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Preventing and Managing Investor-State Conflicts and Disputes in the Energy Sector

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ARTICLE

PREVENTING AND MANAGING INVESTOR-STATE CONFLICTS AND DISPUTES IN THE ENERGY SECTOR

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Economic activities, in particular those taking place in sensitive sectors such as energy, are usually highly regulated, resulting in frequent interaction of foreign investors with several authorities of the host state at the federal, national, regional, and local levels—authorities that are at times competing with each other and that are not always coordinating well. Sometimes these public entities are not very familiar with the international or contractual obligations (or even unilateral commitments) undertaken by the state at different levels, so they may inadvertently violate those obligations or create friction with the investors. On the other hand, companies investing in foreign countries may also not always be fully aware of the underlying causes of conflicts and friction between their local subsidiary, project, or joint venture and the host state. Furthermore, multinationals may also have several competing and not-always-well-coordinated departments or projects. This may affect their decision-making process and escalate a conflict with local authorities.

Despite the best intentions of companies and states, friction is almost inevitable over the life of a project. This is particularly true in the energy sector, which involves large, complex, capital-intensive projects with long life spans during which there may be several changes of governments, project personnel, and even economic circumstances. If not timely and correctly addressed, conflicts may escalate into full disputes, which often involve essential public policies, attract great scrutiny by the media, and implicate claims for substantial monetary damages as well as risks of reputational damage and loss of investment. The question is not whether an energy project will have conflicts but how those conflicts will be prevented and managed (or ultimately solved amicably if they escalate into full disputes). In fact, the energy and mining sectors accounted for more than half

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of the new investment disputes registered by the International Centre for Settlement of Investment Disputes (ICSID) in 2019.[1]

Consequently, both states and companies may benefit from introducing their own internal, binding frameworks to prevent and manage conflicts and disputes. The World Bank's Systemic Investment Response Mechanism (SIRM)[2] and the International Energy Charter's[3] Model Instrument for Management of Investment Disputes[4] are two complementary tools that could be considered for that purpose.

I. Conflict Prevention, Conflict Management, or Dispute Management?

Different institutions and states use different names to refer to prevention and management tools. Therefore, it is important to focus not on the names of tools but on their functions and the objectives they aim to achieve. In 2016, the Energy Charter Secretariat published a paper on "best practices [for] investment conflict prevention and management,"[5] describing different tools already adopted by governments in America, Europe, and Asia.[6]

Conflict-prevention tools aim at avoiding or minimizing friction before it transforms into actual conflicts. While they are usually implemented unilaterally by the host state, conflict-prevention tools can also be part of an international agreement with investment provisions. As an example of the

1. *See* Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *The ICSID Caseload—Statistics (Issue 2020-1)*, at 25 (2020), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf.

2. World Bank Grp. [WBG], *Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses*, at 41–66 (2019), https://openknowledge.worldbank.org/bitstream/handle/10986/33082/Political-Risk-and-Policy-Responses.pdf.

3. The International Energy Charter monitors the implementation of the Energy Charter Treaty [ECT], which is a unique sector-specific (energy) multilateral treaty establishing legal rights and obligations concerning a broad range of issues such as investment, trade, transit, competition, the environment, access to capital markets, and transfer of technology. To provide for the effective enforcement of those rights and obligations, the ECT includes several tailor-made dispute resolution mechanisms. As of February 1, 2019, the ECT has fifty-six signatories and contracting parties, including the European Union. In addition, almost fifty states and regional intergovernmental organizations from all over the world are observers. *Members and Observers to the Energy Charter Conference*, Int'l Energy Charter, https://www.energycharter.org/who-we-are/members-observers (last visited Feb. 24, 2021).

4. For a comment on the Model Instrument, see Alejandro Carballo Leyda, *Model Instrument for Management of Investment Disputes*, *in* Handbook of International Investment Law and Policy (Julien Chaisse et al. eds., 2019).

5. Energy Charter Secretariat, *Best Practices in Investment Conflict Prevention and Management* (2016), https://www.energycharter.org/fileadmin/DocumentsMedia/Other_Publications/20160926-Investment_Conflict_Prevention_Management.pdf.

6. For additional references on dispute prevention, see U.N. Conference on Trade and Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/8 (2011), https://unctad.org/en/Docs/webdiaeia20108_en.pdf (containing the proceedings from the 2010 Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution).

latter, recent international investment agreements (IIAs) usually establish joint committees or commissions (composed of government officials and industry representatives of both states that are party to the international agreement) that meet at regular intervals to promote the exchange of information and discuss potential areas of concern or discomfort. If properly used, these committees can be an extraordinary tool for conflict prevention.

Stocktaking is an important conflict-prevention tool; it aims to provide an early, comprehensive analysis of the national investment environment in the host state. Stocktaking consists of a thorough audit (which should be continuously updated to incorporate any evolving circumstances) of the regulatory, institutional, and economic environment and features some of the following components:

- A clear overview of international legal obligations undertaken by the host state (such as contracts and international agreements with investment provisions and double taxation treaties);
- Early analysis of potential gaps between specific provisions of domestic law and international treaties binding on the state (e.g., article 10.12 of the Energy Charter Treaty (ECT) requires contracting parties to ensure that their domestic law provides effective means for the assertion of claims and the enforcement of rights concerning investments, investment agreements, and investment authorizations);
- Mapping of the categories of foreign investors currently present in the host state's territory and analysis of the potential risks stemming thereof;
- A comprehensive study of the problems, conflicts, and disputes the host state experienced in the past, together with the circumstances in which they happened (a previous example may not always be a good reference for a later conflict if the circumstances in which it took place were very different), the reaction to them, and which solutions worked;
- An overview of the host-state agencies most frequently involved in the conflicts, to consider capacity building and other measures; and
- Monitoring of sensitive sectors prone to international disputes or on which the state's economy may be too dependent (e.g., oil, gas, or mining). A useful monitoring tool in the energy sector is the Energy Investment Risk Assessment (EIRA),[7] which evaluates specific risks affecting energy investment that can be mitigated through adjustments to policy, legal, and regulatory frameworks. It aims to identify policy gaps, provide learning opportunities, and stimulate reforms that make the in-

7. *See Energy Investment Risk Assessment*, INT'L ENERGY CHARTER, https://eira.energycharter.org (last visited Oct. 17, 2020) (containing annual EIRA reports, individual country profiles, year-to-year comparisons, and other information).

> vestment climate of countries more robust and reduce the risk of conflicts with foreign investors. EIRA is primarily addressed to governments, helping them identify and eliminate specific risks that impede the inflow of investments but that can be controlled and limited through government actions.[8] EIRA is also a reliable source for energy companies, investors, and the financial sector, providing useful information on different aspects of the regulatory and legal environment in countries considered for investment. Currently, EIRA evaluates three risk areas: (1) unpredictable policy or regulatory change, (2) discrimination between domestic and foreign investors, and (3) breach of state obligations. To measure these risks, four indicators have been identified: (1) the foresight of policy and regulatory change, (2) management of decision-making processes, (3) the regulatory environment and investment conditions, and (4) the rule of law (compliance with national and international obligations).

Of course, a stocktaking exercise would be useless if not combined with a well-centralized, easily-accessible database and an integrated information-sharing mechanism. "Knowledge is power," but only if it is efficiently and timely shared, in a user-friendly way, with all the relevant actors involved at all levels: federal, national, regional, and local.

Another important conflict-prevention tool is the individual ex ante analysis of policy changes affecting foreign investment to facilitate the identification and monitoring of sensitive issues that could give rise to friction with investors. In 2017, the Energy Charter Conference,[9] recalling the *G20 Guiding Principles for Global Investment Policymaking* (2016)[10] and the joint ACP[11]-UNCTAD[12] *Guiding Principles for ACP Countries' Investment Policymaking* (2017),[13] endorsed (with the understanding that they are not to be considered as a soft-law instrument, uniform practices, or nonbinding recommendations) some best practices in regulatory reform that could minimize potential conflicts with foreign investors.[14]

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8. For information on the scope and methodology of EIRA, see *Methodology*, INT'L ENERGY CHARTER, https://eira.energycharter.org/data/methodology.html (last visited Oct. 17, 2020).

9. The Energy Charter Conference is the governing and decision-making body of the International Energy Charter. *Meetings of the Energy Charter Conference*, INT'L ENERGY CHARTER, https://www.energycharter.org/who-we-are/energy-charter-conference (last visited Feb. 24, 2021).

10. Org. Econ. Coop. & Dev. [OECD], *Annex III: G20 Guiding Principles for Global Investment Policymaking* (2016), https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf.

11. African, Caribbean, and Pacific Group of States.

12. United Nations Conference on Trade and Development.

13. U.N. Conference on Trade and Development, *Guiding Principles for ACP Countries' Investment Policymaking*, U.N. Doc. ACP/85/037/17/Rev.1 (May 22, 2017), http://www.acp.int/sites/acpsec.waw.be/files/Guiding%20Principles%20for%20ACP%20countries.pdf.

14. Int'l Energy Charter, *Best Practices in Regulatory Reform: Minimising Potential Conflicts with Foreign Investors*, CCDEC 2017 4 INV (Oct. 11, 2017), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201704.pdf.

Conflict-management tools are usually designed to facilitate the resolution of investors' grievances and actual conflicts at a very early stage, thereby preventing their escalation into full legal disputes and ensuring effective allocation of both the investors' and the host state's financial resources. An example would be the introduction of a grievance-solving mechanism such as an investment ombudsman (a role whose duties may range from formulating general regulatory or statutory proposals to the government based on general concerns received to the amicable settlement of specific issues at an early stage). The centralization or coordination of grievance-solving mechanisms allows for the consolidation of the institutional memory of the investment climate and therefore facilitates identification of potential regulatory improvements. Additionally, these mechanisms provide an early-warning system, allowing the host state to better understand the situation and prepare in case the conflict regretfully transforms into a dispute. Indeed, another key tool for conflict management is an early-alert or early-warning mechanism with a list of steps to take at the sign of any conflict (with a clear timeline and some flexibility to adapt to circumstances).

Most of the existing conflict-prevention and conflict-management tools can be stand-alone measures, although they may reinforce each other if adopted in combination. While prevention should be prioritized, it is important to provide an encompassing and interactive approach. For example, an online digital platform easily accessible to all relevant public entities could work both as a centralized database, facilitating information sharing, and as an early-alert mechanism enabling public entities to inform the responsible body or lead agency of any potential conflict with foreign investors. Nevertheless, the threat of cyberattacks at the international level is nowadays a real risk, especially when states are involved.[15] Therefore, specific measures should be adopted to protect sensitive data from unauthorized access and to react promptly in case of a security breach.

If the problem invoked by the investor nonetheless persists and escalates into a full dispute (e.g., the investor notifies the host country of its intention to submit a claim under the contract, an existing investment agreement, or a local law), then *dispute-management tools* allow for an effective and coordinated response from the host state. Sometimes, however, conflict prevention and dispute management are interrelated and may overlap (e.g., additional grievances may arise after a dispute has already started, or a dispute may be defused by negotiation or mediation after the notice of litigation has been issued). In fact, the potential evolution of grievances into disputes is not unidirectional (disputes can be defused into conflicts and

15. For example, in *Caratube Int'l Oil Co. v. Republic of Kaz.*, ICISD Case No. ARB 13/13, Award, ¶¶ 150, 156 (2017), an arbitral tribunal authorized the on-record submission of nonprivileged documents that were part of some 60,000 documents previously hacked from the respondent's government systems and later leaked onto a publicly available website.

later into grievances). Sometimes a conflict may be partially solved, reducing the scope and complexity of the potential dispute.

Independent of the ongoing discussions on potential reforms to the investor-state dispute settlement (ISDS) system, an effective and comprehensive mechanism for conflict prevention, conflict management, and dispute management is still fundamental. If efficiently implemented and used, it can significantly improve the general quality, stability, and predictability of the investment environment, thus increasing investment retention while attracting new investment because of foreign investors' confidence.

II. Who Coordinates These Tools and How?

Investment conflicts and disputes are usually complex and rarely involve a single public entity, so internal coordination of the public authorities involved is crucial. Furthermore, the contact details of the responsible official or public agency to whom the investor should address its concerns are not always publicly available, or when they are available,[16] the functions and authority of the entity are not always clear. Thus, the investor may lose a lot of time trying to reach the relevant entity or entities while those entities may not be aware of the existence of potential problems with the foreign investor (in some cases, the investor may send notices to several ministries or agencies, with the risk that each entity takes for granted that the others are dealing with the problem). This lack of information and communication may result in the escalation of conflicts into full disputes instead of their potential resolution at the initial stage.

Therefore, whatever the tools for conflict prevention or management, it is important that they are coordinated and that a single institution (whose contact details are publicly available) is identified as being in charge. The responsible body or lead agency may have a different nature, composition, and work frame depending on the administrative structure and particular circumstances of the state it operates within. In some states, it will be an existing ministry (or a unit or department within a ministry), while in others it could take the form of a newly created agency or interinstitutional or interministerial commission.

While some of its functions may vary from one state to another, the responsible body or lead agency should be a central focal point with enough competencies, resources, legitimacy, and authority (both legal and political) to effectively engage with the concerned foreign investor. It is also important that the responsible body or lead agency ensures not only the necessary coordination with other public institutions but also adequate restraint of other state agencies, making sure that those agencies do not abuse their

16. Some new international investment agreements identify specific agencies that should receive notifications (e.g., Trans-Pacific Partnership, Chapter 9, Annex 9-D) in case of an investor claim, though it is not clear whether such entities will be in charge of managing such disputes.

power in dealings with the investor during the resolution of the conflict or dispute (e.g., through unnecessary audits).[17]

Furthermore, there is a general trend toward transparency in investment disputes—which attract great scrutiny by the media and civil society—and many states provide their citizens with the ability to get information, subject to specific national legislation, which can differ in scope and requirements. However, full transparency regarding investment conflicts and disputes, in particular at the very early stages, could undermine their amicable resolution or even escalate the conflicts. To a great extent, the reaction of citizens, foreign investors, and political groups to investment conflicts and disputes depends on how those conflicts and disputes, as well as their background and the way they are being addressed, are communicated about.

Therefore, it is useful to have a media plan early on (even more so nowadays, when social media can widely spread a message within hours) and an identified spokesperson. A press briefing may also be prepared, containing background information and the essential messages about the case to direct attention to the right issues and avoid inaccuracies and misunderstandings. The responsible body or lead agency should be the entity in charge of providing information to third parties with a single voice, since it can adequately evaluate the consequences of providing particular information and, as a result, strategically select what to disclose. In their public statements and press releases, other agencies and civil servants should avoid any value judgment about a potential controversy without first consulting the responsible body or lead agency. Several cases reflect the tension that sometimes exists between the host state and the foreign investor in relation to media.[18]

III. What Has the International Energy Charter Done to Facilitate the Prevention and Management of Investment Disputes?

In 2014, the Energy Charter Secretariat was charged with assisting with good offices,[19] mediation, and conciliation and with providing neutral,

17. *See* Caratube Int'l Oil Co. v. Republic of Kaz., ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures (July 31, 2009).

18. *See, e.g.*, Biwater Gauf (Tanz.) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Procedural Order No. 3 (Sept. 29, 2006); United Utilities (Tallinn) B.V. v. Republic of Est., ICSID Case No. ARB/14/24, Decision Regarding Respondent's Application for Provisional Measures (May 12, 2016).

19. Good offices are a diplomatic means for the settlement of disputes by which the Secretariat assists in establishing contact or facilitating direct negotiations between the disputing parties. If the parties request it, the Secretariat can also provide support during the negotiations. Int'l Energy Charter, *Conclusions of the Review conducted under Article 34(7) of the Energy Charter Treaty*, CCDEC2014 06 (Nov. 20, 2014), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201406.pdf.

independent legal advice and assistance in dispute resolution. As a result, the Energy Charter Secretariat established a Conflict Resolution Centre providing good offices and mediation support for investment disputes.[20]

During 2015, the Energy Charter Secretariat organized several roundtables with representatives from governments (in particular, officials involved in dispute resolution or investment promotion) and industry (in particular, members of the legal, business, and public-relations departments of energy companies) in order to understand their opinions and experiences regarding conflict resolution and the use of amicable dispute settlement in the energy sector. The general, common message in all those roundtables was the importance of dialogue to solve conflicts amicably before they escalate into full claims and to facilitate good long-term relationships.[21] However, the following problems were also raised: (i) the need for effective implementation of mechanisms to settle disputes amicably, and (ii) the need to raise awareness of those mechanisms among relevant stakeholders—lack of knowledge frequently results in lack of confidence and trust.

Building on this work, in 2016 the Energy Charter Conference endorsed the *Guide on Investment Mediation* as a helpful tool to facilitate the amicable resolution of investment disputes.[22] The guide was prepared by the Energy Charter Secretariat with the support of several intergovernmental organizations and international dispute-resolution bodies. These included ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the International Court of Arbitration, the Permanent Court of Arbitration (PCA), the UN Commission on International Trade Law (UNCITRAL), the Centre for Effective Dispute Resolution (CEDR), and the International Mediation Institute (IMI). The guide aims to be an explanatory document for governments and companies to use as a reference to better understand how investment mediation works so they can make informed decisions about whether to engage in mediation and how best to prepare for it. The Energy Charter Conference further "encouraged Contracting Parties to consider [using] mediation on a voluntary basis . . . at any stage of [a] dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat" and "welcomed the willingness of the Contracting Parties to facilitate effective enforcement in their Area of settlement agreements with

20. *Conflict Resolution Centre*, INT'L ENERGY CHARTER, https://www.energycharter.org/what-we-do/dispute-settlement/conflict-resolution-centre (last updated Apr. 16, 2019).

21. *The Hague Legal Energy Charter Forum*, INT'L ENERGY CHARTER (June 5, 2015), https://www.energycharter.org/media/news/article/the-hague-legal-energy-charter-forum; *Roundtable—Settlement of Investment Disputes*, INT'L ENERGY CHARTER, https://www.energycharter.org/what-we-do/events/roundtable-settlement-of-investment-disputes-30-september-2015 (last updated Sept. 10, 2015).

22. Int'l Energy Charter, *Guide on Investment Mediation*, CCDEC 2016 12 INV (July 19, 2016), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf.

foreign investors[,] in accordance with applicable law and the relevant domestic procedures."[23]

In 2018, the Energy Charter Secretariat developed a Model Instrument for Management of Investment Disputes. The Energy Charter Conference considered that the model instrument would help states enhance their management of investment disputes while attending to their own particular needs and circumstances.[24] The model instrument is based on discussions with international institutions and government officials that deal with investment-dispute resolution, and it draws upon existing work, including documents from Europe, Asia, and Latin America.[25] An initial workshop to discuss a preliminary draft with government officials from several countries, the World Bank, UNCITRAL, the Asian African Legal Consultative Organization (AALCO), and UNCTAD was held by the Energy Charter Secretariat in Brussels on July 6, 2018. The Energy Charter Secretariat conducted additional discussions during the UNCITRAL Trade Law Forum on September 11, 2018, in South Korea; at a seminar on investment-dispute resolution organized by AALCO on October 20, 2018, in Tanzania; and at a seminar on December 3, 2018, in Washington, D.C., in which the World Bank and ICSID participated.[26] The model instrument was selected as a "highly commended" runner-up for the 2019 Financial Times Innovative Lawyers Awards.[27]

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23. *Id.*

24. Int'l Energy Charter, *Model Instrument on Management of Investment Disputes*, CCDEC 2018 26 INV (Dec. 23, 2018), https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes.

25. *See* Decree of 2016: Decreto 125 crea comité interministerial para la defensa del estado en controversias internacionales en materias relativas a inversiones y regula la coordinación para la solución de dichas controversias (Chile); Regulation of 2009: Reglamento para la Prevención y Atención de las Controversias Internacionales en Materia de Comercio e Inversión N° 35452-MP-COMEX (Costa Rica); Decisions of 2013 and 2014: *Odluku o osnivanju Međuresornog povjerenstva za postupanje po zahtjevima stranih ulagaca vezanim uz sporove koji proizlaze iz dvostranih ugovora Republike Hrvatske iz područja poticanja i zaštite ulaganja* (Croat.); Decree of 2015: Decreto No. 303-15 (Dom. Rep.); Legal provision of 2017: Noteikumi Nr. 228 Pārstāvības nodrosināsanas kārtība starptautisko ieguldījumu strīdu izskatīsanā (Lat.); Law of 2006: Ley N° 28933 que establece el Sistema de coordinación y respuesta del estado en controversias internacionales de inversion (Peru); and Decision of 2014: Decision No. 04/2014/QD-TTg of the Prime Minister on Promulgation of Regulation on Coordination in Resolution of International Investment Disputes (Viet.). *See also* Decree of 2013, Resolution of 2014, and Directive of 2016: Decreto 1939 de 2013 por el cual se reglamenta la atención de controversias internacionales de inversion, Resolución 305 de 2014, Directiva Presidencial N. 2 de 2016 (Colom.), and Regulation of 2014 amended in 2016:
(*Положение о Центре судебного представительства Правительства Кыргызской Республики (В редакции постановления Правительства КР от 10 июня 2014 года № 320, 7 сентября 2016 года № 487)*) (Kyrg.).

26. *Seminar on Prevention and Management of Investment Disputes*, INT'L ENERGY CHARTER, https://www.energycharter.org/what-we-do/events/prevention-and-management-of-investment-disputes (last updated Dec. 11, 2018).

27. *Ranking: Creating a New Standard*, FIN. TIMES (Sept. 12, 2019), https://www.ft.com/content/672aaa1a-d093-11e9-99a4-b5ded7a7fe3f.

The model instrument seeks to provide government officials with a comprehensive overview of the legal, institutional, and practical issues that need to be considered for the effective management of investment disputes. It also emphasizes the importance and usefulness of negotiation, mediation, and conciliation (which should be properly considered in a strategy to deal with a dispute), providing a clear and express legal basis for their application as well as the authority to settle investment disputes. Governments may voluntarily use the model instrument as a reference or guide to develop or update their internal legal framework for managing investment disputes, taking into account their specific administrative needs as well as cultural and legal particularities.

The model instrument covers as many practical issues as possible based on the experiences and needs of consulted government officials who deal with investment disputes. It is for the state implementing the model instrument to decide the level of detail needed and whether some issues would be better developed in ancillary documents. The Energy Charter Secretariat stands ready to provide technical assistance and capacity building for governments willing to consider the implementation of the model instrument. So far Albania, Azerbaijan, The Gambia, and Nigeria have seconded officials at the Energy Charter Secretariat to consider their instruments based on the model.

The model instrument can be implemented (establishing an internal legal framework for the management of investment disputes) by way of a protocol, decree, decision, law, order, or any other instrument that states consider more fit according to their legal system. Nevertheless, the Energy Charter Secretariat advises that the internal framework be introduced by some sort of binding document to facilitate effective compliance since sometimes it is difficult to ensure that nonbinding policies and recommendations are applied (especially since they can easily be put aside in a volatile political environment). Government officials need to have the legal certainty of the internal framework's application and its compatibility with other relevant legal sources (such as the constitution). Furthermore, some states have introduced a specific provision in their internal legal framework declaring that the prevention and management of investment disputes are matters of "public interest" (e.g., Costa Rica[28] and the Dominican Republic,[29] while Chile refers to them as a "key and strategic matter"[30]), and at least one state has included a provision on liability in case of omission or

28. Considerando II, Reglamento para la Prevención y Atención de las Controversias Internacionales en Materia de Comercio e Inversión N° 35452-MP-COMEX (Costa Rica).

29. Art. 1, Decreto No. 303-15, Feb. 20, 2015 (Dom. Rep.).

30. Considerando 6, Decreto 125 crea comité interministerial para la defensa del estado en controversias internacionales en materias relativas a inversiones y regula la coordinación para la solución de dichas controversias (Chile).

breach of the provisions of the internal legal framework (e.g., the Dominican Republic).[31]

The model instrument focuses on establishing a lead agency or responsible body and managing investment disputes. This allows states the flexibility to decide whether to address conflict prevention and management in a separate instrument or set of rules and whether the same responsible body or lead agency in charge of managing investment disputes should also be in charge of coordinating conflict prevention and management. Nevertheless, the model instrument also contains several tools that, together with the establishment of a responsible body or lead agency, can be useful for conflict prevention and conflict management, such as centralization of information, information sharing, coordination, and an early-warning mechanism.

IV. How Does the Model Instrument for Management of Investment Disputes Fit with Other International Initiatives?

On April 1, 2019, the Energy Charter Secretariat (with the participation of ICSID, the World Bank, UNCTAD, and the Multilateral Investment Guarantee Agency (MIGA)) organized an interactive workshop on prevention of investment disputes as a side event to UNCITRAL's Working Group III (ISDS Reform) spring meeting in New York.[32] The workshop aimed to identify, with the help of government officials, synergies among different international initiatives and remaining gaps. It showed that the model instrument was addressing a specific area not yet addressed by any other international institution or initiative: how to introduce an effective internal legal framework to manage investment disputes that also provides the legal basis for the use of mediation and negotiation. The model instrument was also considered as complementary with the other relevant initiative at the international level: the Systemic Investment Response Mechanism (SIRM) of the World Bank.

The SIRM focuses only on the specific grievances or conflicts (not disputes) that, based on the investors' indications, place an investment project at risk of leaving the country or place a planned expansion at risk of cancellation. It provides a tracking tool to help states monitor and track the economic impact (amount of investment and number of jobs at risk) of those grievances or conflicts. The World Bank is currently considering sector-specific SIRMs, including for the energy sector. As a first step, the World Bank and the Energy Charter Secretariat are working in 2021 on

31. Art. 16, Decreto No. 303-15, Feb. 20, 2015 (Dom. Rep.).

32. *Brainstorming Session on Preventing Investment Disputes*, Int'l Energy Charter, https://www.energycharter.org/what-we-do/events/brainstorming-session-on-preventing-investment-disputes (last updated Mar. 19, 2019).

empirical research on the experience of the energy sector in preventing investment disputes.

On the other hand, the model instrument of the International Energy Charter is focused on the management of all types of investment disputes (though it also contains some useful tools for conflict prevention and management), regardless of their size or economic impact. It provides for an early, independent assessment of a dispute to ascertain the most effective course of action, including providing the express legal basis for negotiation and mediation.

V. What Is the Role of Foreign Investors?

While conflict-prevention tools can be deployed unilaterally (though some of them could also be part of the contractual arrangement between the host state and the investor), it usually takes two parties to solve conflicts (more if the friction or conflict also involves the local community). Therefore, it is not enough for the state to introduce conflict-prevention and -management tools if the foreign investor is not willing and able to engage.

In May and June 2019, the Energy Charter Secretariat discussed the potential use of the model instrument for companies at the In-House Legal Conference of the European Company Lawyers Association (ECLA) and the International Energy Charter Industry Advisory Panel (IAP).[33] It is becoming more frequent for big transnational companies to have internal policies on managing commercial conflicts and disputes, including alternative dispute-resolution mechanisms. However, those policies and mechanisms do not usually apply to conflicts with foreign governments, and small- and medium-sized enterprises (SMEs) do not usually have similar mechanisms.

In addition, some companies have already started to introduce some sort of local grievance redress mechanisms to deal with project-related conflicts with the local population (as requested by several international financial institutions) and due-diligence plans required by national legislation to prevent severe impacts on human rights, the health and safety of individuals, and the environment.[34] Nevertheless, those tools are not comprehensive since they target only a specific set of conflicts.

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33. For a current list of IAP members (including companies involved with the energy sector from more than thirty countries, intergovernmental organizations, and international business associations), see *Composition of the Energy Industry Advisory Panel (IAP)*, Int'l Energy Charter (June 19, 2020), https://www.energycharter.org/fileadmin/DocumentsMedia/IAP/Composition_of_the_Energy_Charter_Industry_Advisory_Panel_19-06-2020.pdf.

34. For example, one French law requires parent companies of groups with at least 5,000 employees in France, or 10,000 employees worldwide, to establish, implement, and publish reasonable vigilance measures (such as risk mapping, mitigation, and taking preventive actions) and to ensure effective and efficient implementation of such measures through alert mechanisms and monitoring systems. *See* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des societes meres et des entreprises donneuses d'ordre (1) [Law No. 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies (1)], Journal Officiel de

Therefore, it would be useful for companies to consider having their own internal framework to prevent and manage conflicts and disputes with foreign governments. However, for it to be successful, persons regularly interacting with foreign investors and government officials in relation to a contract or investment should be familiar with the internal framework. A successful policy depends not only on its design but also on its effective implementation at all levels. Therefore, it is advised that the internal framework be introduced by some sort of binding document to facilitate effective compliance.

Some of the relevant tools companies may consider including in their internal policy or framework to deal with investment conflicts and disputes are the following:

A. Conflict-prevention tools:

- Stakeholder mapping to identify and assess the relevant actors involved with the investment or contract.
- Ex ante conflict assessment and monitoring of the sensitive issues identified. This conflict assessment should not be frozen in time and should be regularly updated to include, for example, an early analysis of later policy changes affecting the investment.
- An organized, centralized, and consistent database with problems, conflicts, and disputes experienced in the past (not only in the host country but in any other foreign investment the company had), as well as the circumstances in which they happened, the reaction to them, and which solutions worked.
- Capacity building: apart from the previously mentioned workshops, the Energy Charter Secretariat has organized several trainings for government officials and the industry dealing with both investment mediation (with the support of CEDR, IMI, and ICSID) and investment arbitration (with the support of ICSID, SCC, and the PCA).

B. Conflict- and dispute-management tools:

- An early-alert mechanism with a list of steps to take at the sign of any conflict, with a clear timeline and some flexibility to adapt to circumstances. A poor interaction and deficient information sharing within a company could result in the escalation of conflicts. Depending on the corporate culture of the company, effective exchange of information could be even more complex than within some governments.
- Clear internal coordination with the identified person, department, or unit that should be notified of any conflict and would

LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=ID.

be in charge of negotiation, mediation, or arbitration. This entity would be the equivalent of the responsible body or lead agency in the case of states. This person, department, or unit should have either the authority to settle or direct access to the person or body that has that authority.

- Early, independent assessment of the conflict to ascertain the best (most effective) course of action, including using any relevant grievance mechanism (e.g., ombudsman, joint committees), as well as direct or assisted negotiation, mediation, or any other mechanism for an amicable resolution.
- An early strategic-communications plan and an identified spokesperson to deal with the public, political, and media interest in the conflict or dispute.