

COMMENTARY

International Energy Charter Draft Model Investment Dispute Prevention and Management Protocol

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Background

The International Energy Charter Secretariat (International Energy Charter) organized a workshop for government officials on the “Prevention and Management of Investment Disputes” at the International Energy Charter’s premises in Brussels on July 6, 2018. The Secretariat explains that it has been working on a “Model Protocol that could provide a framework for preventing and managing investment disputes.” The invitation to the workshop has been extended not only to member states but also to others, including countries of the Africa, Caribbean and Pacific group through the ACP Secretariat.

The International Energy Charter is mostly known for the large number of investor–state arbitrations brought under its Energy Charter Treaty (ECT). The International Energy Charter’s [website currently lists](#) 115 known arbitration cases initiated under the agreement, with 75 filed in the last five years alone. With the original aim of integrating the energy sectors of the former Soviet Union and Eastern Europe into Western European markets at the end of the Cold War, the stated purpose of the ECT was to establish “a legal framework in order to promote long-term cooperation in the energy field.” Although the framework covers multilateral cooperation over energy transit, trade and efficiency, its primary focus has been on investment protection and international arbitration.

It also includes the largest investment treaty award in history, in three cases brought by Yukos shareholders against Russia. In that instance, an arbitral tribunal found Russia liable for over 50 billion Euros. This arbitral award was eventually [set aside](#) by a Dutch court in April 2016, but the investors are still trying to overturn the decision and are pursuing enforcement proceedings of the set-aside award against Russia across the globe. Another case is pending against Germany for the government’s decision to phase out nuclear energy.

As of June 2018, the 1994 ECT has been signed or acceded to by 51 states plus the European Union and Euratom, bringing the total number of its signatories to 53. But the International Energy Charter is currently looking to gain new resource-rich member countries in Africa and Asia (see our [article from June 2017](#)). The July 6 workshop, which is extended to non-members, attests to this intention.



Overview

According to the International Energy Charter, the Model Investment Dispute Prevention and Management Protocol it proposes aims at providing a framework to guide states in seeking to prevent, manage and resolve investment disputes. The draft addresses tasks, powers, decision making, information sharing, financial considerations, coordination among relevant agencies and individuals, state representation, among other topics, in relation to international investment disputes.¹

As a general comment, we understand that the topics covered by the so-called Protocol would be better served—at least from the perspective of state interests—by guidance and good practice materials as opposed to the effort to develop a legal or quasi-legal instrument creating additional legal jeopardy for states in an arbitration context.

IISD fully supports the view that governments should develop strong internal procedures for preventing and managing investment disputes. Indeed, we have assisted developing countries in doing so. This is a prudent and reasonable course of action.

However, that does not mean these steps should be legalized and turned into rigid documents with short timelines that actually can work to prevent states from developing strong positions and approaches as alternatives to arbitration. The proposed instrument is of little benefit to states on either account.

We see the document as overly intrusive into government administrative processes, seeking often to legalize approaches that risk creating conflicts between levels of government and even between ministries at national government level. Claims that the text is intended to be flexible and adjustable to individual needs may be true in the sense that governments would identify their own specific ministries to be responsible. But the ultimate intent is to force specific choices on states where more flexibility is required. We see little value and much risk in over-legalizing the issues, as the document proposes.

In our view, the wiser approach is not to go down the route of a legal document that locks in one approach, but rather to work with governments on developing realistic best practice and reasonable approaches with a menu for states to be able to adjust and adapt as needed. The proposed instrument in our view overreaches legally and underachieves in terms of being a really practical tool for governments. Instead, it creates new legal risks for states.

Our more specific comments follow.

Unclear Purpose and Legal Status

The overall intent of the so-called Protocol is unclear. While the International Energy Charter is still apparently producing a guidance document to accompany the text, at present it is unclear what the text is intended to be a protocol to: The ECT itself? Other investment treaties or contracts? Domestic laws on international arbitration? None of this is clear in the text.

Our general impression is that the International Energy Charter is embarking on a highly intrusive effort to be directive of government conduct of investment disputes, under treaties, contracts or both. In some instances, it seems to suggest flexibility and options, but lying behind this is a lock-in once a choice is made.

Critically, while we have seen correspondence of the International Energy Charter that seems to suggest the process would be voluntary for states, the language of the instrument itself seems to suggest legally binding consequences as an instrument of domestic law regardless of being voluntary as an international instrument. Article 25, for example, reads:

¹ The full text of the draft Model Investment Dispute Prevention and Management Protocol prepared by the International Energy Charter is available at <https://www.bilaterals.org/?draft-model-investment-dispute>



Article 25

Implementation provisions

1. *All Public Entities shall ensure the implementation of this Protocol and timely report to the Ministry / Commission about any relevant issues during the implementation of this Protocol.*
2. *The Ministry / Commission may propose any additional legal framework necessary for implementing this Protocol. [Emphasis added]*

Article 26 goes into more detail:

Article 26

Liability for Breach of the Protocol

In the event of any omission or breach of the provisions contained in this Protocol by any public entity, its representatives and public employees responsible for the breach or omission shall be held liable and shall be required to compensate the State for the damage suffered due to such breach or omission in accordance with the law on ...]

Not only do these provisions set out specific liability on officials who commit “any omission or breach” of the proposed instrument, which is extraordinary in itself in normal administrative law on state employee liability, they imply very clearly that states can be held liable for damages such omissions or breaches may cause to the state. This means that the state can be held liable by the opposite disputing party for breaches of the provisions.

These provisions provide an extremely vague picture of the intent of the drafters as to legal status and implications of the proposed text. Given the degree of intrusiveness and micro-management of investment disputes proposed by the text, this is an important issue to consider: What is the intended legal status of the document and why are such expansive liability provisions warranted in an international document?

The document never explains why such a legally critical document is needed for states to set out a policy and administrative mechanism for how to manage investment disputes against the state. Many states have such policies and administrative practices which function very well without legalizing them and creating additional state liabilities toward foreign investors. No explanation is provided, for instance, as to why best practice guidance would not be a more flexible and attractive instrument to produce than one with immediate and potentially risky legal consequences.

Preamble and Article 1, Declaration of Public Interest

The preamble and Article 1 work to promote a notion of management of disputes with private investors as a matter of major public interest. It is unclear what the full intent of this is and even less clear why this language is chosen. This leads to a real lack of clarity as to its legal impacts. Words in legal documents are generally intended to be given meaning. What meaning is intended to be given to these words is unclear.

PREAMBLE

Whereas

- I. *[x] has entered into international investment agreements that contain international dispute resolution mechanisms, and the government and its agencies may also enter into contracts with foreign investors that contain dispute resolution mechanisms;*
- II. *Foreign investment disputes, if not addressed early, may implicate important public policies, political and financial considerations, legislative and regulatory activities, and possibly the international reputation of [x];*
- III. *[x] is committed to preventing and managing foreign investment disputes before formal dispute resolution becomes necessary, by facilitating efficient and coordinated inter-institutional actions; and to effectively and efficiently resolving such disputes;*
- IV. *[x] has determined to follow such efficient and coordinated inter-institutional actions, as set out in this Protocol.*



I. GENERAL PROVISIONS

[Article 1

Declaration of public interest

The prevention and management of International Investment Disputes involving [x] and any actions necessary to ensure its effective resolution or adequate defence are declared to be matters of public interest.]

The preamble also supports the unfortunate notion that when a state follows the procedures set out in dispute settlement provisions, and an arbitration is initiated, this will potentially lead to a negative impact on its international reputation (Preamble, para. II). Rather than arguing that by following the process it will be enhancing its reputation by doing precisely what it has committed to do, the text suggested would enhance the view that investors can legitimately threaten the reputation of a state by initiating arbitration against it.

Purposes

The purposes of the so-called Protocol (Art. 2) are defined as encompassing internal government processes to manage investment disputes, but then extend also to provisions on managing the costs of such disputes. This is returned to below. Other purposes relate to managing settlement processes, but the provisions in this regard are few in number compared to those for managing arbitrations and the threats of arbitrations.

Article 2

Scope and purpose

[...]

3. *This Protocol addresses tasks, powers, decision-making, information-sharing, financial considerations, coordination among state agencies, relevant organizations and individuals, and representation of the State in the resolution of International Investment Disputes, with the following purposes:*

- a) *Optimizing the cooperation and coordination within Public Entities in relation to International Investment Disputes, ensuring their timely, effective and appropriate handling;*
- b) *Establishing an early warning mechanism and associated procedure to enable early resolution, where appropriate, of any emerging International Investment Dispute;*
- c) *Defining the procedure for coordination between Public Entities involved in resolution of an International Investment Dispute;*
- d) *Defining the procedure for the hiring of external legal counsel and experts;*
- e) *Setting rules for the expenses involved in an International Investment Dispute and defining a system of financial oversight and payment of associated costs, settlement agreements and awards;*

[...]

Definitions

The definitions (Art. 3) outline the scope of the agreement. They make it clear that the scope would apply to any level of government within a state and any public entity able to conclude agreements with an investor. The implication of this extension of obligations in many investment treaties beyond the national level to all levels of government is not clear.



Coordination and Standardization of Dispute Settlement

There are several provisions on internal cooperation in the management of investor–state disputes that may make sense as administrative guidance. As legal provisions, however, they assume a different meaning.

For example, a paragraph in Article 7 calls for a standard dispute settlement clause to be used in all agreements with investors.

Article 7

Consistency of Dispute Settlement Provisions

1. The *Ministry / Commission* shall draft and provide a model of the investment dispute settlement clause to be used in negotiations of future international investment agreements and investment contracts with the aim of achieving greater consistency and standardisation.
2. In case of deviation from the model clause referred to in paragraph 1 of this Article, the negotiating Public Entity shall submit the wording of such clause to the *Ministry / Commission* for approval before conclusion of negotiations, together with the reasons for such alternative wording. The *Ministry / Commission* shall issue its [binding opinion/recommendations] [within ... working days].

This is highly presumptive and posits a uniformity of situations across sectors and types of investments that does not reflect commercial realities or state needs. The text also posits a level of legal control by federal states over other governments that simply is at odds with the division of powers in many states between levels of government. The result is undoubtedly intended to be a large expansion of investor–state dispute settlement processes, a notion that can only lead to more such arbitrations and more displacement of local courts in relation to public policy issues and government accountability within states. Behind the language of standardizing clauses is a policy choice to standardize disputes to international arbitrations as the rule instead of as the exception.

The level of detail set out, and hence of intrusiveness into government, is seen in the notification obligation in Article 8:

Article 8

Early Alert Mechanism

Any public entity that is notified or otherwise becomes aware of the existence or threat of an International Investment Dispute involving [x] shall notify the Responsible Body in writing no later than [five] working days from the date it became aware of its existence. The notification should include all the relevant information and documents in its disposal that are related to the International Investment Dispute.

This effort to have an extreme level of centralization of disputes at even the earliest moment of a possible dispute will undoubtedly have a chilling impact on governments at different levels of the regulatory chain within a state. It is a recipe for increasing the regulatory chill impact of existing investment treaties and many contracts.

Responsible Body

The provisions on the so-called “Responsible Body” (Arts. 9, 10 and 11) are extraordinary in their level of detail and intrusiveness for an international document. There is no doubt that it is useful for governments to have clearly identified pathways for managing investment disputes. But setting out in unusual detail in a legal document how they should operate defies practical realities that require adaptation and flexibility in many cases.

Indeed, the detail for the operation of the option set out for an Inter-Institutional Commission to manage disputes (Arts. 10.1 through 10.6) raises many issues for the average state to be able to implement on an ongoing basis. In that the Commission proposal would also make it a binding decision-maker in several instances, it is very unclear



how this would interact with other ministerial roles and obligations. Indeed, it would seem intended to override any other contrary ministerial statutes.

The document sets out very significant and limited timelines for internal decisions and strategies (for example, Article 12), unachievable in many international arbitration contexts when facts and information are often very fluid in the early stages of a potential dispute. Rather than being directed at internal efficiency, one might rather conclude that these provisions seek to reduce the length of arbitrations for investors, given that the time it takes to run an arbitration today is far longer than was anticipated even five or ten years ago.

Suggesting internal timelines of seven days for government agencies to comment on critical legal documents is another example of time prescriptions that are clearly aimed at reducing overall time rather than achieving truly outstanding state positions and representation, which would necessarily be sacrificed by these types of rules being applied (for example, Article 13(2)).

Arbitration Process Provisions

The so-called Protocol also includes provisions dealing with recognition and enforcement of arbitration awards (Article 15), enforcement of awards (Article 16) and managing financial aspects of arbitrations (Article 19). The first two add little to what would be found in laws or treaties. The need for them is unclear and could lead to contradictions or go beyond laws or treaty provisions.

Article 19 on financial aspects determines what part of government will be liable for costs in what circumstances. It transfers the ultimate liability onto the agencies responsible for the measure or omission at issue in a dispute. This is another element that could lead to regulatory chill, seeking to impose costs for arbitration on a single department of government as opposed to the principle that costs are borne by the central public treasury. Neither the wisdom or utility of this approach is readily apparent, except to impose the risk of costs of government agencies undertaking public policy and administrative decisions and thus making them hesitant to do so. What this seeks to achieve is therefore something worth questioning.

Mediation and Other Amicable Means of Dispute Settlement

The overall title and apparent intention of the so-called Protocol seems to be to prevent disputes moving to arbitration. Yet the actual provisions set out to do this do not begin until Article 22 and encompass just three articles of the 27 in the text. In fact, only Article 23 actually contains any substantive content on this issue.

This suggests the goal is far more about promoting and managing arbitration than alternatives to arbitration. This is regrettable, as recent practice toward developing strong and enforceable provisions on mediation and other means of amicable settlement is growing rapidly in treaty and contract practice. Not highlighting a full range of these issues is a significantly missed opportunity that suggests that the stated objectives and content are not fully aligned.

Final Provisions

The final provisions (Arts. 25 through 27) relate to coming into force and enforcement and are already noted earlier in relation to the intended legal status of the proposed document. Art. 26 highlights the intention of establishing liability on the state for any omission or breach in relation to the provisions adopted by a state, thus actually adding to its legal jeopardy and potential liability rather than reducing it. This is indeed a strange outcome and again raises questions as to whether the document is intended to be for the benefit of investors using arbitration processes, rather than for the additional security of the state.

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