

**ENERGY CHARTER  
SECRETARIAT**

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Brussels, 19 July 2016

Related documents: CC 560, Mess. 1301/16
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**DECISION OF THE ENERGY CHARTER CONFERENCE**

**Subject: Adoption by correspondence of the Guide on Investment Mediation**

By document CC 560, dated 30 June 2016, the Conference was invited to approve a draft conference decision in relation to the Guide on Investment Mediation.

As specified by Rule 19 (b) of the Rules of Procedure concerning the adoption of decisions by correspondence, members of the Energy Charter Conference were informed that any delegation that wished to object to this proposal should notify the Secretariat of its position in writing by 19 July 2016.

Having received no objections within the specified time limit, on 19 July 2016 the Conference

- (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;
- (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.

Keywords: Guide, Investment Mediation, Dispute, Enforcement, Amicable Resolution, Good Offices



## GUIDE ON INVESTMENT MEDIATION

The Guide on Investment Mediation<sup>1</sup> is designed to (i) explain the mediation process in general (ii) facilitate tips and (iii) explain the role of the Energy Charter Secretariat (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.

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<sup>1</sup> The Guide was prepared with the support of the International Mediation Institute (IMI), the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the UN Commission on International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA).

## 1. WHAT IS MEDIATION?

Mediation is a process in which a neutral third party, a mediator, meets with the disputing parties and actively assists them in reaching a settlement based on their business interests and risk assessments or policy considerations and not only their legal positions. 'Mediation' as used herein is intended to cover both the concepts of mediation and conciliation. The process is designed to assist parties in reaching a settlement, with minimum time and cost. In this informal but organized process, the mediator facilitates negotiation among the parties to help them identify interests, develop settlement options and overcome barriers to settlement. It assists parties to take a strategic overview of their positions, even if no settlement is reached.

Virtually every case in which negotiation is appropriate is suitable for mediation, whether direct negotiations have taken place or a different form of dispute settlement process, such as for example arbitration is pending. Mediation is often seen as a process to be used at the outset of a dispute, but can be initiated at any time, and can take place while arbitration is ongoing.<sup>2</sup> Therefore, the key question is when mediation will be a helpful instrument for the disputing parties: the earlier a mediation takes place, the less information parties may have available but can save more on legal costs.

Mediation differs from arbitration in that participation is entirely voluntary and the process depends on the co-operation of the parties. The mediator does not issue a binding decision. A successful mediation results in a settlement agreement, which may result in solutions other than mere compensation.

The parties have complete control over whether they agree or not and, if they do, over the content of the agreement. Mediation is a much quicker form of dispute resolution than arbitration (usually months versus years). It should be seen as a good adjunct to arbitration, permitting the parties often to resolve a dispute without ultimately having to resort to arbitration.

## 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.

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<sup>2</sup> E.g. There is no provision in the ICSID Convention that would prevent an ICSID Conciliation proceeding once an arbitration proceeding has commenced (Art. 26 of the ICSID Convention envisioned that parties may explicitly agree to pursue another remedy, e.g. conciliation or mediation, alongside ICSID arbitration). Similarly, neither the UNCITRAL Arbitration and Conciliation Rules, nor the SCC Arbitration and Mediation Rules contain any provision preventing mediation/conciliation once the arbitration proceeding has commenced.

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 Energy Charter Treaty 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. Therefore, parties are free to agree to use good offices,<sup>3</sup> structured negotiation,<sup>4</sup> mediation or conciliation using existing mechanisms<sup>5</sup> or even agreeing on a tailor-made mechanism. Nevertheless, as stressed by Art. 26.2 of the ECT, a party to the dispute needs to 'request' amicable settlement before proceeding towards international arbitration or the domestic courts.

While available arbitral awards under the ECT have not confirmed the existence of a duty to mediate in Article 26.1 of the ECT, they confirmed that parties need to seriously attempt to reach an amicable settlement:

- (i) In the Petrobart case, the arbitral tribunal found the three letters addressed and sent to the Prime Minister must be accepted as requests for amicable settlement for the purposes of Article 26(2) of the ECT and that Petrobart therefore satisfied the condition laid down in that provision.<sup>6</sup>
- (ii) In the Amto case, the arbitral tribunal considered that '[t]he request for amicable settlement required by Article 26(2) ensures that a State party is notified of a dispute prior to the initiation of an arbitration and has an opportunity to investigate and take steps to resolve the dispute.'<sup>7</sup>
- (iii) In the Stati Ascom case, the tribunal considered that 'it is clear that the intention of Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity.'<sup>8</sup> The tribunal awarded a stay of the proceedings with the intention of providing the parties a window of settlement. Parties tried but failed to reach an agreement.

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<sup>3</sup> A trusted third party facilitates parties in a dispute to establish contact and to begin to explore ways to reach an amicable settlement. This is usually a preliminary mechanism that could lead to a structured negotiation or to mediation.

<sup>4</sup> Typically, no third party is involved. Instead, both sides collaborate closely as a team to solve a problem.

<sup>5</sup> See section 7 of the Guide.

<sup>6</sup> 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>

<sup>7</sup> 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>

<sup>8</sup> Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading 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>

An exception is contained in the Mohammad Ammar Al-Bahloul case, where the arbitral tribunal considered that the State failure to demonstrate a willingness to reach an amicable settlement made unnecessary to comply with the three month cooling-off period.<sup>9</sup>

## 2.2. After the three months cooling-off period

Conciliation is expressly mentioned, though not defined, in Art. 26.3 of the ECT as one of the options the investor could choose in case the dispute is not settled amicably within the three months cooling-off period. While Art. 26 of the ECT does not mention any specific conciliation rules, Art. 26.4.a refers (among other options) to the ICSID Convention and ICSID Additional Facility Rules, therefore including an express reference to ICSID Conciliation.

According to the travaux and current wording of Art. 26.3 of the ECT, it appears clear that:

- (i) it is for the investor to choose whether or not to opt for conciliation;<sup>10</sup>
- (ii) such option was always linked to the 'unconditional' consent by the Contracting Party: the drafts do not provide a definition of 'unconditional' consent, but imply an obligation on the part of the Contracting Party. Indeed, in a communication explaining the introduction of the 'unconditional consent', one of the initial drafters states:<sup>11</sup>

'... the contracting party to this Agreement would be consenting in advance to disputes being settled by [ICSID or its Additional Facility] or other international arbitration where neither of the two previous alternatives are available.'

Although initially the unconditional consent was limited to the submission of disputes to international arbitration, soon it was expressly extended also to conciliation.<sup>12</sup> By voluntarily acceding to the ECT, the Contracting Party agrees that if both parties cannot resolve the dispute amicably, the investor can require recourse to conciliation.

- (iii) if an Investor chooses to submit the dispute to conciliation but there is no final agreement, the investor is not barred from pursuing arbitration. In this regards, the Australian Delegation stated already in 1992 (without any delegation opposing) that 'it will be necessary to find wording to ensure that going to

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<sup>9</sup> Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability of 2.09.2009, at paras. 154-156, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-020pa.pdf>

<sup>10</sup> Since draft BA 10, of 19 March 1992, it is expressly stated that '... the dispute [shall] at the request of the investor concerned be submitted to international arbitration or conciliation.' Although the final drafting eliminates such wording, Art. 26.2 and 4 ECT still refers to the investor's choice.

<sup>11</sup> Unclassified fax of Mr. A. Young (Legal Advisers, FCO) to Mr. V. Vesely (Conference Secretariat) on 10 January 1992 explaining the combination of the Dutch proposal and the initial draft of Art. 26 ECT.

<sup>12</sup> Draft BA-31, of 21 December 1992.

conciliation does not prevent a party then seeking arbitration.<sup>13</sup> In fact, the fork in the road clause (Article 26.3.b.i) refers only to domestic proceedings or previously agreed dispute resolution mechanisms.

- (iv) The fork in the road (Art. 26.3.b.i ECT) only applies in relation to domestic proceedings or other previously agreed mechanisms, so even if an investor starts international arbitration under Art. 26.4 ECT or under the agreement of the parties after the dispute arises, there is still a possibility of staying the proceedings and attempting to resolve the dispute through conciliation.

### 2.3 Settlement agreements reached in ECT investment cases

Based on publicly available information, there has been a settlement agreement in eight investment cases: *EZ 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). In these cases, the arbitration proceedings were discontinued due to the later settlement entered into by the parties. Out of these eight cases, at least three settlements were embodied in an award and are publicly available.

## 3. PROPOSING MEDIATION

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 Energy Charter Treaty may propose the use of mediation to the other party directly or through a neutral third party, including the Energy Charter Secretariat.

The potential assistance of the Secretariat with good offices, mediation and conciliation was highlighted by the Energy Charter Conference in 2014 as an example of how to emphasise amicable investment dispute settlement.<sup>14</sup> In 2016 the Conference further encouraged ECT 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. During the last years, the Energy Charter Secretariat has provided its good offices prior to the investor resorting to international arbitration (sometimes the Secretariat was copied in the triggering letter) and after the initial stages of arbitration. Investors and governments are encouraged to involve the Secretariat before the triggering letter is sent to facilitate discussion at the relevant level before the dispute escalates.

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<sup>13</sup> Annex 5 to draft BA 10, of 19 March 1992.

<sup>14</sup> CCDEC2014 (06), Point 5.

The Energy Charter Secretariat, through its good offices can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings; and even help the parties to overcome initial procedural hurdles, for example facilitating the premises of the Secretariat for the initial meetings, administering the mediation process...

#### 4. ASSESSING MEDIATION

In order to assess the usefulness of mediation for a particular dispute, parties could consider whether:

- both parties prefer to keep control over the outcome of the dispute;
- the monetary costs of pursuing litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- a fast resolution is of the utmost importance;
- maintaining a relationship is more important than the substantive outcome;
- there is no deep personal hostility and distrust between the parties;
- parties do not require interim relief;
- parties do not just seek quantum or a specific technical issue;
- matters of fundamental principle are not at stake;
- both parties can involve their respective decision-making authorities;
- a party would seek some non-monetary relief such as an apology, a public statement or acknowledgment to third parties...;
- neither side is certain that it will prevail in litigation or arbitration.

To facilitate governmental assessment on whether to opt for mediation, states could establish conflict management systems (in addition to dispute prevention strategies).<sup>15</sup> 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.

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<sup>15</sup> It is usually easier to solve the controversy with a foreign investor before it escalates into a full dispute under the Treaty. Therefore, institutional mechanisms could be established to prevent disputes from emerging: (i) effective channels of communication among different ministries and governmental agencies dealing with investments, as well as between them and foreign investors; (ii) double checking compatibility of obligations under ECT and BITs when enacting laws and implementing policy measures; (iii) maintaining a list of potential areas where disputes with investors can arise; (iv) early response to controversies...

## 5. PREPARING FOR MEDIATION

Once all parties have agreed in principle to have a mediation, there are various steps that parties should undertake to prepare for the mediation:

### 5.1. Step one 1: Logistics

There are practical considerations that need to be dealt with in order to make it happen. These include:

- whether to use a service provider or set the mediation up by the parties
- length of mediation
- choice of venue – neutral venue is often preferred but not essential
- 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
- choice of mediator
- language of the mediation process
- what issues and disputes are intended to be resolved
- degree of confidentiality
- costs of the mediation - agreeing these with the mediator and how parties share these costs (including whether or not in case of an unsuccessful mediation the costs are to be treated as costs of the litigation)
- what should be the outcome of the proceedings and nature of a potential settlement agreement

### 5.2. 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 the following documents for the mediator:

#### a) Case summary

It is normal for a written mediation case summary to be prepared by each party, to be circulated to the mediator and all other parties. It is not sufficient simply to reproduce the Statements of Case used in the proceedings. The summary is a document for use in a consensual process intended to find a settlement, and which is off the record for all litigation purposes. Its aim should be to identify the key issues. It serves as a brief explanation of what the dispute is about and should aim to provide:

- a perspective of the dispute to the other parties - the statement is a persuasive tool that starts the groundwork for the subsequent negotiations

- the mediator with the necessary background to the dispute in order to facilitate a discussion
- clarification of the respective positions of the parties - the strengths and weaknesses - and their involvement in the mediation process
- link to supporting documentation.

#### b) Supporting documents

Critical documentary evidence will vary from case to case. The principle is to provide a small relevant bundle of core documentation that adds to the mediation case summary rather than replaces the submission including:

- Key contracts & agreements
- Key correspondence
- Photographs which assist understanding
- Charts or diagrams that are particularly informative
- Relevant and important extracts from key expert reports
- Spreadsheets where useful to highlight quantum elements

### 5.3. Step three: Preparing your team

The final step in getting ready for the mediation is making sure your team is prepared.

#### a) Who should attend

The general rule is to keep the team as small as possible in order to maximise engagement. At a minimum the Party representative with the maximum degree of authority to reach an agreement should attend. The issue of authority here is particularly important for the state party. If it is the case that any proposed settlement reached in the mediation would need to be made contingent upon ratification by a Minister or cabinet etc, then this must be made clear in the mediation agreement or at the earliest stage possible during the mediation proceedings. In these circumstances a mediator may insist that the relevant party acting for the state at the mediation should have authority 'effectively to recommend' the outcome of the mediation to the ratifier.

It is not always necessary to have a legal advisor (whether in-house counsel, external counsel or a combination) in the team since mediation would focus on interests. Nevertheless, it is useful to have an initial legal assessment of the potential outcome of the dispute if taken to arbitration/court.

## b) Mediation strategy

Parties and their teams should work together to develop a clear strategy for engaging in the mediation process. This would include:

- Review your objectives and considering the other party's objectives
- Review issues and factual context
- Review legal context and likely costs of this route to resolution
- Look at ways to create value in the mediation- what else can be put on the table?
- Have a clear sense of alternatives to not settling in mediation

Develop a clear negotiation strategy considering the starting point for your offers, likely concessions and 'walk away' point.

## 6. THE ROLES OF THE PARTY AND ITS LEGAL REPRESENTATIVES

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 legal representatives could:

### Counseling and Preparation

- Counsel on the advisability of settlement and mediation
- Persuade parties to agree to the mediation process
- Help design or adapt the mediation procedure
- Help select a mediator or mediation provider
- Educate the party about the mediation process and the legal issues
- Help the party think through goals for the process
- Draft statements for submission to the mediator
- Prepare for effective presentations by lawyers and client
- Counsel on management or suspension of arbitration
- Ensure the confidentiality of the process

## Participation in the Mediation Proceedings

Advocate in a non-confrontational manner designed to impress the mediator and other side with the reasonableness of your position

Listen carefully to the other side's statements, so as to understand their interests

Ask questions

Answer questions about legal claims, etc.

Serve as a sounding board for the client, brainstorming and discussing settlement options as the mediation progresses

Help the client articulate business concerns and formulate proposals

Avoid compromise of the client's legal position should the mediation fail

Be aware of legal ramifications of possible solutions and options

Help to draft the settlement agreement and assure its enforceability

## 7. MEDIATION RULES AND THE ROLE OF INSTITUTIONS

Under Article 26.1 of the ECT, investors and Contracting Parties are free to choose any mediation or conciliation rules (see comparative Annex), such as those of:

- IBA – International Bar Association
- ICC - International Chamber of Commerce
- ICSID - International Centre for Settlement of Investment Disputes
- PCA – Permanent Court of Arbitration
- SCC - Stockholm Chamber of Commerce
- UNCITRAL – United Nations Commission on International Trade Law

Under Article 26.3 of the ECT, the Contracting Parties have given their unconditional consent to ICSID conciliation (Article 26.4.a of the ECT refers, among other options, to the ICSID Convention and ICSID Additional Facility Rules, therefore including reference to ICSID Conciliation).<sup>16</sup> Therefore, the investor could revert to ICSID conciliation without any additional agreement with the defendant Contracting Party. In case the investor prefers to use other conciliation or mediation rules, the agreement of the defendant Contracting Party would be required.

Institutions (such as PCA, ICC, ICSID, SCC, CEDR) and the Energy Charter Secretariat can further assist with the mediation process in several ways:

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<sup>16</sup> The reference would also include the ICSID Fact-Finding (additional Facility) Rules, which offer parties the opportunity to constitute a Committee to inquire into and report on relevant circumstances in the pre-dispute phase. The report is limited to findings of fact; it does not contain recommendations and is not an award.

Help to secure the agreement of parties to participate in the process.

Facilitate information on costs that would help parties to secure the necessary funding on time.

Help to identify candidates well qualified to serve as mediator in the particular dispute, secure the agreement of all parties to the retention of one of the candidates, recruit that person and make remuneration arrangements.

Help the parties to overcome initial procedural hurdles, that may block them from organizing a first meeting with the mediator, for example agreeing on the place of the meeting, language of the proceedings, etc.

Administer the proceedings.

Provide assistance to help secure visas to travel to the place of the meeting.

## 8. SELECTING THE MEDIATOR(S)

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 may be appropriate. In that case two mediators can be appointed, representing different disciplines, technical expertise or cultural backgrounds. A co-mediation with a commercial mediator and a person with political/diplomatic background could also be explored. In case of co-mediation it may also happen that each party would appoint one of the co-mediators. The size and complexity of the case will influence the selection of the mediator. The styles, personalities and orientation of mediators vary.

The selection of an experienced, trustworthy and capable mediator is vital. 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 him/her. The proposed standards below are just for reference.

### Standards for mediators

A good mediator:

is available to timely conduct the mediation process

is trained and has experience as a mediator, with a thorough understanding of the negotiation process

is impartial, independent, and fair and so perceived

inspires trust

is able to understand people's motivations

is an active listener, articulate and persuasive

is capable of understanding the facts of a dispute, including surrounding circumstances, even if he/she is not an specialist in the substantive field of the investment at issue

has experience in investment dispute resolution proceedings

is able to analyse complex problems and get to the core

is a problem solver; creative and imaginative in developing proposals and knows when to make them

has regional or international reputation, giving more credibility to the outcome of the process

has government experience or experience in dealing with governments

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 mediator's fees (if any) will be determined before appointment. Those fees, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation, but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal. Shared costs will not include costs that each party incurs in preparing its own case, attending meetings and instructing representatives. The parties will bear these costs themselves.

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. It is strongly advised 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 some basic principles and rules are to be observed. The following basic rules normally apply to all mediations, subject to any changes on which the parties and the mediator(s) agree and subject to any specific set of rules chosen by the parties to govern the mediation process.

- a. The process is voluntary and depends on the co-operation of the parties. The mediator does not issue a binding decision.

- b. Each party may withdraw at any time by written notice to the mediator and the other party or parties.
- c. The mediator is neutral, independent and impartial.
- d. The mediator controls the procedural aspects of the mediation. The parties cooperate fully with the mediator.
  - (i) The mediator is free to meet and communicate separately with each party.
  - (ii) The mediator decides in consultation with the parties when to hold joint meetings with the parties and when to hold separate meetings. The mediator fixes the time and place of each session and its agenda in consultation with the parties. There is no formal written, audio or video record of any meeting. Formal rules of evidence or procedure do not apply.
  - (iii) Unless otherwise agreed by the parties, the mediator decides, if necessary, the language in which the mediation is to be conducted and whether any documents should be translated.
- e. Each party is represented at each mediation conference by a representative authorized by a written delegation of authority legally effective pursuant to the laws of the jurisdiction where the party is domiciled, to negotiate a resolution of the dispute and to execute a settlement agreement. Each party may be represented by more than one person though the mediator may limit the number of persons representing each party.
- f. The mediation process is to be conducted expeditiously. Each representative undertakes to make every effort to be available for meetings.
- g. 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.
- h. The mediator and any persons assisting the mediator is disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation), unless the applicable law to the proceeding provided otherwise

- i. If the dispute goes into arbitration, the mediator will not serve as an arbitrator, unless the parties agree otherwise.
- j. The mediator may withdraw at any time by written notice to the parties. A new mediator will then be appointed.

## 10. PRELIMINARY MATTERS

### 10.A Initial Consultation with the Mediator

Before dealing with the substance of the dispute, 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.

The initial consultation of the parties with the mediator serves several purposes:

The parties are given an opportunity to make an assessment on the mediator.

The mediator will discuss the entire mediation process, including the ground rules, with the parties. They may agree on modifications.

If they have not done so previously, they should draft a mediation agreement with the mediator.

A meeting schedule may be discussed.

The mediator and the parties will discuss the role(s) the mediator will have in the parties' negotiations.

The parties will begin to familiarize the mediator with the dispute.

The mediator can confirm that the parties have a genuine interest in resolving their dispute and will engage persistently through the mediation process.

The parties' representatives will begin to talk to each other in a manner appropriate to their joint goal of reaching an accommodation.

There will be discussion of who will represent the parties at future sessions, and the extent of their authority. If the stakes are large, it may not be possible for the negotiators to have complete authority to sign a settlement agreement, but each should have authority to negotiate a settlement, and the authority of the negotiators should be comparable.

The exchange of certain information may be discussed (see section B below).

## 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.

The mediator should expressly agree in writing to keep confidential any materials or information received. It is normal that the parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the consent of the latter.

At the conclusion of the mediation process, upon request of a party, the mediator without retaining copies returns to that party all written materials and information which that party had provided to the mediator.

## 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.' 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, 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 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, 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 Energy Charter Secretariat 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.

## 11.A The Opening

As a general practice, the mediation begins with some form of joint opening meeting or phone/video-conference where the parties outline their perspectives and the mediator explains the process and principles of mediation. The mediator may ask the parties to submit such written materials as they consider necessary or advisable on an agreed time schedule. A statement summarizing the background and status of the dispute is likely to be the principal document. If arbitration is pending, documents such as the briefs may be submitted. If an exchange of certain documents between the parties has been agreed upon, that exchange also should occur during this phase of the proceedings.

## 11.B JOINT SESSIONS AND CAUCUS (separate meetings with each party)

After the initial conference and exchange of written materials, a joint session is usually scheduled with the mediator, the parties and their advisors attending. During joint session, the parties' representatives will normally state their views orally in an informal manner and will address the conflicting views of the other party or parties. Each party will present its position in what it considers the most effective manner. Usually there will be opportunities for rebuttal and for discussion and clarification of issues. The formality of the rules of evidence will not hinder the proceedings and the presentations will not be transcribed. The mediator will prescribe the sequence of presentations, may impose time limits and is likely to ask clarifying questions.

Following the joint session, the mediator may caucus in a private meeting with each party. The parties will be encouraged to be more candid in such a private meeting in the knowledge that any confidential information shared with the mediator will be respected and not disclosed without their specific consent. The mediator may well elicit in confidence information not disclosed at the joint session. The mediator may explore certain aspects of the party's presentation and may request additional materials. The mediator will explore with each party representative his or her underlying interests and aims, will identify barriers to settlement and will help the parties address those barriers.

The mediator must understand the case fully from each side's perspective; the mediator should then assure that each side better understands how the case looks from the other side's viewpoint. The mediator should avoid expressing views on legal issues. The mediator, to be effective, must be kept fully informed of all developments and must be able to control dialogue between the parties. The mediator may conclude at any stage that it is preferable to keep the parties apart.

## 11.C NEGOTIATION OF SETTLEMENT TERMS

Negotiation is most productive when the parties focus on their underlying interests and concerns, avoiding fixed positions which can obscure what a party really wants. The mediator can help the parties crystallize their own interests and understand each other's interests, defuse adversarial stances and develop a more cooperative approach. The mediator can narrow or expand the range of issues as appropriate for effective resolution of a particular dispute. The mediator can help each party to generate ideas, to develop options and alternative proposals that will lead to a mutually acceptable solution, and to try out unusual solutions.

The first settlement proposal is not likely to be the last. It may provide a basis for negotiation. At this juncture, some mediators will usually engage in 'shuttle diplomacy,' i.e. meet with the parties individually to try to bridge a gap or develop a more acceptable solution; other mediators are likely to conduct joint sessions to bring the parties together. When conveying one party's position to the other, the mediator must take care to state that position accurately. On some occasions, the mediator may consider it advisable to meet with the principals of the parties, separately or together, outside the presence of lawyers. Any such meetings should occur only if the principals and their lawyers agree to them.

Some mediators prepare the first draft of a settlement agreement, seek the parties' comments, and prepare successive drafts until all parties are in agreement. If the parties do not develop mutually acceptable settlement terms the mediator, only with the parties' consent, (a) may submit a settlement proposal, and (b) if the mediator feels qualified to do so, may give the parties an evaluation of the likely outcome of the case. When submitting a settlement proposal it may be advisable for the mediator to assure the parties that acceptance of the proposal by either party will not be communicated to the other, unless and until the other also accepts.

## 12. SETTLEMENT

If a settlement is reached, the representatives of the parties draft a settlement agreement incorporating all settlement terms, which may include mutual general releases from or discharges of all liability relating to the subject matter of the dispute. This draft will be circulated among the parties and the mediator, amended as necessary, and formally executed. Initially, a preliminary memorandum of understanding may be prepared at the mediation and executed by the parties; the memorandum should make it expressly clear whether it is intended to be binding or not.

It is important to make sure that the settlement agreement settles all 'related' (potential) claims arising out of the same measure (e.g. subsidiaries, shareholders...). The settlement agreement should aim at a broad release of all claims each party has against the other. However, sometimes, a settlement agreement will only cover part of the dispute, leaving the rest to be discussed by an arbitral tribunal, domestic court or any other previously dispute settlement procedure.

It is important to consider the following relevant issues:

- Common agreement on the facts of the dispute;
- How the settlement agreement will be recorded (in a private document, authenticated by witness or by a public Notary). It is important to comply with the legal formalities of the defendant state and of the country in which the agreement is signed;
- Law applicable to the settlement agreement;
- Who drafts the initial version of the agreement?;
- Press releases vs. non-disclosure clauses;
- Lump-sum payments vs. instalments on specific deadlines or according to the terms of the initial contract;
- Requirement of a bank guarantee to secure compliance with the settlement agreement and/or liquidated damages (damages whose amount the parties designate for the injured party to collect as compensation upon a specific breach e.g., late performance with the settlement agreement);
- Monitoring requirements?;
- Arbitration clause in case of breach of the settlement agreement?;
- What happens with taxes over the compensated amount?;
- Who has the authority to bind each party?;
- What are the specific requirements in the legal system of the defending state for the enforcement of private agreements (notarization, full determination of the amount to be paid....)
- Inclusion of the amount to be paid in the state's budget to secure its payment

One of the 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. 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.

### 13. ENFORCEMENT OF THE SETTLEMENT AGREEMENT

Settlement agreements are binding contracts and therefore, they must be complied by both parties. Parties may agree on the applicable law to such agreement (which will decide its validity, required formalities, performance...); otherwise the tribunal competent to discuss compliance or validity of the settlement agreement will apply its own conflict of laws rules to identify the applicable law.

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. This facilitates the enforcement of the settlement in case of a party's reluctance to comply with its terms since arbitral awards may be enforced internationally through instruments such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This may also apply in the event of domestic proceedings in case it is allowed by the domestic procedural rules. Even if no arbitration proceedings had commenced, some mediation rules allow the parties, subject to the consent of the mediator, to agree to appoint the mediator as an arbitrator and request him/her to confirm the settlement agreement in an arbitral 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.

### 14. BARRIERS TO SETTLEMENT

Common barriers to settlement are outlined below. These barriers should be identified and addressed in a mediation proceeding, and often they can be overcome with the assistance of the mediator.

#### a. Differing Perceptions

Perceptions can differ about a number of issues relevant to settlement. Do the parties have different views regarding the facts? Do they disagree about what proposition the facts prove? Is this disagreement based on each side having access to limited information? Has the foreign investor full knowledge and information of the activities carried out (and how they were done) by the local subsidiary through which the investment was carried out? Is disagreement primarily the result of each side's partisan assessments of the evidence and its implications? Do the parties have different views as to how the law will be applied or as to the likelihood of

success at trial? Do the parties have different views of what is at stake? Do they make different assessments concerning the value of those stakes? It is very common for each party to be unduly optimistic about its chances of success, particularly during the early stages.

b. Extrinsic Pressures, Linkage

Are there pressures working on one or more parties that cut against prompt settlement? Do time constraints operate differently on the parties? Has personal animosity hindered rational decision taking? Is resolution of this dispute linked to other similar disputes, pending or contemplated? Does either side have constituencies that would criticize a settlement? Are there 'strategic' considerations to avoid settlement, e.g., to discourage other suits?

c. Process Failures

Communication problems between the parties or their lawyers are a common barrier. Does the negotiation process afford sufficient opportunities to devise and explore settlement options? Do the lawyers have different incentives than their clients' interests?

d. Delay Considered Advantageous

A party may believe, rightly or wrongly, that it will benefit from delay. When a dispute arises while a business relationship is ongoing, both parties have an incentive to put the matter behind them, although a party might seek to abuse the mediation process with delay tactics. Even when there is no continuing relationship, there are likely to be advantages to all parties in having the matter resolved in a timely manner. A trained and experienced mediator will remain vigilant to protect the mediation process from unnecessary delay.

e. Parties

All of the parties with a stake in the dispute are not present for negotiations. Consider whether non-disputants with a stake be invited to participate?

f. Information

Parties may believe that they are not in a position to properly assess their own or the other side's position until, for example, after disclosure of documents, statements of witnesses or reports of experts. This is an argument more for postponement of settlement than for its abandonment.

g. Fear of potential allegations of corruption

As mentioned before, an internal monitoring mechanism and some transparency of the process will facilitate to ease fears of potential allegations of corruption or abuse of powers towards the government authorities representing the state in such mediation. In addition, the administration of the mediation process by a neutral institution in compliance with any national anti-bribery and corruption laws applicable in the country in which the mediation will take place could reinforce the arguments against corruption allegations.

	UNCITRAL	IBA	SCC	ICC	ICSID	PCA	CEDR
Rules	UNCITRAL Conciliation Rules Contents, General Assembly Resolution 35/52.  <a href="http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf">http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf</a>	IBA Rules for Investor-State Mediation, Adopted by a resolution of The IBA Council 4 October 2012.  <a href="http://www.ibanet.org/Document/Default.aspx?DocumentUID=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C">http://www.ibanet.org/Document/Default.aspx?DocumentUID=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C</a>	The Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce adopted by the Stockholm Chamber of Commerce and in force as of 1 January, 2014.  <a href="http://www.sccinstitute.com/media/49819/medlingsrepler_eng_web.pdf">http://www.sccinstitute.com/media/49819/medlingsrepler_eng_web.pdf</a>	Mediation under the ICC Mediation Rules in force as from 1 January 2014.  <a href="http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/#Article_4">http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/#Article_4</a>	Rules Of Procedure For Conciliation Proceedings (Conciliation Rules).  <a href="https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partE.htm">https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partE.htm</a> or (PDF) <a href="https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf">https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf</a>	Permanent Court Of Arbitration Optional Conciliation Rules.  <a href="http://www.pcacpa.org/CONCENGbe42.pdf?fil_id=197">http://www.pcacpa.org/CONCENGbe42.pdf?fil_id=197</a>	CEDR Model Mediation Procedure  <a href="http://www.cedr.com/about_us/modeldocs/">http://www.cedr.com/about_us/modeldocs/</a>
Commencement	The party initiating conciliation sends to the other party a written invitation to conciliate. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate.	On the date on which the request is received by a party, if the parties agreed to mediation under these rules before the differences or disputes arose,  Or;  On the date on which the parties agreed to mediate under these rules, if the parties did not agree to mediation before the differences or disputes arose.	On the date when the SCC receives a written Request for Mediation. Upon filing the Request for Mediation, a Registration Fee shall be paid.	→Where there is an agreement between the parties to refer their dispute to the Rules: any party shall file a written Request for Mediation with the Centre. The party filing the Request shall pay the filing fee required on the date the Request is filed. The Centre shall acknowledge receipt of the Request and of the filing fee.  The date on which the Request is received by the Centre shall be deemed to be the date of the commencement.  →Where there is No Prior Agreement to Refer to the Rules: any party that wishes to propose referring the dispute to the Rules to another party may do so by sending a written Request to the Centre. Upon receipt of such Request, the Centre will inform all other parties of the proposal and may assist the parties in considering the proposal. Together with the Request, the party filing the Request shall pay the filing fee required on the date the Request is filed. Where the parties reach an agreement to refer their dispute to the Rules, the Proceedings shall commence on the date on which the Centre sends written confirmation to the parties that such an agreement has been reached.  Where the parties do not reach an agreement to refer their dispute to the Rules within 15 days from the date of the receipt of the Request by the Centre or within such additional time as may be reasonably determined by the Centre, the Proceedings shall not commence.	Either the State party to the dispute or the foreign national may institute conciliation proceedings by sending a request for conciliation to the ICSID Secretary-General. The request for conciliation is registered unless the Secretary-General concludes that it is manifestly outside the scope of the Centre's jurisdiction. The proceedings are deemed to have been instituted on the date of the registration of the request.	The party initiating conciliation sends to the other party a written invitation to conciliate. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the party initiating conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such other period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to conciliate.	Referral of a dispute to a mediator or to CEDR for mediation may be as a result of:  <ul style="list-style-type: none"> <li>voluntary referral by all parties;</li> <li>referral by one party who asks CEDR to secure the involvement of other parties into a mediation;</li> <li>responding to a Pre-action Protocol, Court Rules, a Court Order or a recommendation by a judge before trial or appeal;</li> <li>the provisions of an ADR clause in a commercial or government contract requiring the use of mediation as a step in the parties' agreed dispute resolution process;</li> <li>the provisions for use of mediation within an industry or public sector policy framework.</li> </ul> Parties referring a case to CEDR are encouraged to include a copy of any appropriate document or agreement with the referral.  The mediation will then be organised for a mutually convenient date for the parties.
Appointment	P 1 conciliator	1 mediator	1 mediator	1 mediator	1 commission consisting of a Sole Conciliator or any uneven number as the parties may agree	1 Mediator	1 conciliator
	E 3 conciliators maximum	2 co-mediators maximum	No maximum specified	-	-	-	3 conciliators maximum
P: Principle E: Exception	-The parties shall endeavor to reach agreement on one name. -Parties may enlist the assistance of an appropriate institution or person.	The parties may designate jointly as a mediator any person whom they consider to be suited to assist them in resolving their or disputes within 21 days.	-SCC shall solicit the views of the parties, or -The parties jointly propose a person.	-Joint nomination by the parties, or; -The Centre shall either appoint a Mediator or propose a list.	- Parties to agree on number of conciliators and method of their appointment - In the absence of a party agreement, Commission to consist of three conciliators, one appointed by each party, third and presiding conciliator by agreement of the parties; - If commission not constituted within 90 days of the registration of the request, either party may request Chairman of ICSID Administrative Council (i.e. the President of the World Bank) to appoint the conciliators not yet appointed.	-The parties shall endeavor to reach agreement on one name. -Parties may enlist the assistance of an appropriate institution or person.	The parties may choose their own mediator directly or from any CEDR panel of mediators, or may ask CEDR to nominate one or to recommend names from whom they can choose one to act as the mediator for a dispute in accordance with the wishes of the parties. Where there is a contractual or requirement for the parties to act under the auspices of CEDR, CEDR will appoint a mediator where the parties fail to agree on a name within 14 days of notice of the dispute.  CEDR will only nominate or appoint a mediator who, in their view, possesses the relevant skills and experience to mediate the dispute for the parties effectively, and who will comply with the CEDR Code of Conduct for Third Party Neutrals ('the Code'). Any nominated mediator will be required to confirm immediately to CEDR if there is any matter which might prevent the nominated mediator from complying with the Code in relation to the mediation of the dispute, such as a conflict of interest. CEDR will then notify the parties of any such matter immediately it is disclosed to them.  It is standard practice to have a single mediator, frequently with an observer (a newly qualified mediator) who may provide support to the mediator during the mediation but takes no active role. In multi-party disputes, co-mediators may be used.
Costs	Fixed by the conciliator: fee of the conciliator; travel and other expenses of the conciliator and of witnesses; expert advice; any assistance provided. The costs are borne equally by the parties.	The mediator's fees and expenses, and the administrative expenses of the Designating Authority, if any shall be borne by the parties in equal shares.	The Mediation Costs consist of the Mediator's fee; the Administrative Fee.	Request shall be accompanied by the filing fee. Centre may request that the party pay a deposit to cover the administrative expenses. Upon termination the Centre shall fix the total costs of the Proceedings. All costs shall be borne in equal shares by the parties.	The lodging fee (filing of a request), the annual charge for ICSID services (usually divided equally between the parties), fees and expenses incurred by the conciliator(s) in connection with the proceeding; each party to make advance payments to cover the costs of the proceeding; remaining funds will be refunded to the parties after proceeding is concluded	Fixed by the conciliator: fee of the conciliator; travel and other expenses of the conciliator and of witnesses; expert advice; any assistance provided. The costs are borne equally by the parties.	For disputes under £125,000, a fixed fee scheme is possible. For all other disputes, the cost is based on the mediator's hourly rate including preparation time. Unless otherwise agreed, the costs are borne equally by the parties.
Confidentiality	-The conciliator and the parties must keep confidential all matters relating to the conciliation. -Unless the parties have agreed otherwise. -Disclosure exception.	-The mediation shall be private. -Unless the parties have agreed otherwise. -Disclosure exception.	Neither the parties, the Mediator nor the SCC shall disclose the existence of the Mediation. -Unless the parties have agreed otherwise. -Disclosure exception.	-The Proceedings, but not the fact that they are taking place, are private and confidential; -Unless prohibited by applicable law. -Unless the parties have agreed otherwise. -Disclosure exception.	Each conciliator shall sign a declaration of confidentiality; Unless the parties otherwise agree, neither party may be entitled to invoke or rely in any other proceeding on any views expressed or statements or admissions or offers of settlement made by the other party, or the report or any recommendation made by the Commission Content of proceedings may not be disclosed by ICSID unless the parties otherwise agree; basic information about proceeding (eg name of parties, composition of commission, date of registration) and procedural developments in the course of the proceeding is made publicly available.	-The conciliator and the parties must keep confidential all matters relating to the conciliation. -Unless the parties have agreed otherwise. -Disclosure exception.	- The mediation is subject to a confidentiality in the mediation agreement and no information about what has occurred can be shared except with the permission of the parties. CEDR operates confidentiality from the moment of contact by the parties.
Role of Conciliator/Mediator	-He assists the parties. -Conduct the proceedings. -Proposals for a settlement of the dispute.	-He may take decisions with regard to the procedural conduct. -He shall take into account the wishes of the parties.	-He may not act as arbitrator in any future arbitrations relating to the subject matter of the dispute.	-He assists the parties., -He shall discuss the manner in which the mediation shall be conducted. -He shall provide the parties with a written note informing them of the manner in which the mediation shall be conducted.	-Commission to clarify the issues in dispute; to this end it shall hear the parties and shall endeavor to obtain any information that might serve this end. - Commission to attempt to bring about agreement between the parties; to this end, Commission may make recommendations from time to time to the parties. -The Commission may request from either party explanations or evidence and with the consent of the parties may visit any place connected with the dispute or conduct inquiries there.	-He assists the parties. -Conduct the proceedings. -Proposals for a settlement of the dispute.	The mediator will actively assist the parties to work towards a settlement. The mediator is facilitating the process to enable the parties to reach a settlement but will not guide the parties as to what that settlement should be.
Independence and Impartiality	The conciliator assists the parties in an independent and impartial manner.	The mediator shall be impartial and independent (Statement of Independence and Availability).	A Mediator must be impartial and independent (must disclose any circumstances likely to give rise to justifiable doubts).	Mediator shall sign a statement of, impartiality and independence.	Conciliator to sign statement of independence and impartiality.	The conciliator assists the parties in an independent and impartial manner.	The mediator is wholly independent, neutral and impartial in relation to the mediation and must hold no conflict of interest.

Disqualification of the Mediator/Conciliator	-	The parties may agree to replace the mediator at any time.	Where a Mediator is unable to perform his duties the SCC shall remove him and appoint a new.	-	A party may request disqualification of a conciliator for, inter alia, manifest lack of the ability to exercise independent judgment; conciliator rules also provide procedures to fill vacancies on a commission resulting from resignation, incapacity or death of a member of the Commission	-	The mediator can withdraw from the mediation at any time for reasons set out in the CEDR code of conduct (eg. Concerns over safety). In other exceptional circumstances, the mediator may be disqualified.
Representation	The parties may be represented or assisted by persons of their choice.	-	-	-	Each party may be represented or assisted by agents, counsel or advocates.	The parties may be represented or assisted by persons of their choice.	The parties may be represented by persons of their choice. All attendees of the mediation are party to the confidentiality provisions.
Place and Language	The place is determined by the conciliator. Unless the parties have agreed otherwise.	Following consultation with the parties, the mediator may take decisions with regard to the language and the place.	-	In the absence of an agreement of the parties, the Centre may determine the location and the language or may invite the Mediator to do so.	The Commission shall meet at the seat of the Centre or at such other place as may have been agreed by the parties. The parties may agree on the use of one or two languages, which do not need to be any of the official languages of ICSID	The place is determined by the conciliator. Unless the parties have agreed otherwise.	The location of the mediation can be agreed by the parties or take place at a venue provided by CEDR. The language of the mediation can be agreed by the parties but is conducted in English by default.
Termination	-By the signing of the settlement agreement; -By a written declaration of the conciliator to the effect that further efforts at conciliation are no longer justified; -By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated; -By a written declaration of a party to the other party and the conciliator to the effect that the conciliation proceedings are terminated.	-Upon the signing of a settlement agreement by the parties; -Upon the withdrawal of any party; -The mediator determines that the parties will not resolve the differences or disputes through the mediation.	-By a settlement agreement between the parties; -By a declaration of the Mediator to the parties to the effect that further efforts of Mediation are unlikely to lead to the resolution of the dispute; -By a written request from a party to the Mediator that the Mediation shall be terminated.	-The signing by the parties of a settlement agreement; -The notification by any party, that such party has decided no longer to pursue the mediation; -The notification by the Mediator to the parties that the mediation has been completed; -The notification in writing by the Mediator to the parties that the mediation will not resolve the dispute; -The notification by the Centre to the parties that any time limit set for the Proceedings has expired; -The notification by the Centre to the parties that a payment has not been made; -The notification in writing by the Centre to the parties that there has been a failure to nomination.	A report by the Commission, either (i) finding that the commission lacks jurisdiction; or (ii) recording the parties' settlement agreement; or (iii) recording the parties' failure to reach a settlement; or (iv) noting a party's failure to appear or participate; or (v) an order taking note of the discontinuance of the proceeding for failure to pay the requested advances, or (vi) an order taking note of the discontinuance of the proceeding following a request by one or both parties	-By the signing of the settlement agreement; -By a written declaration of the conciliator to the effect that further efforts at conciliation are no longer justified; -By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated; -By a written declaration of a party to the other party and the conciliator to the effect that the conciliation proceedings are terminated.	The mediation may end in a number of ways: <ul style="list-style-type: none"> <li>• by settlement of the dispute in whole or part, when all agreed matters must be written down and signed by the parties to be binding;</li> <li>• by an 'in principle settlement' of the dispute with an agreement to draft binding terms after the mediation day;</li> <li>• by the mediator advising the parties that a settlement, for the time being, at least, cannot be reached;</li> <li>• by one or more parties leaving the mediation before settlement is achieved;</li> <li>• by an agreed adjournment for such time and on such terms as the parties and the mediator agree;</li> <li>• by withdrawal of the mediator in accordance with the mandatory and optional circumstances set out in the Code;</li> <li>• by production of a document of summary or recommendations from a mediator, if requested by all parties and agreed by the mediator.</li> </ul>