive information
- A clear and unambiguous contact point for investors and State representatives
- Easier coordination between involved public entities and persons
- Creation of a "Centre of Excellence" for early and effective communication and conflict management, expertise concerning the duties and obligations of the State, public international law, international contracts, the IS dispute settlement process, ADR techniques and the engagement of counsel, experts, mediators and arbitrators as necessary to enable the optimal prosecution of the State's claims and defences.

[11] Model Instrument, op cit, Art. 3.3 at p. 4
[12] Model Instrument, ibid, Art. 3.4 at P.4
[13] Model Instrument, ibid, Art. 3.6 at p.4
[14] Model Instrument, ibid, Art. 3.6 (a) at p.4
[15] Model Instrument, ibid., Art.3.6, footnote 1, at p.4

The Model Instrument offers a choice of two options for establishing a Responsible Body for investment disputes. The first choice is a single Ministry (e.g. Economic Development, Finance or Justice). The second option is a specially formed Inter-Institutional Commission.

Though no votes were taken, it's fair to say that the IMI Taskforce was strongly in favour of putting a single ministry in charge, seeing real value in centralising authority and expertise in a single body. The ISDS process is replete with strategic choices, filing requirements and deadlines, all of which argue for a more streamlined decision-making process.

However, on further reflection, the inter-institutional commission approach has real appeal. The establishment of a commission and the shared authority that goes with that approach speak directly to the ills anticipated by the ECC (e.g. political scapegoating, allegations of misfeasance or corruption). Granted, the establishment and maintenance of an inter-institutional commission will require far more by way of organisational work (e.g. multi-department budgeting, creating a Chair and secretariat, convening meetings, communications and decision-making). That time and expense might be warranted.

As with the investor corporations they face across the table, States will need to designate authority in a way that is reflective of their particular needs, culture and politics.

4. Communicate Early and Often

Unlike fine wine and cheese, disputes do not age well. Early and effective communication and coordination up and down the lines of command regarding contractual, community and other political concerns surrounding investment projects is critical.

Coordination and communication issues are particularly challenging in public sector projects. Multiple agencies and individuals may well be relatively new to the rough and tumble of managing complex international projects. Even with the best of intentions and regular oversight market conditions change, governments change and community issues assert themselves.

Putting an agency or individual in charge and creating a central repository of information and expertise is a great start (see Responsible Body above). The Model Instrument also establishes General Principals of Coordination[16], which create a cascading series of duties, starting with the Responsible Body and continuing down to involved public entities and their employees, present and past. Coordination is required at all conflict management stages, including amicable settlement, mediation, arbitration and enforcement. Understanding that sticks, as well as carrots, are sometimes useful to encourage desired behaviour, the Model Instrument provides that delays or failures in cooperation may lead to "administrative sanctions".

[16] Model Instrument, ibid, Art.4 at p.5

5. Develop an Early Warning Mechanism

Mirroring best practices in corporate conflict management[17], the Model Instrument provides for an early alert mechanism, requiring notification from Involved Public Entities to the Responsible Body when the Involved Public Entity "becomes aware of the existence or likelihood of an International Investment Dispute".[18] Query whether words are enough. Some thought should be given as to how State employees can be educated to think pro-actively concerning early dispute management. In the commercial world companies with effective conflict management schemes spend time and money training their staff to identify problems early and manage them "up or out". Brief, early summaries of the dispute are frequently enough for an expert in dispute resolution to take quick steps to solve or minimise the problem. In any case, conflict management policy and best practices should be communicated effectively through every agency of government likely to be involved in international investment contracts.

6. Do a Preliminary Assessment; Map Out a Strategy

Early coordination with involved Public Entities and persons, legal experts and others is critical to the formulation of a successful strategy for mitigation and resolution of investment disputes, whether those disputes arise out of investment contracts or treaties. As mentioned above, the Model Instrument requires immediate written notice to the Responsible Body when a Public Entity becomes aware of even the likelihood of an international investment dispute. Once notified, the ISDS experience and expertise of the Responsible Body can be exercised, with additional information gathered, a strategy formulated and the possibility of early dispute settlement preserved.

7. Get Early, Expert Advice

Failure to consult competent IS legal counsel and experts as necessary early in the life of a dispute can lead to unfortunate outcomes in terms of timely investigation, timely assertion of rights and timely prosecution of claims and defences. The Model Instrument puts the Responsible Body in charge of the hiring process[19] and suggests that assessing the need for legal counsel and experts and other legal experts should take place "as soon as possible" after notice of a potential dispute.

Both the hiring and active involvement of legal counsel creates a multiplicity of issues for States. The involvement of local counsel may be politic and helpful for building local expertise and experience. That said, and historically speaking, the labyrinth created by the intersection of contract law and public international law has usually been navigated successfully by a relatively small section of the international dispute resolution bar; caveat emptor. Once having hired competent counsel the next issue is bringing them up to speed quickly concerning the dispute. Finally, optimal outcomes are realised best when client states and counsel are aligned. By way of example, if the State has a policy favouring early dispute resolution and the use of mediation those issues need discussion while contemplating both the hiring process and the development of case strategy.

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[17] Dispute Wise Business Management.; Best Corporate Practices in Conflict Management from France. https://www.adr.org/sites/default/files/document_repository/Dispute-Wise%20Management%20France%20-Best%20Practices%20Report.pdf

[18] Model Instrument, op cit, Art.8 at p.6

[19] Model Instrument, ibid, Art.11(e) at p. 8 and Art.17 at p.11

8. Address Budgetary Issues

Perhaps surprisingly, Energy Charter members identified the absence of a budget as one of the earliest obstacles to successfully accessing IS dispute resolution processes and expertise. Even States who wanted to access the services of a mediator literally had no way to pay.

The Model Instrument addresses both the location of the dispute settlement budget and how dispute settlement costs are allocated.[20]

The Responsible Body is charged with establishing a budget to cover costs of dispute prevention and resolution. Following the Model Instrument, in a dispute implicating a treaty, where the Responsible Body is the Ministry/Commission, expenses are covered by the Central Government budget. If the dispute is contractually based, the Responsible Body is a local public body and expenses are covered by that local public body's budget.

Separate and apart from the budget for prosecuting the State's case, the Model Instrument provides that those costs should be allocated to the "public entity or agency responsible for the measure, action or omission giving rise to the potential conflict or dispute".[21] The important implication for policy makers at all levels of government is that they and their agency will have to live with the consequences of their acts or omissions. In this respect the Model Instrument mirrors best practices in the corporate world, where companies have found that allocating the consequences of decisions to a corporate law department budget sends the wrong message to division executives. In this respect at least, both government agencies and investor executives need a similar message of accountability.

9. Support Negotiated Outcomes

The perception and, in some cases, the reality that politics makes *bona fide* attempts at negotiation impossible may be the single biggest stumbling block to the effective management of conflicts between investors and States. As mentioned above, fears, including charges of malfeasance, corruption and adverse political consequences, are at the very least perceived to drive inaction by State executives.

The Model Instrument addresses the issue head-on "by recognising the value of negotiated outcomes in a statement of purpose. *The importance is hereby recognised of Alternative Dispute Resolution (ADR) methods such as negotiation, conciliation and mediation, which allow a more agile, efficient, and effective resolution of disputes. (X) shall prioritise the use of ADR methods."*[22]

The Model Instrument goes on to make clear the authority of the Responsible Body for the management and resolution of disputes, and in an important and critical nod to investors, makes it clear that investors shall be entitled to rely on the settlement authority of the Responsible Body.[23]

[20] Model Instrument, ibid. Art. 19 at p.12
[21] Model Instrument, ibid, Art. 19.5 at p. 12
[22] Model Instrument, ibid, Art.22.1 at p.13
[23] Model Instrument, ibid, Art.22.4 at p.13

10. Balance Competing Needs for Transparency and Confidentiality

One of the presumed road blocks to early negotiation and settlement of IS disputes is the need, indeed frequently a requirement, for transparency. Transparency, in and of itself, isn't the problem. Rather, what causes concern is the supposed conflict between transparency and the need to maintain confidentiality during negotiation if difficult subjects are to be fully explored and candid discussion is called for.

In discussions at the ECC, Member State representatives experienced in IS matters did not see transparency and confidentiality as mutually exclusive. Delegates suggested that certain documents (e.g. contracts and settlement agreements) would need to be published and that others (e.g. negotiation communications) both require and allow for confidentiality.

The Model Instrument addresses transparency by requiring publication of the texts of IIAs and, (suggested) ICs, on the State's website/public registry, subject to "confidentiality requirements of Law on ….".[24] The Model Instrument also requires current and former representatives and employees of Public Entities to comply with obligations of confidentiality, whether legal or contractual.[25] In so doing, the Model Instrument reflects the expectation that separate confidentiality legislation and/or non-disclosure agreements with employees will already be in place.

Energy Charter's Guide to Investment Mediation

At the behest of Member States who have seen mediation as being a beneficial step in dispute resolution under the ECT, the ECS began work on the formulation of guidelines to provide a procedural framework under which the mediation process is explained. Furthermore, the guidelines were to set out the steps by which mediation can be utilised in practical terms, attempting to address some of the issues identified as obstacles to IS mediation.

The Guide on IM was adopted by the ECC on 19 July 2016.[26] It was prepared with the support of IMI, ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**"), the International Court of Arbitration of the International Chamber of Commerce ("**ICC**"), UNCITRAL and the Permanent Court of Arbitration ("**PCA**").

As set out in the Preample to the Guide on IM, the ECC:

> "*(1)* ***welcomed*** *the work of the Investment Group and* ***endorsed*** *the Guide on Investment Mediation as a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes;*
>
> *(2)* ***encouraged*** *Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat;*

[24] Model Instrument, ibid. Art.6.2 and Art. 6.3 at p.6
[25] Model Instrument, ibid. Art. 20 at p.12
[26] https://energycharter.org › CCDECS › CCDEC201612

(3) ***welcomed*** *the willingness of the Contracting Parties to facilitate effective enforcement in their Area of settlement agreements with foreign investors in accordance with the applicable law and the relevant domestic procedures.*"

The Guide on IM is designed to (i) explain the mediation process in general (ii) facilitate tips and (iii) explain the role of the ECS and other institutions. The aim is to have an explanatory document that could be voluntarily used by governments and companies to take the decision on whether to go for mediation and how to prepare for it.[27]

The Guide to IM is divided into 14 headings covering:

1. What is Mediation?
2. Mediation as Part of the ECT Dispute Resolution Mechanisms
3. Proposing Mediation
4. Assessing Mediation
5. Preparing for Mediation
6. The Role of the Party and Legal Representatives
7. Mediation Rules and the Role of Institutions
8. Selecting the Mediator(s)
9. Basic Rules of the Proceedings
10. Preliminary Matters
11. The Mediation Process
12. Settlement
13. Enforcement of the Settlement Agreement
14. Barriers to Settlement

Each heading is considered below.

1. What Is Mediation?

The mediation process and its advantages (including speed and cost) are described, as well as the role of the mediator.

2. Mediation as Part of the ECT Dispute Resolution Mechanisms

The Energy Charter Treaty ("**ECT**") encourages amicable resolution of investment disputes and allows parties to an investment dispute to resort to mediation at any point in time.

2.1 During the three months cooling-off period (or required amicable discussion prior to submitting the dispute for resolution to courts or arbitral tribunals)

Article 26.1 of the ECT states that investment disputes related to breaches of obligations under Part III of the treaty "*shall, if possible, be settled amicably*." There is no specific constraint within the ECT as to which mechanisms could be used under such 'amicable settlement' process within the three months cooling-off period. Nevertheless, as set out in Article 26.2 of the ECT, a party to the dispute needs to 'request' amicable settlement before proceeding towards international arbitration or the domestic courts. This mandatory requirement is helpful as without it a party may feel that to suggest mediation unilaterally

[27] See introduction to the Guide on IM

may be interpreted by the other side as a sign of weakness. Both parties can therefore point to this provision to initiate such a discussion.

Investors and Contracting Parties are free to choose any mediation or conciliation rules, such as those of the International Bar Association ("**IBA**"), ICC, ICSID, PCA, SCC and UNCITRAL which have developed special provisions for the use of State parties or entities.

While available arbitral awards under the ECT have not confirmed the existence of a duty to mediate in Article 26.1 of the ECT, the Guide on IM considers three cases that have confirmed that parties need to seriously attempt to reach an amicable settlement.[28]

Of course, undertaking a mediation during the three-month "cooling off" might not be the right time to mediate. It might be viewed as premature in some cases and sometimes the parties need to engage in some form of attrition over a period of time before they are ready to consider seriously the possibility of settlement. That said, the ability to engage early in meaningful settlement negotiations with the assistance of a neutral can self-evidently have significant time and costs savings. Indeed, even if a mediation does not result in a complete resolution at the first attempt, it may result in the parties having a much better understanding of not only their opponent´s case, but also their own, which in itself can be of benefit to the parties in the proceedings. A mediation may also result in a partial settlement of the matters in dispute that can have time and cost advantages to the parties. Many of the ISDS community have come around to understanding that there are many times to consider mediation, up to and including the enforcement stage, and that if mediation is unsuccessful at the first attempt there may be scope to attempt mediation again at a later stage.

2.2. After the three months cooling-off period

Under Article 26.3 of the ECT, it is for the investor to choose the applicable set of rules and administering institution, since the Contracting Parties have already given their unconditional consent pursuant to the ECT. This means that, if an investor chooses to proceed by way of mediation under the ECT, the State is obligated to do so pursuant to the rules chosen by the investor.

2.3 Settlement agreements reached in ECT investment cases

Based on publicly available information, the Guide on IM lists eight investment cases where there has been a settlement agreement.[29]

[28] Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003, Award of 29.03.2005, at page 73, available at http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-004a.pdf; Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Award of 26.03.2008, at para. 50, available at http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-010a.pdf; and Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. 116/2010, Award of 19.12.2013, at paras. 828-830, available at http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-028a.pdf

[29] ČEZ v. Albania (2013), Slovak Gas Holding BV et al v. Slovak Republic (2012), Türkiye Petrolleri Anonim Ortaklığı v. Kazakhstan (2011), EVN AG v. The Former Yugoslav Republic of Macedonia (2010), Vattenfall v. Germany (2011), Barmek Holding A.S. v. Azerbaijan (2006); Alstom Power Italia SpA, Alstom SpA v. Mongolia (2004), and AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary (2002).

3. Proposing Mediation

The Guide on IM notes, among other things, that mediation can be used in any type of dispute, including those where numerous parties are involved. Any party to an investment dispute arising under the ECT may propose the use of mediation to the other party directly or through a neutral third party, including the ECS.

4. Assessing Mediation

In order to assess the usefulness of mediation for a particular dispute, the Guide on IM suggests that parties could consider a number of factors, including whether (i) both parties prefer to keep control over the outcome of the dispute; (ii) maintaining a relationship is more important than the substantive outcome; (iii) a party would seek some non-monetary relief such as an apology, a public statement or acknowledgment to third parties; and, (iv) neither side is certain that it will prevail in litigation or arbitration.

Another important factor are the benefits and possible minefields when engaging non-contractual parties. This is particularly relevant in arbitration where the scope for consolidation and joinder of parties varies between arbitration rules and are often somewhat limited in relation to non-signatories to an arbitration agreement. Mediation, on the other hand, may include all relevant parties and stakeholders to ensure a more efficient and comprehensive resolution.

To facilitate governmental assessment on whether to opt for mediation, the Guide on IM recognises that it is usually easier to solve the controversy with a foreign investor before it escalates into a full dispute under the ECT. Accordingly, the Guide on IM suggests that States could establish conflict management systems (in addition to dispute prevention strategies). Those systems could include training of relevant government officials, empowering a specific agency/department to coordinate with relevant governmental bodies and negotiate disputes with investors, facilitating the budgeting for mediation costs (a lengthy approval process may hinder the decision to go to mediation) and clarifying the process for formal approval of the government consent to a settlement agreement.

5. Preparing for Mediation

The Guide on IM sets out various steps that parties should undertake to prepare for the mediation once all parties have agreed in principle to have a mediation. These are:

Step one 1: Logistics - These include (i) whether to use a service provider or set the mediation up by the parties, (ii) the length of mediation, (iii) the choice of venue, (iv) agreeing mediation agreement or rules to conduct the mediation by, including whether or not the agreement to mediate constitutes a bar to court proceedings or a bar to initiate arbitration, (v) choice of mediator, (vi) language of the mediation process, (vii) what issues and disputes are intended to be resolved, (viii) degree of confidentiality, and (ix) the costs of the mediation.

Step two: Documents - The mediator will need to understand the background and key issues in the case, so each party will normally need to prepare (a) a Case Summary and (b) supporting documents for the mediator. The Guide on IM sets outs guidance of what to include in these documents.

Step three: Preparing your team – Considerations include (a) who should attend, (b) designation and limits of authority and arrangements for approval, (c) understanding of the merits of the case and the likely outcome at trial or hearing, (d) developing a clear mediation strategy to include a review of your objectives and considering the other party's objectives, looking at ways to create value in the mediation and having a clear sense of alternatives to not settling in mediation.

6. The Roles of the Party and its Legal Representatives

The Guide on IM recognises that in case a party decides to involve legal representatives, they have to function as a team. Party representatives have the best understanding of their interests and are the most likely to embrace creative solutions. It is preferable for a party to be represented by someone who does not feel a need to defend past actions, who can be relatively objective and unemotional, but who has a thorough knowledge of the facts. It will be helpful for the representatives of the parties to relate well to each other and to be experienced negotiators. Each representative should be a decision maker authorized to negotiate and enter into or recommend a settlement.

The Guide on IM sets out the roles that legal representatives could best play in mediation both in preparing for and participating in the mediation.

7. Mediation Rules and The Role of Institutions

As noted above, Investors and Contracting Parties are free to choose any mediation or conciliation rules.

Institutions can also further assist with the mediation process in several ways, including helping to secure the agreement of parties to participate in the process; identify candidates well qualified to serve as mediator in the particular dispute; and, to administer the proceedings.

8. Selecting the Mediator(s)

It is often said when buying retail estate that the most important consideration is location, location, location. Similarly when considering mediation arguably the most important consideration is the mediator, mediator, mediator. Identifying suitably experienced and qualified individuals with the requisite legal, sectoral, cultural and linguistic skills requires proper research and careful consideration.

The Guide on IM acknowledges that in most cases a single mediator (in principle of a nationality other than that of the parties) is most suitable. However, in complex or politically sensitive cases co-mediation, with two or possibly more mediators, may be an appropriate option.

The selection of an experienced, trustworthy and capable mediator is vital and should not be underestimated. A mediator is not vested with the legal authority of a judge or arbitrator, but must rely on his/her own resources and on the voluntary commitment and co-operation of the parties. Therefore, the most important criteria/standard for the mediator is that both parties trust the mediator(s). The Guide on IM sets out a number of other standards for mediators for reference only.

Where the parties have in writing expressly opted for the application of specific mediation rules, these will set out a procedure for the appointment of the mediators, which will be followed. Where this choice has not expressly been made, the parties may request the Secretary General of the ECS to act as an appointing authority.

The Guide on IM notes that before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously and will sign a declaration of independence, confidentiality and impartiality. The Guide on IM strongly advises that the parties and the mediator enter into a mediation agreement to cover the basic aspects of the process and their relation (confidentiality, deadlines, authority of the mediator, identification of the parties involved, fees of the mediator…).

9. Basic Rules of the Proceedings

There is no one right way to conduct a mediation, but the Guide on IM sets out some basic principles and rules that are to be observed. Crucially they include that:

(a) The process is voluntary and depends on the co-operation of the parties. The mediator does not issue a binding decision;
(b) The mediator is neutral, independent and impartial;
(c) The mediator controls the procedural aspects of the mediation. The parties cooperate fully with the mediator;
(d) There is no formal written, audio or video record of any meeting. Formal rules of evidence or procedure do not apply; and,
(e) The mediator does not transmit information received in confidence from any party to any other party or any third party, unless authorized in writing to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.

10. Preliminary Matters

10.A Initial Consultation with the Mediator

Before dealing with the substance of the dispute, the Guide on IM suggests that the parties and the mediator should discuss preliminary matters, such as the ground rules, place and time of meetings, and each party's need for documents or other information in the possession of the other. This initial consultation can take place as a physical meeting between the parties and the mediator or by telephone/skype conference. It is open to the parties to discuss with the mediator sensitive matters with the mediator on a confidential basis without the presence of the other side.

10.B Exchange of Information

Before the first substantive mediation conference, each party normally submits to the mediator a written statement summarizing the background and present status of the dispute and such other material and information as it deems helpful to familiarize the mediator with the dispute. The parties may also agree to submit jointly certain other materials. The mediator may request any party to provide clarification and additional information. The mediator may limit the length of written statements and supporting material. The mediator may direct the

parties to exchange concise written statements and other materials they submit to the mediator to further each party's understanding of the other party's viewpoints.

10.C Confidentiality of the Process

The parties normally agree that the mediation process, and all negotiations, statements and documents expressly prepared for the purposes of the mediation shall be 'without prejudice.' This is important as it encourages to be open in their engagement with the other side without fear that anything said during these without prejudice discussions can later be used against either party.

The entire mediation process is then confidential. Unless agreed among all the parties or required by law or ordered by the Court, the parties and the mediator may not disclose to any person any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceedings.

Nevertheless, as the Guide on IM recognises, heightened expectations of confidentiality in mediation limit the ability of States to disclose and explain mediated settlements publicly. The State party may therefore wish to define an internal monitoring mechanism that requires the State's representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposal that may have been made by the mediator. Such documentation strengthens the legitimacy of the settlement in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness of concessions or payments to the other party. This also facilitates to rebuttal potential allegations of corruption over the settlement agreement.

Furthermore, governments increasingly face the request for more transparency and it may be politically difficult for governments to keep confidential the fact that a mediation is taking place and even the terms of the settlement agreement. In fact, some modern domestic legislation on transparency require states to publish any agreement reached with foreign investors. Therefore, parties could agree to disclose the fact that the mediation is taking place and the main aspects of the settlement.

In any case, the Guide on IM recommends that a single spokesperson should be designated to deal with media and an internal document with the basic facts of the case and Frequently Asked Questions should be distributed to those agencies involved.

10.D Length of Proceedings

The length of mediation proceedings depends on factors such as the complexity of the case, the number and availability of the parties, the urgency, and the difficulty of reaching agreement on the facts and on settlement terms. The mediator should discuss with the parties the likely length of time required for each phase of the proceeding.

If arbitration has already commenced, the commencement of mediation does not operate to stay those proceedings, unless the parties expressly agree to this with the arbitrators. Nevertheless, the usual practice is to request the arbitral tribunal for such a stay to facilitate the mediation process and to avoid increasing arbitration costs.

10.E The Seat of the Mediation

The seat of mediation determines the subsidiary application of the local mediation law for procedural and enforcement issues when the rules chosen by the parties are silent. It may also have a future impact in case there is an international agreement for the enforcement of settlement agreements, since the seat of the mediation could determine the applicability of such international agreement.

If possible, the mediation should occur at a convenient, neutral site, agreed by the parties and the mediator. There should be sufficient space for both joint sessions and separate meetings. Some meetings could take place in a different place or even through a virtual environment (making a better use of technology to save time and costs). The offices of the ECS are available for mediations of disputes under the ECT.

11. The Mediation Process

The process is flexible and mediators will adjust their approach according to the dispute and the parties they are working with. The Guide on IM gives advice on the Opening, joint sessions and caucus/private meetings; and negotiation of settlement terms.

The advice is practical and reflects generally accepted practice. For example, a number of years ago there was an active debate as to the need for Opening Statements with a number of commentators and practitioners suggesting that these could be dispensed with in their entirety. The Opening Statements provide an important function is setting the framework and tone of the mediation and ultimately setting out what the parties are seeking to achieve in the mediation. They are generally concise summaries of a party´s position and frequently present the first opportunity for the parties themselves (rather than their legal representatives) to speak directly to one another.[30] As a result, such a procedure is included with the Guide to IM.

12. Settlement

The Guide on IM includes advice on how best to record a settlement, what to include in a settlement agreement and the process for concluding the settlement agreement.

One of the key advantages of mediation is the ability of the parties to structure solutions other than an amount of damages to be paid, ie, the parties may agree on modified or new contractual arrangements, they may explore new opportunities for collaboration, or they may find other ways to satisfactorily structure their relationship. This focus on the interests rather than the strict legal rights of the parties is arguably one of the most powerful characteristics of mediation that makes the likelihood of a successful resolution.

The Guide on IM recognises that in some cases, State enterprises may in some instances face difficulties posed by domestic laws regarding public tenders, but this should not be a preclusion to a discussion of possible models by which disputing parties may settle their dispute.

[30] See Chapter on "Opening Statements" by Joe Tirado in IBA Mediation Committee e-book on Mediation Techniques, 2010

13. Enforcement of the Settlement Agreement

Settlement agreements are binding contracts and therefore, they must be complied by both parties. Where arbitration proceedings have been commenced pursuant to the ECT, the settlement may provide that the parties will request the arbitral tribunal to incorporate such settlement agreement into the award.

Another possibility to secure future enforcement of the settlement is to request in the settlement agreement a first demand bank guarantee (which can be directly enforced in case of breach of the settlement agreement) and/or liquidated damages (to compensate the injured party upon a specific breach) together with a dispute resolution clause.

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "**Convention**") is also likely to have a significant impact on the promotion and use of mediation. It was adopted on 20 December 2018 by the United Nations General Assembly resolution 73/198. This Convention applies to international settlement agreements resulting from mediation. It is an instrument to facilitate international trade and to promote mediation as an alternative method of resolving disputes. As a binding instrument, it is expected to bring certainty and stability to the international framework on mediation.

14. Barriers to Settlement

Common barriers to settlement are outlined in the Guide to IM and include the following:

(a) Differing Perceptions
(b) Extrinsic Pressures, Linkage
(c) Process Failures
(d) Delay Considered Advantageous
(e) Failure to include all stakeholders
(f) Insufficient information available
(g) Fear of potential allegations of corruption

Conclusion

The Model Instrument and the Guide on IM are innovative and valuable tools for States and investors alike. They address many, if not most of the critical issues that policy makers will need to address if effective conflict management of IS disputes is to become a reality. Early feedback[31] on the Model Instrument suggests that it will be, like the Guide on IM, both valued and utilised. These new tools in ISDS are to be welcomed. It is hoped that they will assist parties in identifying and following more cost effective and time efficient resolution of their disputes and encourage more amicable dispute resolution.

[31] The Energy Charter Secretariat reports that multiple States are now looking at the Model Instrument for guidance. See also https://energycharter.org/media/news/article/energy-charter-secretariat-is-runner-up-for-the-financial-times-award/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=9ac1f9527d7b544964ba38637d61c43e.