



THE ARBITRATION, MEDIATION
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ENERGY CHARTER TREATY MEDIATION GUIDELINES

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The Energy Charter Secretariat

The role of the Energy Charter Secretariat is to provide the Energy Charter Conference with assistance in the performance of its duties and to carry out the functions allocated to it under the Energy Charter Treaty.

- As part of this function the Secretariat has over the past two years been exploring the introduction of mediation guidelines as part of the conciliation process outlined under the Treaty.

The Energy Charter Treaty

- Under Article 26.1 of the ECT, investors and Contracting Parties are free to choose any mediation or conciliation rules, 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
- Article 26.3 of the ECT, sets out that 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 Treaty.
- If an investor chooses under the Treaty to proceed by way of conciliation, the State is obligated to do so pursuant to the rules chosen by the investor.

Mediation Guidelines

- At present, investment treaty regimes lack an infrastructure for the incorporation of mediation in investor-state disputes.
- The ECT Secretariat has launched an effort together with assistance from the International Mediation Institution (IMI), CEDR and the Treaty's supporting Institutions, including the SCC ICSID, PCA, and ICC, to introduce mediation guidelines to fill this procedural void.
- The current project on which the Energy Charter Secretariat has embarked relates to the formulation of Mediation Guidelines to mesh with the existing conciliation provision of the Treaty.
- The Guidelines may serve as a template for other investment treaties and international institutions.

Guideline Content

The Guidelines are meant to:

- (a) provide a procedural framework under which the process of mediation is explained;
- (b) set out the steps by which mediation can be utilised in practical terms in the Investor/State context should an investor opt for conciliation under the Treaty;
- (c) attempt to address some of the issues identified as obstacles to Investor/State mediation;
- (d) Sets out the role of the participating institutions under the Treaty and potential use of their mediation rules and appointment authority.



Impetus Behind the Guidelines

- The Guidelines are an initiative formulated by the Secretariat at the behest of member States.
- It is the member States themselves that have seen mediation as being a beneficial step in dispute resolution under the Treaty.
- The States have asked the Secretariat to find an effective way to incorporate mediation into the Treaty process and that is what the Guidelines have been written to achieve.

Next Steps

- The Guidelines themselves will be augmented with mediation training for State officials and institutional administrators.
- They will also be promoted broadly within the Secretariat and its organs, ensuring that all Treaty members are aware of the potential benefit mediation brings to resolving disputes with investors.
- The Secretariat itself will provide advisory services related to mediation, but actual administration will be left to the parties and the participating institutions;
- States will be encouraged to implement internal processes supporting mediation and ensuring that public officials are both empowered to mediate settlements and protected from retaliation in regards to such settlements.
- The mediation Guidelines will also be more broadly discussed and promoted to Law Firms and Users, so that investors also see the benefit of using mediation when disputes arise falling under the Treaty.

Role of States and Institutions

- States have an important role to play in this, encouraging the use of mediation, as the UK Government has done, and to ensure that they put in place the internal mechanisms to permit State officials to negotiate effectively leading to binding settlements.
- Institutions also have a role to play, in particular ensuring that panels of appropriately-trained and acceptable mediators are available for these disputes.
- IMI (International Mediation Institute) is currently working on standards for Investor/State mediators. Once these are published in 2016, there will exist a standard which training organisations can use in their training programmes

Obstacles to Mediating Investor State Disputes

- There are many reasons cited why mediation will not work in Investor/State disputes:
- States are subject to procedural and political constraints that private individuals do not face.
- Developing States, in particular, often operate through large bureaucracies, where accountability and transparency may be lacking.
- State officials are reluctant to agree to settlements because they can later be open to criticism and even prosecution.
- The motivation for States to make decisions is also often related to public policy and political considerations and pressures, not only commercial concerns.
- This often leads to differing objectives for the State and the investor.
- By the time disputes reach arbitration under BIT's, negotiation has already run its course and the relationship is so tarnished that mediation is useless in saving that relationship.

Arguments against these Objections

- These arguments do not take into account the fact that many States have incorporated mediation procedures in their own domestic dispute resolution practises.
- The British Government, for example, has a stated policy to attempt mediation in all disputes with its disputants.
- Mediation is an interest-based facilitated process, as opposed to party lead negotiation, which is a rights-based process. Simply because negotiation between parties fails, does not imply that mediation facilitated through a trained neutral exploring options with all potential interested parties present, will not lead to settlement.
- Mediation, when employed much earlier in the dispute cycle has a chance of preserving relationships, permitting investments to continue, perhaps in a more acceptable and altered form.



Requirements

Mediation can be utilised to help in settling Investor/State disputes by paying attention to:

1. additional skill sets for the mediator training;
2. include other key stakeholders in the mediation process
3. require that the appropriately authorised State official is at the mediation;
4. ensure that local law permits the public administration to mediate and protects public officials when they reach settlement;
5. ensure that settlements with States have a readily available enforcement mechanism;
6. more transparency than normal commercial mediations will be required given the public policy concerns at stake;
7. the mediation settlement will have to be formally ratified by the Government to ensure protection of the State official negotiating it.

The Future

- This is still an on-going project and no doubt additional issues and solutions to them will be formulated before it is completed, but the effort in itself is encouraging.
- The next step may well be to move forward into the area of dispute avoidance and this may be achieved by building in a mediator as in project life mediation or the use of dispute boards.
- There are possibilities in the future for an Energy Charter Ombudsman and an administrative role for the Energy Charter Secretariat disseminating information about the mediation process and involved in the selection of mediators.

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