

# Energy Charter Secretariat

## Investment mediation and dispute prevention

In 2014, the Energy Charter Secretariat<sup>1</sup> was charged with assisting with good offices, mediation, and conciliation and with providing neutral, 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.<sup>2</sup>

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.<sup>3</sup> 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

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<sup>1</sup> The Energy Charter Secretariat assists the Energy Charter Conference in monitoring 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. In order to provide for the effective enforcement of those rights and obligations, the ECT includes several tailor-made dispute resolution mechanisms. As of 1 February 2019, the ECT has 56 Signatories and Contracting Parties, including the European Union. In addition, almost 50 states and regional intergovernmental organisations from all over the world are Observers.

<sup>2</sup> <https://www.energycharter.org/what-we-do/dispute-settlement/conflict-resolution-centre/>

<sup>3</sup> <https://www.energycharter.org/media/news/article/the-hague-legal-energy-charter-forum/>  
<https://www.energycharter.org/what-we-do/events/roundtable-settlement-of-investment-disputes-30-september-2015/>

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.<sup>4</sup> 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 (i) 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 (ii) welcomed the willingness of the contracting parties to facilitate effective enforcement in their area of settlement agreements with foreign investors, in accordance with applicable law and the relevant domestic procedures.<sup>5</sup>

In 2017, the Secretariat co-organised the first training for investment mediators together with ICSID, IMI and CEDR in Washington. It was followed by trainings in 2018 and 2019 in

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<sup>4</sup> CCDEC 2016 12, available at [https://www.energycharter.org/web/Metadata/Temp/1600688265\\_614\\_CCDEC201612.pdf](https://www.energycharter.org/web/Metadata/Temp/1600688265_614_CCDEC201612.pdf)

<sup>5</sup> Ibid.

Paris and Hong Kong. The main objective is to build the capacity of prospective investor-state mediators, counsel and government officials.

In 2018, the Energy Charter Secretariat developed a *Model Instrument for Management of Investment Disputes*.<sup>6</sup> 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.<sup>7</sup> The model instrument is based on discussions with international institutions<sup>8</sup> and government officials that deal with investment-dispute resolution, and it draws upon existing work, including documents from Europe, Asia, and Latin America. 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 2018, including at a seminar on investment-dispute resolution organized by AALCO on October 20, in Tanzania; and at a seminar on December 3, in Washington DC.

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 emphasises 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

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<sup>6</sup> English, French, Russian and Chinese versions of the Model Instrument can be found at <https://www.energychartertreaty.org/model-instrument/>. A comment on the Model Instrument is available at Carballo Leyda, A. (2019) 'Model Instrument for Management of Investment Disputes', in Chaisse J., Choukroune L., Jusoh S. (eds) *Handbook of International Investment Law and Policy*, Springer, Singapore [http://doi-org-443.webvpn.fjmu.edu.cn/10.1007/978-981-13-5744-2\\_19-1](http://doi-org-443.webvpn.fjmu.edu.cn/10.1007/978-981-13-5744-2_19-1)

<sup>7</sup> CCDEC 2018 26 (available at [https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826\\_-\\_INV\\_Adoption\\_by\\_correspondence\\_-\\_Model\\_Instrument\\_on\\_Management\\_of\\_Investment\\_Disputes](https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes))

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. Some countries have seconded officials at the Energy Charter Secretariat to consider their instruments based on the model.

The model instrument focuses on establishing a lead agency or responsible body and managing investment disputes, allowing 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 management, such as centralization of information, information sharing, coordination, and an early-warning mechanism.

In addition, the Energy Charter Secretariat and the World Bank are considering to work together on an empirical research on the experience of the energy sector in preventing investment disputes.