International Mediation Institute

IMI Competency Criteria for Investor-State Mediators

September 19th, 2016

The aim of the IMI Competency Criteria for Investor-State Mediators ("Criteria") is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators, or co-mediators, for disagreements involving private sector entities and States, by listing criteria that can help inform and guide their choices. Ideally, these Criteria should be applied cumulatively.

Mediation presents a credible and compelling option for both investors and States seeking to settle disagreements and disputes arising from investment activities. Mediation can be used in conjunction with, or in parallel to, investment arbitration, notably as a means to reach early settlement during the "cooling off" period provided for in treaties. When properly used with competent and suitable mediators, mediation can generate significantly more expedient, less expensive and more satisfactory outcomes in line with the overall objective of the long-term investment relationship between foreign investors and a State.

While a pool of Investor-State arbitrators has developed over the recent years, and while, in parallel, mediation of international disputes has gained momentum, there is as yet no readily available pool of accredited or identifiable Investor-State mediators from which parties can choose their mediator or co-mediators. Further, as good arbitrators do not necessarily make good mediators, and not all competent mediators may be suitable for mediating investment disputes, it is important for the parties and appointing bodies to carefully carry out due diligence before appointing their mediator. The skillset used by mediators differs considerably from those of conciliators, adjudicators, and arbitrators, and, while there is often overlap, many of those skills do not crossover. Co-mediation may also be a useful way of combining qualities found in different candidates and assisting in dealing with cultural nuances and the complexities of Investor-State disagreements.

At the outset, two issues should be emphasized:

(1) Investment disputes are particular, as they involve private parties on the one hand, and States on the other, and, therefore, may involve issues of public interest, public international law or sovereignty.

(2) Mediation is as much an art as a science, and Investor-State mediators should be not only competent but also suitable for each dispute.

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Ideally, selected Investor-State mediators should have satisfactory levels of knowledge and experience in each of the following areas:

1. Understanding of Investor-State issues

An Investor-State mediator should be informed on, and advised of, common issues that may arise in the course of investment disagreements. The mediator may be helpful in resolving not only substantive issues but also procedural ones (*e.g.*, who has authority to represent the State, public interest defences,

transparency concerns, sovereign immunity claims). The mediator should, therefore, have a solid understanding of, or familiarity with, procedural and substantive issues that may arise in Investor-State dispute settlement proceedings.

The mediator should be familiar with international investment processes, international commerce, financing mechanisms, public international legal issues and international arbitration procedures (*e.g.*, ICSID, UNCITRAL and ICC). The mediator need not be an expert in all of these fields but should have sufficient background knowledge to understand complex issues arising from disputes involving the domestic and international responsibilities of States, and the inherent risk for companies investing abroad, independent of the dispute's subject matter. Mediation allows participants to meet, interact and share their interests and concerns with their counterparty(-ies) and the mediator(s) in a safe and confidential manner. This social aspect of the process allows the participants to explore solutions that might not be available in arbitration or other adjudicative forms of dispute resolution.

2. Experience in mediation and other dispute resolution processes

An Investor-State mediator should be familiar with a wide range of dispute resolution processes, as well as with how to safely combine them. The mediator should understand how to address the potential for adverse impact on parallel arbitration or court proceedings. The mediator should know how to assist the parties in the following:

(1) Diagnosing the dispute and the risks of it escalating;
(2) Identifying likely timing issues and deadlines;
(3) Understanding the need to address proper party representation and ratification issues, taking into account the particular requirements for binding settlements;
(4) Explaining the mediation process in detail and its possible outcomes, making sure that the right participants are present and that necessary internal processes are in place to allow effective communication between those present and those authorized to make decisions;
(5) Convening and conducting the mediation process, and guiding the parties through it, being sure to address the needs of States regarding transparency and public and media access as appropriate, and balancing those needs with confidentiality, and establishing and maintaining trust among participants;
(6) Foreseeing and addressing possible procedural issues and obstacles;
(7) Understanding the possible impact of various procedural options on the parties' social behaviour (*e.g.*, triggering "pro-social" as opposed to "anti-social" behavioural patterns);
(8) Recognizing the formalities needed to allow the parties and the State to enter into enforceable settlement agreements, including the budgetary and financial approval requirements to make payments.

3. Experience with different forms of negotiation, mediation and conciliation

An Investor-State mediator should be experienced in different forms of negotiation, mediation and conciliation, and should have experience in conducting international mediations involving a State or a state entity and a private party as either a sole or co-mediator.[1] The mediator should be a trained, certified or accredited professional mediator, with strong intercultural and interpersonal skills, and should be

[1] At the time of preparing this set of competency criteria, the pool of experienced mediators with Investor-State dispute settlement experience is small and still being developed. These Criteria aim at encouraging the development of new expertise in Investor-State dispute settlement. It is advisable to treat them flexibly, and to revisit them once a sizable pool has emerged and experience has been gathered.

comfortable managing different types of mediation processes (*e.g.*, evaluative, facilitative, transformative), and working with other mediators or dispute resolution or other experts as part of a team (*e.g.*, as co-mediators), as may be appropriate. The mediator should understand that mediation is not only a legal but also a political and social process, and should know how to bring in appropriate experts when needed.

The mediator should know how to assist participants in using mediation to meet the various legal, political, social and/or cultural considerations that might arise in the course of resolving the disagreement, and should be familiar with relevant rules, guidelines and codes of ethics applying to Investor-State mediation.[2] Experience in international negotiations, particularly in settlement negotiations involving investment disputes or international disputes involving a State, could present an alternative to experience as a mediator.

4. Understanding of arbitration and adjudication

An Investor-State mediator should be familiar with different forms of arbitration and adjudication. Although it is useful to have experience working as an arbitrator, tribunal secretary, party representative, advocate, legal counsel, advisor or neutral in international commercial arbitration or adjudication proceedings, or with Investor-State arbitrations, such experience is not essential. More importantly, the mediator should be familiar with differences between institutional and ad-hoc proceedings, civil law and common law approaches to dispute resolution, and ethical issues and guidelines affecting arbitration and mediation.[3] The mediator should also understand enforceability issues and UNCITRAL texts on the recognition and enforcement of arbitral awards, as well as provisions regarding the possible use of consent awards or arbitral awards on agreed terms.

The mediator should have previous knowledge or experience with disputes involving a State as a party (*e.g.*, Investor-State arbitrations, international commercial arbitrations or adjudications). The mediator also should have an ability to synthesize complex information and provide a structural framework for identifying any applicable norms and dispositive issues (*e.g.*, issues of fact and law), while at the same time enabling the parties to focus on their future interests, the social dynamics between key participants, and any external procedural requirements (*e.g.*, transparency, public access, media) that may influence the handling of their discussions.

5. Intercultural competency

An Investor-State mediator should have strong and demonstrated competencies in dealing with cross-cultural situations. The mediator should understand culturally-shaped preferences and expectations, especially in international cross-border disputes and in different organizational cultures (*e.g.*, governmental, business) in relation to decision-making approaches and attitudes towards time and information exchange. The mediator should be able to appreciate nuances involved in different types of diplomacy, approaches to "cooling-off" periods, and how to convene, prepare for, coordinate, and conduct different types of meetings in different settings.[4]

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[2] *See, e.g.*, IBA Rules for Investor-State Mediation (2012).

[3] *See, e.g.*, IBA Guidelines on Conflicts of Interest in International Arbitration (2014) and IBA Rules on the Taking of Evidence in International Arbitration (2010).

[4] The provisions contained in the Criteria for Approving Programs to Qualify Mediators for IMI Inter-Cultural Certification may also be relevant, in particular the Cultural Focus Areas set out in Appendix 1 to those Criteria, available at https://imimediation.org/intercultural-certification-criteria (retrieved 15 Sep. 2016).

6. Other competencies

An Investor-State mediator should also be familiar with various tools and technologies that can assist the participants in communicating more effectively, reducing costs and saving time, such as online webinar or video-conferencing systems, data-analysis tools (*e.g.*, decision trees, mind maps) and process management skills. Such tools will hopefully give participants a greater sense of predictability, helping them to better manage budgets and deadlines. Familiarity with issues arising from third party funding is also desirable. Although familiarity with the particular industry relevant to the disagreement (including technical, economic and legal trends, as well as common business practices and public policies) may be helpful, such should not be considered a necessary criterion for appointment. Co-mediation and/or expert participation might also be employed as means of bringing additional know-how to the mediation.

Appendix A:
Relevant Provisions in Recent Investment Mediation Rules

The following qualifications have been identified in recent publications, which should be taken into consideration when seeking prospective Investor-State mediators:

1. The IBA Investor-State Mediation Rules (2012) – Appendix B

"*In considering prospective mediators, the following qualifications may be taken into consideration:*

- *Experience as mediator;*
- *Mediation training, including any accreditation as a mediator by an internationally recognized organization;*
- *Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes;*
- *Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue;*
- *Regional or international stature;*
- *Experience in dealing with governments;*
- *Experience as mediator in cross-cultural disputes;*
- *Experience in dealing with parties of the nationalities at issue;*
- *Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating; and*
- *The advisability of appointing a mediator of a nationality other than the nationalities of the parties.*"

2. The European Union's Trade and Investment Partnership Agreements

The draft EU–U.S. Transatlantic Trade and Investment Partnership Agreement proposed by the European Commission sets the following criteria for the selection of a mediator:

"*The […] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.*"[5]

[5] Draft EU–U.S. Transatlantic Trade and Investment Partnership Agreement, Section 3, Art. 3.4, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (retrieved 15 Sep. 2016).

Appendix B:
Members of the IMI Taskforce on Investor-State Mediation

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