Effective use of investment mediation

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2019 COLLOQUIUM ON INTERNATIONAL LAW
2015: Several International Energy Charter roundtables (states-industry) on amicable resolution of investment disputes. Both parties want disputes to be solved early and to maintain a good long term relation. Importance of dialogue and mediation to amicably solve conflicts before they escalate into a full claim → main problems identified:

- raising awareness among the relevant stakeholders
- the effective implementation of those mechanisms


(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.

2017: Intl Energy Charter with the support of the IMI: **survey** with government officials and **analysis** of domestic legislation of several states. **Additional workshops and seminars**, as well as further discussions with government officials, confirmed the following main findings:

- Concerns by the lack of a clear domestic legal framework, resulting in
  - ambiguous authority to settle or even to enter into discussions with foreign investors,
  - fears of potential allegations of corruption and abuse of power leading to liability
  - lack of funding for the process.

- Lack of an early, independent assessment of the dispute to ascertain the best (most effective) course of action (including the possibility of solving the dispute by negotiation or mediation).

- **2018** Intl Energy Charter **Model Instrument on management of investment disputes** (drafts discussed at several events in Europe, Asia, America and Africa with UNCITRAL, IMI, UNCTAD, AALCO, ICSID, World Bank and government officials) that could be used **voluntarily** for implementing their own domestic framework or as a guidance in relation to legal and practical issues that need to be considered
  - 2019 Financial Times shortlisted for innovation in legal expertise
  - Express consideration for mediation, conciliation as a potential tool to solve the dispute
  - Implementation to take into account specific administrative needs and particularities
Awareness: A successful ADR policy depends not only on its design, but also on its effective implementation at all levels.

Preparation and Opening are critical in investment mediation + support of an institution (e.g. Energy Charter Conflict Resolution Centre)

Public/political/media interest in dispute/its resolution + transparency obligations → need for a media protocol → Early media plan and an identified spokesperson (internal tensions). Counsel should continuously assess whether interaction with the media could affect the process and resolution of the dispute.

Several international arbitration cases reflect the tension that sometimes exists (Biwater v. Tanzania; United Utilities v. Estonia). In those cases, each side accused the other of waging a media war and tried to respond to perceived negative publicity as well as to alleged misleading and damaging leaks.

Cybersecurity measures for internal and external communications.

2018-19: ICSID draft investment mediation rules + UNCITRAL update of Rules on conciliation/mediation

2019: UN Singapore Convention signed on 7 August 2019 by 46 states → enforcement of settlement agreements including a state party (unless reservation under Art. 8.a)
Thanks for your attention

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