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INTERNATIONAL ENERGY CHARTER

OCCASIONAL PAPER SERIES

Eliminating barriers to the entry and to the establishment of energy investments

Negotiating non-discriminatory pre-investment obligations, market access and facilitating investment in the energy sector

Maiko Meguro

Energy Charter Secretariat

Knowledge Centre

2017

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Eliminating barriers to the entry and to the establishment of energy investments

Negotiating non-discriminatory pre-investment obligations, market access and facilitating investment in the energy sector:

a groundwork analysis identifying barriers and exploring instruments of removal

ACKNOWLEDGEMENT

As requested by the Energy Charter Conference in 2015 and pursuant to the programme of Work for 2016-2017, the Energy Charter Secretariat started conducting groundwork activities on the conditions to negotiate a new legal instrument providing non-discriminatory treatment in the establishment of investments as well as to identify non-discriminatory barriers to the establishment of energy investments. The objective of this review report is to develop a groundwork analysis identifying the existing barriers (discriminatory measures and less obvious as well as more complex barriers) and suggesting instruments to remove them.

This report has been prepared by Ms. Maiko Meguro who was a research fellow at the Secretariat and a former deputy director of Economic Partnership Division, Ministry of Economy, Trade and Industry, Japan. She was an officer in charge of the investment and service chapters of the Trans Pacific Partnership, the EU-Japan Economic Partnership Agreement (EPA), the Japan-Turkey EPA, and also other Bilateral Investment Treaties (BITs). She is currently on sabbatical from the Government of Japan, and based at University of Amsterdam. The report was prepared in cooperation with Mr. Matteo Barra who was a Senior Investment Expert at the Energy Charter Secretariat.

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EXECUTIVE SUMMARY

This report is part of the activities carried out by the Energy Charter Secretariat in 2016-2017 aimed at preparing the groundwork on policy options for eliminating barriers to the establishment of energy investments. It contributes to these activities by answering the research questions: what are the international legal instruments available for removing barriers to the establishment of energy investments? What is the current practice of negotiating pre-investment obligations? What are the challenges in negotiating a new binding instrument in the energy sector and what lessons can be learnt from past experiences? What are the opportunities for negotiating a non-binding instrument?

After a brief review of pre-investment obligations under International Investment Agreements (IIAs), the paper proposes a working definition of pre-investment obligations. It then goes on to discuss the various forms of barriers that may hinder the entry and establishment of energy investments.

Thereafter, the paper reflects upon the varied practice in IIAs in relation to national treatment (NT) and Most Favoured Nation (MFN) clauses, to the prohibition of performance requirements (PRs) and, to Fair and Equitable Treatment (FET) and umbrella clauses. Various other clauses, such as positive and negative lists, different kind of reservations or security exceptions that reduce pre-investment protection due to prevailing public interests are also analysed.

In chapter 5, the combination of these various clauses is examined in relation to the IIAs concluded by selected countries, namely, the United States of America, Canada, Japan, the European Union, Turkey, Iran, Tanzania, Mozambique, Nigeria, China, Indonesia, the Russian Federation, Ukraine, Mexico and Brazil. The subsequent chapter elaborates upon the international and regional cooperation in promoting non-binding instruments on transparency and cutting the red tape.

Finally, as a preliminary conclusion, chapter 7 of the report indicates future perspectives for regulating pre-investment activities in the energy sector, taking into account the discussion among country representatives and international organisations on one side, and industry representatives who responded to the *ad hoc* questionnaire on the other.

One of the key recommendations of the report is that binding obligations under IIAs (*i.a*. NT, MFN) would have the effect of lowering or removing discriminatory and non-discriminatory barriers to the entry of energy investment, without prejudice to the concurrent public interest of protecting or creating links to the local economy (by means of *ad hoc* provisions to this effect, including exceptions). Removing barriers, with attention to balancing relevant public interest, would concretely mobilise the energy investments required to reach universal access to energy and energy transition.

In the second place, common and binding rules in IIAs on the entry and establishment of energy investments would provide the legal certainty on investment protection required by investors at the moment when they engage in the complex activities leading to the investments decision. In absence of clear rules under the existing IIAs or under a new legal instrument, the arbitral tribunals are left to exercise their interpretative powers in a *vacuum* which may lead to inequitable or undesired results.

Finally, multilateral binding rules on the establishment of energy investments would contribute to strengthening predictability and transparency as well as to reduce fragmentation and increase coherence in cross-border investment, global energy governance, sustainable development and energy transition.

With a binding instrument to enforce the principles of transparency and predictability, investors would be able to mitigate legal and regulatory investment risk. Indeed common rules would create a common level field for energy investors to operate cross border investments, enjoying the same opportunities and competing under the same conditions.

There is a strong opportunity to lower or remove non-discriminatory barriers to energy investments also by means of non-binding instruments. Investment facilitation and regulatory cooperation are an important domestic and international option to facilitate the enabling conditions for energy investors to take sound business decisions and to eliminate non-discriminatory barriers such as poor implementation, lack of transparency and excessive bureaucracy.

CHAPTER 1. INTRODUCTION

1.1. International Energy Charter on removing barriers to energy investments

In 2016, the Energy Charter Secretariat engaged in a series of activities aimed at facilitating the implementation of the principle in the 2015 International Energy Charter calling "*to promote the development of efficient, stable and transparent energy markets at regional and global levels based on the principle of non-discrimination and market-oriented price formation, taking into account environmental concerns and the role of energy in each country's national development*" as well as to *"remove all barriers to investment in the energy sector and provide, at national level, for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade"*.

This activity was mandated by the Energy Charter Conference, which requested the Secretariat to prepare the groundwork for a debate on policy options to eliminate barriers and to regulate the establishment of energy investments (CCDEC.2015.15.INV). In light of the 'modernisation' of the Energy Charter Treaty, the activities emphasised the benefits of predictable, transparent, and stable domestic and international frameworks to mobilise the investments required to achieve objectives like universal access to energy and clean energy transition.

The Secretariat collected information on existing barriers, IIAs, arbitral decisions and relevant practice of international and regional organisations through questionnaires and a series of meetings organised throughout 2016.

In June 2016, a meeting of representatives from governments from Africa, Middle East, Asia, South Caucasus, Europe and Latin America, as well as regional and international organisations opened the discussion on key principles for mobilising energy investments and balancing these with public interest in sensitive policy areas. The meeting helped to identify the primary elements in domestic and international policies that could be used in order to regulate the establishment of energy investments. These elements included sovereignty over energy resources, sustainable energy investment strategy, factors that enable energy investments, among which were predictability, transparency, regulatory stability, market confidence and the rule of law.

In July 2016, on the occasion of the UNCTAD World Investment Forum, the Secretariat organised a side event on transparent markets for sustainable energy investments attended by representatives from governments, investment promotion agencies, academia, industry and financial institutions. Speakers and participants were encouraged to comment on and question the subject of energy investments required to achieve the United Nations Sustainable Development Goal to '*Ensure access to affordable, reliable, sustainable and modern energy for all*' (SDG7). Again, different domestic and international policy options having a strong potential to mobilise sustainable energy investments were suggested.

1.2. Mobilising energy investments for energy security and sustainable development

Improving the investment environment through the rule of law and good governance contributes significantly to the overall objectives of sustainable development and energy security.

In order to achieve sustainable development and energy security, governments and industry members are called on to identify and deliver policies, which simultaneously address energy security, universal access to affordable energy services, and environmentally sensitive production and use of energy. The '**world energy trilemma**'[1], i.e. energy security, energy equity, and environmental sustainability, also represents three important dimensions of sustainable development strategies which are at the core of the **2015 International Energy Charter**[2].

First, energy is not yet accessible for everyone. Mobilising foreign direct investment plays a crucial role in achieving universal access to energy. Universal access to energy is identified as one of the major challenges that the world faces today. The Sustainable Energy for All (UNSE4All) initiative started by the former UN Secretary-General Ban Ki-moon aims at supporting governments in ensuring universal access to modern energy services, improving efficiency and increasing the use of renewable sources.[3] The resolution of the United Nations General Assembly establishing UNSE4ALL also recognises "the current share of new and renewable sources of energy in the global energy supply is still low owing to, among other

[1] World Energy Council at https://www.worldenergy.org/work-programme/strategic-insight/assessment-of-energy-climate-change-policy/
[2] http://www.energycharter.org/process/international-energy-charter-2015/
[3] http://www.se4all.org/our-vision

factors, high costs and lack of access to appropriate technologies."[4] In order to finance renewable energy projects and minimise the cost of energy and electricity, policies enhancing competition, liberalising the energy sector and increasing private investment are essential.

According to the International Energy Agency, global energy demand will grow 33% by 2040.[5] Under this scenario, to maintain the current development trend, investment worth 68 trillion USD will be required in the global energy sector by 2040.[6] As regards environmental sustainability, the Paris Agreement responded to the climate change challenge with the firm commitment of transitioning to a low-carbon economy by limiting the increase in global warming at 2ºC above pre-industrial levels.

1.3. The added value of transparent and predictable rules for the establishment of energy investments

Improving the investment environment is in the overall interest of the host states. Predictable, transparent and stable regulations, based on the rule of law and good governance, are essential for maximising the benefits of investment for both the host states and investors.

The World Bank provides the database on regulations and administrative processes for FDI,[7] and concludes that while restrictive frameworks and poor implementation impede investments, **good regulations and efficient processes and institutions** matter.[8] Indeed, the World Bank recognises the **financial value** of **predictable regulation, implementation and enforcement,** and estimates that investing in **high regulatory risk countries require more than twice the rate of return in comparison to lower risk countries**.[9]

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[4] the UN General Assembly 67/225 Resolution on 121 December 2012
(Deciding the establishment of the United Nations Decade of Sustainable Energy for All 2014-2024)

[5] IEA, *World Energy Outlook 2015 and its Factsheet*, available under *https://www.iea.org/media/news/2015/press/151110_WEO_Factsheet_GlobalEnergyTrends.pdf*

[6] *Ibid*

[7] World Bank, *Doing Business*, annually published at http://www.doingbusiness.org/

[8] World Bank, Investing across borders – indicators of foreign direct investment regulation, Washington (2010), at p. 8 et ff., available under http://iab.worldbank.org/

[9] World Bank, World Development Report 2005 "A Better Investment Climate for Everyone", pp.23-24, available at http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327693758977/complete_report.pdf

UNCTAD and OECD also point out the importance of stable and predictable regulations and their application in mobilising investments.

CHAPTER 2. DEFINITION OF PRE-INVESTMENT

2.1. Protection of Pre-Investment Activities under BITs and other IIAs

i. The definition of pre-investment activities

The expression 'pre-investment' denotes activities pertaining to the entry and to the establishment of investments within the territory of a host state. In business practice, investors take various steps before they 'establish' the investment. For instance, before the conclusion of the final investment agreement and the actual running of business, investors may conduct feasibility studies to assess the potential risks and returns, apply for permissions, enter into various contracts with the host state, and conduct investment-related activities.

Examples of business activities preliminary to the establishment of the investment

- Feasibility studies - Assessment of the geophysical condition - Assessment of the geopolitical condition - Due diligence of compliance with domestic laws (sectoral, competition, intellectual property rights) - Tax assessment - Applications for permissions (land survey, use of national property) - Transfer of capital to local partners

Article 1(8) of the Energy Charter Treaty defines 'Making of Investment' as "establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity". Further, its Article 10(2) states that "*Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the* ***Making of Investments*** *in its Area, the Treatment described in paragraph (3)*".

The expression 'making of investment' was also referred in the proposed Multilateral Agreement on Investment (MAI) of the OECD to illustrate that pre-establishment activities encompass "the

making of the new investment, including the participation in existing enterprises by foreign or non-resident investors".[10]

The 2012 US Model BIT provides that "Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to **the establishment, acquisition, expansion,** management, conduct, operation, and sale or other disposition of investment in its territory." The expression 'establishment, acquisition, and expansion' refers overall to the pre-establishment activities of the foreign investment. The concept of 'expansion' of an investment along with its 'establishment' and 'acquisition' as a component of pre-investment activities acts as a bridging concept between 'pre' and 'post' activities.

ii. Global trends in IIA and different approaches in providing pre-establishment obligations

UNCTAD registered a rise in the number of agreements that protect investors in the acquisition and the establishment of investments (10% of all IIAs in 2014). By the end of 2014, **228** instruments (125 'other IIAs' and 103 BITs) contained pre-investment obligations.[11] Additionally, **11** instruments (9 'other IIAs' and 2 BITs) extended protection to pre-establishment activities,[12] out of the 25 instruments signed by May 2016 recorded in the UNCTAD database.[13] **70%** of all signed IIAs that include pre-investment protection are entered into by developed economies.[14]

In the practice of BITs negotiated and currently in force, two general approaches exist regarding the formulation of pre-investment obligations. The first one is the 'liberalisation approach', whereby the treaty extends the applicable standards of treatment, such as NT, MFN, and prohibition of PRs to pre-establishment activities. This practice is common in the United States of America (US), Canada, and Japan. Some states that follow this approach prefer a broad

[10] Negotiating Group on the Multilateral Agreement on Investment: Treatment of Investors and Investments (Pre/Post-Establishment), DAFFE/MAI (95)3, (11 October 1995), at http://www1.oecd.org/daf/mai/pdf/ng/ng953e.pdf

[11] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, p.110

[12] The scope of 'pre-investment' here includes at least one of establishment, acquisition, expansion or similar concept. UNCTAD, IIA Database.

[13] The total 40 BITs and IIAs were signed from January 2015 to May 2016

[14] *Supra* note. 1 and 2

definition of protected investment which includes establishment, acquisition and, expansion of the investment. The use of the liberalisation approach has increased recently, particularly in regional economy integration agreements, such as CAFTA (Central American Free Trade Agreement) and SADC (Southern African Development Community). Such agreements may also protect market access in service.

Second is the 'protection approach', whereby the treaty provides certain standards expressly applicable to specific post-investment activities and does not refer to the 'establishment, acquisition, expansion' of investments. This approach is mostly found in treaties concluded by the EU member states and by developing states.

Examples of liberalisation provisions under selected IIAs

Broad definition of investor or of investment activities Japan-Mongolia EPA Article 10.2 (definition of investment activities) ***"establishment, acquisition, expansion,*** *operation, management, maintenance, use, enjoyment and sale or other disposal of an investment"* Canada-Cameroon FIPA Article 1 (definition of investor) *"investor of a Party" means a Party, or a national or an enterprise of a Party, that* ***seeks to make, is making*** *or has made an investment. For greater certainty, it is understood that an investor seeks to make an investment only when the investor has taken concrete steps necessary to make the investment;"* CETA (Canada – European Union) Article 8.1 (Definition) *"investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that* ***seeks to make***, ***is making*** *or has made an investment in the territory of the other Party".*
Standard (National Treatment, MFN) or obligations (PR) extending to the establishment and to the acquisition of an investment The Trans-Pacific Partnership (TPP), signed 2016 Article 9.4 (National Treatment) *"1. Each Party shall accord to investors of another Party treatment no less favourable than that*

it accords, in like circumstances, to its own investors with respect to ***the establishment, acquisition, expansion,*** *management, conduct, operation, and sale or other disposition of investments in its territory.*
2. Each Party shall accord to covered investments treatment…"
Article 9.5 (MFN Treatment)
…
Article 9.10: Performance Requirements
"No Party shall, in connection with the ***establishment, acquisition, expansion,*** *management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:***"**

Apart from the liberalisation and protection approaches, there is also a third approach known as 'the right to establishment.' This is common in regional economic integration agreements such as the MERCOSUR and the ECOWAS agreements. Another example is the BIT between Iran and Turkey. Typically, these treaties allow admission of investments among the member states and extend non-discrimination, transparency, fair and equitable treatment, investment facilitation to them.[15] Last, but not least, the Eurasian Economic Union - Viet Nam FTA also extends the scope of substantial protection (NT, MFN) to the phase of establishment. Recent IIAs concluded by the EU also involve protection at the establishment of investment stage in chapters dealing with Establishment or Market Access in service.

Examples of establishment/market access provisions under selected IIAs

The Right of Establishment

CARICOM
Article 35 (Establishment)

1. Each Member State recognizes that restrictions on the establishment and operation of economic enterprises therein by nationals of other Member States should not be applied, through accord to such persons of treatment which is less favourable than accorded in such matters to nationals of that Member State, in such a way as to frustrate the benefits expected from such

[15] UNCTAD, in *Admission and Establishment*, identifies five models of an admission and establishment clause: Investment control, selective liberalization, the combined NT and MFN (full liberalization), the regional industrial program approach, the mutual national treatment approach. The latter two approaches are included in the third approach in this fact sheet.

removal or absence of duties and quantitative restrictions as is required by this Annex

ECOWAS
Article 1
*"**Right of Establishment**" means the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, to carry out these activities as well as to set up and manage enterprises, and in particular companies, under the same conditions as defined by the legislation of the host Member State for its own nationals*

Admission of investment
MERCOSUR
Article 2
1. Each Contracting Party shall promote investments by investors of the other Contracting Parties and shall admit them in its territory no less favorably than the investments of its own investors or investments by investors of third States, without prejudice to the right Of each Party to temporarily maintain limited exceptions corresponding to one of the sectors listed in the Annex to this Protocol.

2. When one of the Contracting Parties has admitted an investment in its territory, it shall grant the necessary authorizations for its better performance, including the execution of contracts for licenses, commercial or administrative assistance, and the entry of the necessary personnel.[16]

Iran-Turkey BIT (1995 signed, 2005 in force)
Article 3
*"3.Either Contracting Party with respect to its laws and regulations **admit investments** of investors of the other Contracting Party in its territory, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country.*

4.Either Contracting Party after the admission of an investment shall grant all permits which are necessary in accordance with its laws and regulations for the proper realization of the said investment."

Eurasian Economic Union - Viet Nam FTA
Article 8.20(Scope)

*1. This Section shall apply to any measure by the Parties to this Chapter affecting **establishment**, commercial presence and activities.*
Article 8.21(National Treatment)

[16] *Unofficial translation*.

1. *With respect to **establishment** and subject to the reservations set out in its individual national List provided for in Annex 3 to Protocol No. 1, each Party to this Chapter shall grant, within its territory, to the persons of the other Party to this Chapter treatment no less favourable than that it accords in like circumstances to its own persons.*

Article 8.22 (Most-Favoured-Nation Treatment)

*1. With respect to **establishment** and subject to the reservations set out in its individual national List provided for in Annex 1 to Protocol No. 1, each Party to this Chapter shall grant to the persons of the other Party to this Chapter treatment no less favourable than that it accords in like circumstances to persons of any third country.*

2.2. Case Law

In practice, it is difficult to differentiate between pre- and post-investment activities, especially during the early stages of the investment, unless it is explicitly stated in the applicable IIA.

Arbitral tribunals do not always distinguish between pre- and post-investment, especially when there is no explicit reference to 'pre-investment' under the relevant IIA. However, in some instances arbitral tribunals have awarded damages to investors for pre-investment expenditures even when the text of the applicable BIT or IIA did not explicitly provide obligations concerning pre-investment activities.

In *ad hoc* investment arbitrations (under UNCITRAL rules), the jurisdiction *ratione materiae* (on disputes arising from an investment) is determined according to the intent of parties to the applicable treaty. In ICSID investment arbitrations, jurisdiction *ratione materiae* must satisfy the criteria set under Article 25 of the ICSID Convention. The article does not define what qualifies as an investment and this vagueness makes it difficult for drafters to agree on the scope of 'investment' (so much that 'pre-investment' was not discussed during the drafting process). In such cases, the question whether or not pre-investment activities are covered by the investment obligations is left to the tribunals, unless the BIT and other IIA clearly include or exclude pre-investment activities.

Recent arbitral awards on pre-investment suggest that pre-investment expenditure (such as in relation to concession contracts) may amount to an 'investment' when the BIT and other IIA does not explicitly exclude the pre-investment. For example, *PSEG v*. *Turkey* admitted *rationae*

materie to the expenditure at pre-investment activities. Even when tribunals did not award damages in relation to pre-investment expenditures, they left the possibility that - in other circumstances - the notion of covered investment under the relevant BIT or under Article 25 ICSID Convention, may include the pre-investment expenditure.

To a certain extent, the distinction between 'pre' and 'post' investment activities is an artificial concept in the light of business practice. The establishment of investment in business practice is a continuous process from its preparation to the actual running of the business. However, the legal uncertainty as to whether pre-investment expenditures are protected under the IIA may heighten the investment risk for the investors.

So far, arbitral tribunals defined the scope of covered investment by drawing a line between 'before' and 'after' the concession contract. However, they often grounded their decision on the intention of the parties under the specific circumstances. The case law thus testifies the interpretative discretion of the tribunal in the absence of explicit treaty language.

From these viewpoints described, regulation of pre- and post-investment activities in the IIAs contributes as a whole to increase the legal certainty of investment protection and provides the stable legal ground necessary to set up the investment project.

i. Mihaly v. Sri Lanka. (ICSID,2002)[17]

Mihaly Ltd entered into a letter of intent (LOI) with Sri Lanka on a project for setting up a 300-megawatt power plant on a build-own-transfer (BOT) basis. Following the LOI, Mihaly spent significant expenses on establishing a project company, arranging finances, and other activities. However, approval for the project was not issued by the Sri Lankan government, the project documentation was never finalised or signed, and consequently, the project was abandoned. Mihaly filed a request for arbitration under ICSID, based on the *a priori* consent provisions of the US-Sri Lanka BIT, for the expenditures and lost profits on the abandoned project. Sri Lanka argued the tribunal lacked jurisdiction *ratione materiae* and *ratione personae*.[18]

[17] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award (15 March 2002)
[18] The LOI was concluded by the Mihaly Canada Ltd on behalf of consortium.

The Tribunal declined the argument by Mihaly that pre-investment expenditure is included in the covered investment. The Tribunal stated that the LOI did not constitute an obligation of any party, while it specified a period of exclusivity in which the government would not negotiate with any other potential investors, and "the grant of exclusivity never matured into a contract" in the case.[19] Further the Tribunal continued "it is always a matter for the parties to determine at what point in their negotiations they wish to engage the provisions of the Convention by entering into an investment",[20] and confirmed that Sri Lanka had clearly signalled its intention that it will not enter into contractual relations nor recognise the establishment of investment until the execution of a contract.[21] Thus, the Tribunal concluded that the LOI does not contain any binding obligation or acceptance by Sri Lanka that the expediter constitutes an investment under the ICSID Convention.[22] The Tribunal was also of the opinion that the covered investment under article 2.2 of the US-Sri Lanka BIT extends to only existing investment, which is to be accorded "fair and equitable treatment".

Whereas the Tribunal refused the argument by Mihaly, it also clarified that the Tribunal did not consider the question whether or not expenditures at the pre-investment activities in other circumstances might constitute an "investment".[23] The basis of the award was the subjective intention of the Parties in the circumstances of the case. Thus, as the Tribunal stated, "in other circumstances, similar expenditure may perhaps be described as an investment."[24]

In this regard, case law constitutes a key tool to understand, better formulate and define regulations of pre and post-investment activities. However, such an approach cannot be undertaken without taking into account the importance of transparency in ISDS. Indeed, an increase in the use of transparency regulations in investment arbitration would significantly help to boost legal certainty by making precedents on the matter publicly available, hence consolidating legal case law in that respect.

[19] Para.48
[20] Para.51
[21] *Ibid*.
[22] Para. 59
[23] Para. 48
[24] Para.49

ii. MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile (ICSID, 2004) [25]

The case was brought by the Malaysian housing company MTD after Chile's Ministry of Housing and Urban Development refused to re-zone land near the city of Santiago. The re-zoning was required to permit construction of a planned community by the claimant in an area that was zoned for agricultural use. MTD invested 17 million USD into the project after receiving approval from Chile's Foreign Investment Commission. However, the Ministry refused re-zoning on the basis that urban development was planned for the north of Santiago rather than the south, where the project was located.

The Tribunal found that Chile breached the FET obligation under the BIT by creating an expectation that the project will be implemented in the location, but only awarded the damages that had causal link with the expectation created by the approval of investment. The Tribunal stated the damage before the execution of the first Foreign Exchange Contract is "not eligible for purpose of the calculation of damages even *if they could be considered part of the investment*."[26]

As in *Mihaley v. Sri Lanka*, the tribunal did not treat the question whether or not the term investment under ICSID or the BIT includes the pre-investment activities, and left an argumentative vacuum in this regard.

iii. PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey (2004)[27]

PSEG, a US based company, was granted authorisation to conduct a feasibility study into the building of a coal-fired power plant in the Turkish province of Konya. The implementation contract was signed in 1996, and the Turkish Council of State approved the implementation contract in the form of a concession contract in 1998. PSEG started with the project following the approval of a concession contract. Subsequently, a dispute arose between the parties as to whether the Concession Contract included a final agreement on key commercial terms, and what

[25] MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004), available at [http://ita.law.uvic.ca/documents/MTD-Award_000.pdf]
[26] MTD, para.240.
[27] PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No. ARB.02/5, Decision on Jurisdiction (2004), (2007)

those terms were. In the meanwhile, the enactment of Law No. 4628 in 2001 eliminated the possibility of the Claimants' obtaining a Treasury guarantee for the project. PSEG claimed that it spent a large amount of expenditures on feasibility studies, and extended a round of negotiation with governmental agencies. PSEG brought the case to ICSID that its investments were destroyed due to breach of the obligations under the BIT, such as fair and equitable treatment. Turkey argued that the investment was not yet established because the final investment agreement was not concluded.

The Tribunal found *rationae materie* at jurisdictional stage and awarded compensation on the merits, regarding the expenditure on pre-investment activities. In the jurisdictional decision of 2004, the Tribunal pointed out a striking difference from the Mihaly case, where the parties never signed a concession contract, and expressly disclaimed any legal obligations arising from the preparatory work undertaken.[28] In the end, the Tribunal concluded that the existence of a Concession Contract is sufficient to establish the jurisdiction, on the basis of an investment made in the form of a Concession Contract.[29] For the Tribunal, the nature and the specific terms of the Concession Contract in this case embodied the investment agreement under which the investor was authorised to undertake the power generation activities.[30]

At the merit stage, the Tribunal found Turkey in breach of fair and equitable treatment,[31] and awarded the damage that was caused by the FET violation, declaring "an investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialisation of the Project."[32]

2.3. Overview of the Concept of "pre" investment

The past tribunals have attempted to extend the protection to cases where the concession agreement existed although the applicable law did not clearly provide protection to "pre-investment" activities. However, it does not lead to the conclusion that "concession agreement"

[28] Para. 81,PSEG(2004)
[29] Para.104, PSEG(2004)
[30] Para.114, PSEG(2004)
[31] Para.246, PSEG(2007)
[32] Para 304. As to the scope of the calculation of the compensation, the Tribunal allowed not only for the cost of feasibility studies, but also for the costs of negotiation of a project at para. 319, PSEG (2007)

is a milestone to identify the line between the pre- stage and the post stage. While there is a metaphysical line between "pre" and "post", the place of this line highly depends on various factors such as the content of the contract or the type of investment or even pre- and post may overlap in some cases. For example, 'expansion' of investment that has been referred by some of the existing IIAs that cover pre-investment protection is an overlapping concept between the pre- and the post stage investment. In sum, there is a considerable uncertainty about the outer edge of investor protection that can be secured by the IIAs without elucidating pre-investment protection in the IIAs since the pre- and post-activities are intertwined in the investment process especially at the beginning.

CHAPTER 3. BARRIERS TO THE ENTRY AND TO THE ESTABLISHMENT OF ENERGY INVESTMENTS

Barriers to the entry and establishment of energy investment can take various forms. These may include discriminatory regulations with greater requirements for foreign investors and, arbitrary and/or excessive administrative procedures (referred as 'red tape'). These barriers create a concrete risk in the making of an investment, which investors take into account while estimating the anticipated return on the investment. Pre-investment barriers may be discriminatory or non-discriminatory, with direct or indirect effects, depending on their content and the way they are applied in practice.

3.1. Discriminatory barriers

i. Domestic regulation of foreign investment

Restrictive regulation

Every State has the sovereign right to decide the conditions for the entry and establishment of foreign investment within its territory. Such regulations usually take the form of controls or restrictions over the admission and establishment of foreign investments, or limitations on foreign ownership and control.[33]

[33] UNCTAD, *Admission and Establishment*, 2002, p. 7

Examples of restrictive regulation of pre-investment activities

Pre-investment rules regulating the admission and establishment of foreign investments:

- entry control over access to the host-country economy
  - quantitative restrictions
  - registration in the host country
  - screening and monitoring
  - conditional entry into host-country economy
- performance requirements (local sourcing, national development criteria)
  - fees, taxes and specific guarantees
  - capital and exchange restrictions.

Pre-investment rules regulating foreign ownership and control of local business:

- controls over ownership
  - quota of foreign ownership
  - mandatory transfers to local entities
  - mandatory joint ventures or partnerships
- controls based on the limitation of shareholders powers
  - restrictions on shareholders rights
  - restrictions on the right to transfer the shares
- controls based on governmental intervention in the running of the investment
  - direct governmental intervention in the management
  - restrictions on the management

Other regulations that have a restrictive effect on investors

Regulations which serve national interests, such as environmental and tax regulations may have a restrictive effect on the ability of investors to establish activities. Although such regulations are usually applied on a non-discriminatory basis to both nationals and foreign investors, excessive and disproportional requirements may be applied to restrict foreign investment for legitimate national policy objectives. These objectives range from national security, control over natural resources, critical infrastructures, public health, environment, and national development strategic objectives[34].

[34] UNCTAD, IPFSD, National Investment Policy Guidelines at 2.1 "Entry, establishment and operations of foreign investors".

ii. Investment agreements

While establishing FDI, the host state and the investor often conclude a series of contracts. For example, in natural resource exploration, the investor usually concludes a concession contract with the host state for permission to use the land, and other state property that is required for the project. In energy infrastructure projects (public-private partnership (PPP), parties usually opt for BOT[35] (build–operate–transfer) and BOOT (build–own–operate–transfer) schemes. Under these arrangements, the host state contracts an investor to finance, design, construct, and operate a facility for a specified period of time, after which the ownership is transferred back to the host state entity. Meanwhile the host state provides land and other utilities that are required for the investment. The State may also conclude an agreement to purchase a predetermined amount of the project's output so that the investor recoups its initial investment cost. Such investment agreements are of special importance for FDI in the energy sector which is often controlled or monopolised by state entities, especially in developing countries.

Examples of investment agreements

Concession Agreement: A right granted by the host state to the investor to use utility assets, land, property, and to operate or carry out an investment. Concessions are concluded in the sectors where the host state has control over the use of state owned property or in the operation of public utility services. Concession agreements are commonly negotiated for the exploration of natural resource, or building and operation of electricity generation plants.

Purchase Agreement: A guarantee provided to foreign investors, as public service providers and/or resource expropriators, guaranteeing the host state will purchase services and products at a certain price for a certain time period. In energy investment, a long-term power purchase agreement (PPA) is an instrument to obtain guarantees from the host state or the State-owned Electricity Company.

Performance Agreement: Performance agreements on the condition for grants regarding investment. Performance agreements are provided to address concerns related to inward FDI. The common forms of performance agreements are: minimum export requirements, maximum import limits, local content, local labour requirements, technology transfer, restriction of royalty etc.

[35] For BOT, the ownership of the facility is not assumed for the investor.

In BOT and BOOT, the investment agreement between the host state and the investor includes the concession agreement, purchase agreement, performance agreement, implementation agreement, etc. In practice, these contracts are inter-related with one another and together define the conditions of investment at entry. For example, while performance agreements impose certain performance obligation on investors, provisions in purchase agreements, such as narrow political *force majeure* guarantees and take-or-pay provisions, are considered to bind the freedom of the host state. The entire effect of barriers must take into account the whole picture concerning the right and obligations of the parties.

3.2. Non-discriminatory barriers

De facto barriers are non-regulatory measures by host states that negatively affect investors in making the investment. Such barriers may include arbitrary application of regulations, delay in processes, lack of transparency, inefficiencies and, excessive administrative procedures. These barriers usually affect investors regardless of their nationalities, and often impact domestic investors as well. *De facto* barriers occasionally arise out of lack of respect for the rule of law as well as out of poorly designed regulations and institutions.

Unlike discriminatory barriers, *de facto* barriers do not contribute to any policy objective of the host state. International organisations such as UNCTAD, OECD and the World Bank regularly emphasise the importance of transparency and predictability in the regulatory and administrative environment to facilitate trade and investment.

Examples of *de facto* barriers [36]

- Bureaucratic process in licensing
- Administrative costs
- Delay of process
- Arbitrary treatment/discretion of decision makers
- Regulatory unpredictability
- Frequent change of policies
- Corruption

[36] World Bank, *Doing Business*; World Bank, *World development report 2005 "A Better Investment Climate for Everyone"*; Scott Jacobs and Jacqueline Coolidge, *Reducing Administrative Barriers to Investment* (FIAS, World Bank Report)(2006), UNCTAD, *World Investment Report* (especially 2013, 2014);OECD, *Policy Framework for Investment* (2015).

- Tax Policy
- Lack of Institutional capacity

The OECD has conducted extensive ground work on the administrative burden faced by investors while setting up businesses.[37] One of the studies on investment facilitation identified that administrative burdens include information gaps created by incoherent or inaccurate policies, the number of steps involved in the decision-making process of the administrations, lack of clarity in public administration and policies.[38]

A series of World Bank reports provide a detailed study about the costs and impacts of administrative burdens. According to the World Bank, on an average, there is **a 3 times difference** between developing and developed countries in relation to the number of steps required to be taken by an investor when starting a business.[39] Regulatory unpredictability is also stated as a concern for investors. The World Bank study submits that **95 percent of firms reported a gap between formal policies and their implementation**, and investing in high risk countries with regulatory unpredictability required **more than twice the rate of return** compared to investing in low risk countries.[40]

3.3. Overall macro-economic and political conditions

The overall political and economic condition of the host state has a large impact on investment protection. Though the investors make vast expenditures in establishing the investment, the return does not immediately follow the investment. The investors take this considerably large risk on the assumption that the conditions under the relevant regulations or the contracts will not change during the project period, otherwise they suffer a massive loss. Thus, situations such as default of government or the devaluation of currencies in economic crisis are high political risks for the investors. In *CMS Gas Transmission v. Argentine*, Argentine lifted the pegging peso 'one to one' exchange with the US dollar following Argentina's economic crisis. Since the contract

[37] OECD, *Policy Framework,* and related studies on administrative simplification. *See at* http://www.oecd.org/gov/regulatory-policy/administrative-simplification.htm
[38] OECD, *Policy Framework*, pp.39-45
[39] World Bank, *Doing Business 2015*, pp.167-230
[40] World Bank, *World development report 2005*, pp.23-24

provided that CMS recoup its initial cost from the gas tariffs in peso, the devaluation of the peso resulted in a considerable loss of return for CMS and its subsidiary in Argentina.

CHAPTER 4. IIAS PROVISIONS REMOVING BARRIERS TO PRE-INVESTMENT ACTIVITIES

The starting point for any discussion on pre-investment in the energy sector is that States enjoy the sovereign right to control and regulate the entry and the establishment of foreign companies operating in their energy sector, as well as the acquisition of interests in domestic ventures and the expansion of existing business.

Policymakers aim at balancing an investor friendly climate on one side and their development strategy on the other. This ensures that investments are integrated into the local economy and contribute to national energy security and sustainable development. For achieving this, policymakers may consider removing discriminatory barriers against foreign investors such as quantitative restrictions, economic needs tests, foreign ownership restriction, joint venture requirements, and even straightforward exclusion from certain economic activities. Additionally, they may consider removing non-discriminatory barriers and grant foreign investors an international standard according to the rule of law.

As a whole, instruments for removing pre-investment barriers that can be negotiated within the framework of IIAs are NT and MFN clauses, prohibition of PRs, market access and establishment rights, as well as FET and umbrella clauses.

Overview of IIA provisions removing pre-investment barriers

Discriminatory Barriers	**Non-discriminatory Barriers**
- National Treatment - Most Favoured Nation Treatment - Prohibition of performance requirements - Market Access - Establishment rights	- Fair and Equitable Treatment - Umbrella clause - Promotion and Protection

4.1. National Treatment and Most Favoured Nation Treatment clauses

The principle of non-discrimination according to NT and MFN applies across various fields of international economic law.[41] Both standards are traditionally used to eliminate trade barriers. The MFN clause attempts to harmonise the global competitive conditions among trading states while the NT clause aims at eliminating trade barriers against foreigners.

According to the current practice of IIAs, NT and MFN clauses in relation to pre-investment activities are negotiated to eliminate domestic rules that discriminate the establishment of foreign investments compared to domestic investments or compared to most favoured foreign investments as well as to establish a non-discriminatory standard in the treatment of pre-investment activities. Thus, NT or MFN clauses outlaw and eliminate rules that are more restrictive to foreign investors than to national or other most favoured third parties.

4.2. Prohibition of performance requirement

PRs are "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country".[42] Prohibition of PR was originally discussed under the WTO framework, which eventually culminated in the TRIMs Agreement. Local content requirements and import/export restrictions are PRs that are contrary to WTO rules[43] while PRs linked to technology transfer are in principle lawful.[44]

PR provisions are negotiated by both developed and developing states in order to optimize and control the impact of FDI. According to UNCTAD[45], the *rationales* for supporting PRs are various. For example, to overcome information asymmetries in the market, to distribute economic benefit to the population at large, and to remedy the distortion created by the governmental intervention policies such as import substitution and other market failures. In the

[41] Customary international law does not require any host country to guarantee a non-discriminatory treatment to foreign investors to pre- and post-investment.
[42] UNCTAD, 2003, p.2
[43] Article III.4 of the GATT, Article 2.1. of the TRIMs Agreement.
[44] The TRIMs Agreement does not cover the technology requirements.
[45] UNCTAD, *FOREIGN DIRECT INVESTMENT AND PERFORMANCE REQUIREMENTS: NEW EVIDENCE FROM SELECTED COUNTRIES*(2003)

case of developing countries particularly, boosting the local economy by obliging investors to source locally is often a part of the long-term development strategy.

There are divergent views regarding the effectiveness of PR, including local content, in achieving the objectives of sustainable development. According to UNCTAD, some empirical studies have concluded that local content requirements "can be a costly and inefficient policy tool in terms of resource allocation and growth" while other studies have found that local content requirements have been used as an effective tool to modify information asymmetries and improve the local capabilities.[46] UNCTAD also noted that PRs are normally intended to distribute the benefit of FDI to the larger public, including local service/labour/product suppliers, but in practice they create rent-seeking that benefit "relatively small but well-organised interest groups in society at the expense of the larger public."[47]

A recent OECD study also suggests that local content requirements in solar and wind power could hinder international investment flow in the context of the global value chain.[48] The OECD emphasises that local requirements not only result in reduced competition and efficiency losses, thereby damaging the investment environment, but are also perceived as having an adverse impact on their abilities to compete globally by distorting trade.[49]

Domestic PR may be removed by means of an express prohibition under the relevant IIA.

4.3. Clauses removing non-discriminatory barriers

As to the non-discriminatory barriers (where regulations are applied in arbitrary ways, are complicated and/or inconsistent, or excessive compared to the risks that the regulations are intended to cope with) some BITs and IIAs traditionally require host states to grant all permits, which are necessary in accordance with its laws and regulations, for the proper realisation of the said investment after the admission of an investment under **'Promotion and Protection'** articles.

[46] UNCTAD, *supra* note. XX, p.8
[47] UNCTAD, *supra* note. XX, p.7
[48] OECD (2015), Overcoming Barriers to International Investment in Clean Energy, Green Finance and Investment Series, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264227064-en
while the scope of FET still leaves argumentative spaces.[4949] *Id*, p.81

The recent practice extends **the umbrella clause** to pre-establishment activities relating to the implementation of the investment contracts.

While the scope of FET still leaves space for discussion[50], protection of investors from arbitrary treatment, and lack of transparency are widely considered to be a part of the concept of **FET** under BITs and other IIAs.[51]

4.4. Exceptions

In a quest to provide legal stability in the making of an investment, and at the same time securing the national interests of sustainable development and energy security, States often negotiate exceptions to the above mentioned clauses. In this context, exceptions are aimed at reconciling the legal obligation to remove barriers with the overall development strategy of the host state.

The exceptions most commonly negotiated in IIAs are: (i) exceptions on the scope of investment protection; (ii) reservation on non-conforming measures; (iii) reservation from investor-state dispute settlement; (iv) national security exceptions.

i. Positive lists

A large number of IIAs limit their scope of application either by means of a **positive list**, *i.e.* a selective liberalisation of sectors where investors enjoy pre-establishment rights, or by means of a **negative list** which identifies the sectors and industries excluded from the scope of the agreement.

The positive list approach is used, for example, in the market access provision under the WTO General Agreement on Trade in Services (GATS). The GATS obligations do not apply unless the sector and/or specific sector are inscribed in the schedule.

[50] UNCTAD Series on Issues in International Investment Agreements II, "Fair And Equitable Treatment", at p. vi.
[51] For example, *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; *Glamis Gold Ltd v. United State*s, UNCITRAL Rules, Award, 8 June 2009, para. 605.

Positive list

GATS

Article XX

*"1. Each Member **shall set out in a schedule the specific commitments it undertakes** under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify…"*

Negative list

EU-Korea FTA

Article 7.10

*"With a view to improving the investment environment, and in particular **the conditions of establishment** between the Parties, this Section applies to measures by the Parties affecting establishment in all economic activities **with the exception of :***

- *mining, manufacturing and processing of nuclear materials;*
- *production of, or trade in, arms, munitions and war material ;*
- *audio-visual services ;*
- *national maritime cabotage; and*
- *domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:*

  (i) aircraft repair and maintenance services;

  (ii) the selling and marketing of air transport services;

  (iii) CRS services; and

  (iv) other services auxiliary to air transport services, such as ground handling services, rental service of aircraft with crew and airport management services."

ii. Reservations to non-conforming measures

Reservations to non-conforming measures allow States to exclude the entire sensitive sectors (future reservation) or existing laws and measures that contradict the obligations under the respective IIA.

The current negotiating text of the Supplementary Treaty of the Energy Charter Treaty contains a reservation of non-conforming measures.

Supplementary Treaty of Energy Charter Treaty

Article 2.3.a:

*"**Paragraph (2) shall not apply to:***

(i) any non-conforming measure that is maintained by a Contracting Party as set out in Annex EX;

(ii) the continuation or prompt renewal of such non-conforming measure; or

(iii) an amendment to such non-conforming measure to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraph (2)

iii. Reservations from investor-State dispute settlement

The third approach is to provide that the pre-establishment issue is not subject to the dispute settlement procedure. During the negotiation of the MAI, the issue of whether investor-state dispute settlement (ISDS) procedure should cover the disputes involving the investor's pre-establishment rights, was one of the outstanding issues that have still not been decided. The practice of limiting the application of dispute settlement procedures only to post-investment activities is also found in BITs and other IIAs negotiated by States that mostly support expanding the pre-investment protection.

US - Columbia BIT

Article 10.16:

"1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation….

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."

Canada – Burkina Faso BIT

Article 21

"*1. An investor of a Party may submit to arbitration under this Section a claim that:*

the respondent Party has breached an obligation under Section B (Substantive Obligations), other than an obligation under:

- Article 4 (National Treatment), with respect to the establishment and acquisition of an investment[52]*,*

- Article 8(3) (Senior Management, Boards of Directors and Entry of Personnel), or Article 12 (Transparency) or 15 (Health, Safety and Environmental Measures); and the investor has incurred loss or damage by reason of, or arising out of, that breach."

iv. National security exception

The exception related to the protection of **essential security interests** is also widely accepted practice in mitigating public interest and investment protection. The content of security is essentially left to the domestic law of the parties to the agreements since it gives parties freedom to take any measures necessary for the protection of their respective security interests.

For example, regarding the screening of foreign investment, OECD Codes of Liberalisation of Capital Movements and Invisible Transactions provides a security exception without specifying the scope of security.

OECD Codes of Liberalisation of Capital Movements

Article 3 (Public order and security)

"The provisions of this Code shall not prevent a Member from taking action, which it considers necessary for:

i) the maintenance of public order or the protection of public health, morals and safety;

ii) the protection of its essential security interests;"

[52] Claims regarding the expansion of an investment may only be submitted if the measure regards the existing activities of the covered investment and if it has caused loss or damage to the covered investment.

CHAPTER 5. THE PRACTICE OF IIAS

The United States[53]

By the end of the 1980's, the US had already signed several BITs which provided protection for pre-establishment activities, starting with the US-Panama BIT (1982). The US-Panama BIT contained provisions on NT and MFN[54] and protected pre-investment activities as "associated activities" under a specified list.[55] It also covered PR through the words "as a condition for the establishment of investment".[56] Some of the other BITs concluded by the US such as the US-Congo Democratic (1986), the US-Cameroon (1986), the US-Egypt (1986) and the US-Bangladesh (1986) also referred to establishment of "associated activities" along with investment falling under the protection of NT and MFN.[57]

When the US entered into a BIT with Sri Lanka in 1991, it also concluded a number of other BITs that expanded the FET[58] protection to the "acquisition" and "expansion" of investments. It was only in 1995, after the US – Nigeria BIT, such FET expansion was faded out by the US. Instead, the FET articles are accorded the standard of customary international law as NAFTA (1992), which does not include pre-investment protection. It is also noteworthy that the NAFTA does provide the NT, MFN, and PR protection to both pre and post investment activities.

NAFTA

Article 1102: National Treatment

"1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the ***establishment, acquisition, expansion****, management, conduct, operation, and sale or other disposition of investments.*

[53] 113 BITs and other IIAs signed or in effect(as of April 1st, 2016)

[54] Article 2.1

[55] Agreed Minutes, para. 1 (a) the establishment, control and maintenance of branches, agencies, offices, factories or other facilities for the conduct of business.

[56] Article 2.4.

[57] Article 2.2.a, article 2.2.i, article 2.2.a.i, Protocol para.1.a

[58] "Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, **acquisition, expansion**, or disposal of investment made by nationals or companies of the other Party." In the US-Georgia BIT where it was made clear that the FET is the Minimum Standard of Treatment under the customary international law, "acquisition, expansion" was not provided.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the ***establishment, acquisition, expansion****, management, conduct, operation, and sale or other disposition of investments."*

Article 1103: Most-Favored-Nation Treatment

"1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the ***establishment, acquisition, expansion****, management, conduct, operation, and sale or other disposition of investments."*

Article 1106: Performance Requirements

"1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with ***the establishment, acquisition, expansion****, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:"*

The recent practice regarding pre-investment (2000-2016)

(NT, MFN, PR, FET)	(NT, MFN, PR)
US-Sri Lanka BIT	US-Singapore FTA
US-Slovakia BIT	US-Chile FTA
US- Czech BIT	US-AUS FTA
US-Argentina BIT	US-Morocco FTA
US-Kazakhstan BIT	NAFTA
US-Romania BIT	US-Oman FTA
US-Russia BIT	US-Peru FTA
US-Armenia BIT	US-Colombia FTA[59]
US-Bulgaria BIT	US-Panama FTA
US-Kyrgyzstan BIT	US-Korea FTA
US-Moldova BIT	US-Uruguay BIT
US-Ecuador BIT	US-Rwanda BIT
US-Belarus BIT	TPP
US-Jamaica BIT	
US-Ukraine BIT	

[59] Colombia-the US FTA excluded MFN in the pre-investment activities from the dispute settlement mechanism.

US-Estonia BIT US-Latvia BIT US-Nicaragua BIT	

Canada[60]

Before concluding the NAFTA, pre-investment protection for Canada was the non-discrimination at permission of investment.[61] For example, Article 2.3 of the Canada-Russia BIT (1989) provided "(T)his Agreement shall not preclude either Contracting Party from prescribing laws and regulations in connection with the establishment of a new business enterprise or the acquisition or sale of a business enterprise in its territory, provided that such laws and regulations are applied equally to all foreign investors". After NAFTA's conclusion, the scope of pre-investment protection was also expanded to PR.

Since 2000, 17 out of the 27 BITs and IIAs signed by Canada provide pre-investment protection for NT, MFN, and PR. Only 2 agreements do not provide any substantial obligations for pre-investment activities.

In terms of FET, Canadian BITs and IIAs generally provide investors treatment in accordance with customary international law, which does not include pre-investment protection.

The recent practice regarding pre-investment (2000-2016)

(NT, MFN, PR) Canada-Peru BIT Canada-Latvia BIT Canada-Kuwait BIT Canada-Tanzania BIT Canada-Benin BIT Canada-Cameroon BIT Canada-Nigeria BIT Canada-Serbia BIT Canada-Senegal BIT Canada-Mali BIT Canada-Côte d'Ivoire BIT Canada-Burkina Faso BIT	Canada-Peru FTA Canada-Columbia FTA Canada-Panama FTA Canada-Honduras FTA Canada-Korea FTA TPP

[60] 57 BITs and other IIAs signed or in effect (as of April 1st, 2016)

[61] Those BITs also clarifies the decision on permission itself is not under the Dispute Settlement.

(One or two of PR, the non-discrimination on permission) Canada-Latvia BIT Canada-Czech BIT Canada-Romania BIT Canada-Slovakia

Japan[62]

Japanese practice on pre-investment protection can be traced back to the 1980s. Japan adopted an approach that included elements of pre-investment activities, such as establishment, within the definition of business activities protected with the covered investment. Japan also concluded several BITs and IIAs to include a specific article on the non-discriminatory treatment of permission of investment.

Since the conclusion of the Japan-Singapore EPA in 2002, Japan has increased the number of BITs and IIAs that include pre-investment protection. In 2016, 22 out of its 47 BITs and IIAs included pre-investment protection.

The Japanese practice of pre-investment protection may be classified into 2 approaches. One is the NAFTA approach (NT, MFN, PR), and the second is a comprehensive approach that includes "establishment, acquisition, expansion of investment" within the definition of "investment activities" together with management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investment.

Some examples of the comprehensive approach are the Japan-Mexico EPA (2004), Japan-Indonesia EPA (2007), Japan-Mozambique BIT (2013), and Japan-Mongolia EPA (2015). As to FET, most of the agreements concluded by Japan exclude pre-establishment from their scope or provide for treatment in accordance with customary international law.

[62] 47 BITs and other IIAs signed or in effect(as of April 1st, 2016)

Japan Mexico EPA Article 58 Definitions *"(g) the term "investment activities" means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments;"*

The recent practice regarding pre-investment (2000-2016)

(NT, MFN, PR, SMBD*, FET**) Japan-Philippine BIT Japan-Cambodia BIT Japan-Lao* BIT Japan-Uzbekistan* BIT Japan-Peru BIT Japan-Colombia* BIT Japan-Kuwait* BIT Japan-Mozambique*** BIT Japan-Myanmar*** BIT Japan-Uruguay BIT	Japan-Mexico EPA Japan-Chile* EPA Japan-Thailand EPA Japan-Brunei EPA Japan-Indonesia* EPA Japan-Mongolia* EPA TPP
(One or two of NT, MFN, PR) Japan-Korea BIT Japan-Vietnam BIT Japan-Malaysia BIT	Japan-Singapore EPA Japan-Switzerland EPA

European Union[63]

IIAs concluded by the EU regulate foreign investments in terms of 'establishment' or 'market access' of trade in service (GATS, Mode 3) rather than as a separate chapter. Under such IIAs, NT and MFN clauses apply to those pre-establishment activities that fall under the scope of trade in service commitments.

Among the 65 IIAs concluded by the EU, 21 extend investment protection to establishment activities. However, the EU changed its practice on pre-investment protection and adopted the liberalisation approach while concluding the Canada-EU Comprehensive Economic and Trade Agreement (CETA). CETA has an independent chapter on investment with the expanded definition of "investor" to include those seeking "to make, is making an investment in the territory of the other Party".

[63] 68 BITs and other IIAs (as of August 1st, 2016)

The definition is essential as it determines which investments benefit from the protections provided in other parts of the agreement. By extending the definition of investor, parties agreed to extend the scope of application of the treaty to the pre-establishment phase of an investment. It also elucidates substantial obligations in the chapter - Market access, NT, and MFN cover "establishment, acquisition, expansion".

The recent practice regarding pre-investment

(Establishment)	**(Market Access)**
EC-EFTA BIT	EU-Korea FTA
EC-Russia Cooperation Agreement	EU-Colombia-Peru FTA
EC-Moldova CA	CETA
EC-Tunisia Association Agreement	
EC-Israel CA (*)	
EC-Morocco CA (*)	
EC-Jordan AA	
EC-Macedonia AA	
EC-Egypt AA (*)	
EC-OCT AA	
EC-Algeria AA	
EC-Lebanon AA (*)	
EC-Tajikistan Partnership	
EC-Albania AA	
EU-Montenegro AA	
EC-Serbian AA	
EC-Bosnia Stabilization Agreement	
EC-CARIFORUM EPA	
EU-Ukraine AA	
EU-Moldova AA	
EU-Georgia AA	

(*) *GATS*

Turkey[64]

The Turkey-US BIT (1985) extends protection to PR during the establishment of investment,[65] and protects pre-investment activities as 'associated activities' under the list of specified activities regarding NT, MFN.[66]

[64] 116 BITs and other IIAs (as of August 1st, 2016)

The same approach has been adopted in the Japan-Turkey BIT (1992) that assures NT and MFN protection to establishments in relation to the conduct of business activities.[67]

Turkey has concluded a number of BITs that include MFN treatment at admission and permission (almost 50% of the BITs and IIAs concluded in the period 1990 to 2016).[68]

Turkey-Iran BIT

Article 3 Promotion and Admission of Investments

"3. Either Contracting Party with respect to its laws and regulations admit investments of investors of the other Contracting Party in its territory, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country.

4. Either Contracting Party after the admission of an investment shall grant all permits which are necessary in accordance with its laws and regulations for the proper realization of the said investment"

Iran[69]

A few of the BITs concluded during the 1990s provided pre-investment protection to the admission procedure, ensuring no-less favourable treatment than any third states[70] and its own investor.[71] Later, Iran concluded BITs to expand the prohibition of arbitrary and discriminatory protection to pre-investment activities (acquisition of investment).[72]

Iran-Finland BIT

Article 4 Fair and Equitable Treatment

"3. Each Contracting Party shall not impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment acquisition or disposal of investments in its territory of investors of the other Contracting Party."

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[65] Art.2.7
[66] Art.1.g, art.2.1, art.2.2
[67] Art.3.1, art. 3.2, art. 3.3
[68] 47 BITs and IAAs cover the non-discrimination of permission and promotion of investment.
[69] 67 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[70] art.4(Iran-Turkey)
[71] Art. 3 (Iran-Belarus)
[72] Art.4 (Iran-Finland), art.4 (Iran-Ethiopia)

Tanzania[73]

In 2001, Tanzania negotiated with Finland, for the first time, an FET clause that covered pre-investment activities. It included NT, MFN and FET protection with respect to the acquisition and expansion of investments.[74]

In 2006, Tanzania concluded the SADC treaty with thirteen other African countries.[75] The treaty granted MFN and FET protection to pre-investment activities.[76] The agreement adopted a comprehensive approach to include "acquisition or establishment of productive and portfolio investment asset" to the definition of "investment."[77]

The latest BIT Tanzania concluded was the Canada-Tanzania BIT in 2013, which included NT, MFN and PR protection for pre-investment activities.

Mozambique[78]

The BITs concluded by Mozambique with the US (1998) and Japan (2013) adopted pre-investment protection including NT, MFN, PR. With Japan, Mozambique accepted the inclusion of establishment, acquisition, and expansion within the definition of investment activities.

Nigeria[79]

For Nigeria, the first investment agreement it concluded was the establishment treaty of ECOWAS, which extended NT to the right of establishment among the member states.[80] In 2003, ECOWAS concluded the ECOWAS energy protocol, which obliged the parties to endeavour extending NT and MFN to pre-investment activities.[81]

Nigeria concluded few BITs which extended NT, MFN and FET protection to pre-investment activities. The latest BIT Nigeria concluded is the Canada-Nigeria (2014)BIT, which includes NT, MFN and PR protection for pre-investment activities.

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[73] 26 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[74] Article 3.1, 3.2, 2.3.
[75] Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Zambia, Zimbabwe
[76] Article 6.
[77] Article 1.
[78] 33 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[79] 36 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[80] Article 2.
[81] Article 10.2.

China[82]

China has concluded several BITs, which cover establishment, acquisition and expansion of investment regarding MFN[83] and FET.[84]

As to NT clauses, the China-Canada BIT (2012) includes 'expansion' within its scope. In the Australia-China BIT (2015), Australia extended NT protection to "the establishment, acquisition, expansion" of investment and investors from China. On the other hand, China provided the scope as "the expansion, management, conduct, operation and sale or other disposition of investments in its territory", defining the concept of expansion to " not include the establishment or acquisition of a new, separate investment."[85]

Indonesia[86]

Early practice in BITs and IIAs limited pre-investment protection to the admission procedure, to the extent the admission procedure was required for making an investment.[87]However, from 2006 onwards, the number of BITs and IIAs that contained the pre-investment protection increased drastically. Among the BITs and IIAs signed after 2006, 75%[88] in effect included pre-investment protection. Four of them were concluded as ASEAN.[89]

The Russian Federation[90]

In general, the BITs and other IIAs concluded by Russia do not include pre-investment protection. However, some of the BITs and the IIAs from the 1990's, such as the Russia- US BIT

[82] 150 BITs and other IIAs signed or in effect (as of August 1st, 2016)

[83] Art.3 of China-UAE BIT (1993), art.3.3 of China-Finland BIT (2004), art. 5.1 of ASEAN-China Investment Agreement, 4.1 of China-Uzbekistan BIT (2011), art. 5.1 and 5.2 of Canada-China BIT (2012), article 9.4.1 of Australia-China EPA (2015). Art.4 of China-Japan-Korea investment agreement also extend the protection to MFN in relation to admission.

[84] Art.2.3 of China-UAE BIT (1993)

[85] Art.9.3

[86] 66 BITs and other IIAs signed or in effect (as of April 1st, 2016)

[87] Indonesia-BLEU (Belgium-Luxembourg Economic Union) BIT (1970)

[88] Finland (2006), Japan (2007), ASEAN Investment Agreement (2009), ASEAN-AU-NZ(2009), ASEAN-Korea(2009), ASEAN-China(2009). The latest ASEAN-India which is yet in force, also includes the pre-investment activities protection for NT.(As of 30th, March)

[89] ASEAN Investment Agreement only includes "mining and quarrying", "services incidental to mining and quarrying" within the scope regarding energy.

[90] 88 BITs and other IIAs signed or in effect(as of August 1st, 2016)

(signed in 1994, not in force)[91] and the Russia-EC PCA (1994),[92] include NT and MFN protection for pre-investment activities.

In 2014, Russia established the Eurasian Economic Union along with Armenia, Belarus, Kazakhstan and Kyrgyzstan. The establishment of investment was considered within the scope of the union treaty and was subject to NT, MFN, and PR. The Eurasian Economic Union signed its first FTA with Vietnam in 2015, extending NT, MFN, PR and **Market Access (MA)** provisions to the pre-establishment stage.

Ukraine[93]

The coverage of pre-investment activities is limited, except in 4 BITs. The BITs with the US and the EU extended NT and MFN to pre-investment activities. Similarly, the BIT with Turkey extends the obligation of non-discrimination to admission. The BIT with Canada extends MFN and PR to the pre-investment stage.

Mexico[94]

Since the conclusion of NAFTA (1992), Mexico has been the leading country in Latin America to adopt pre-investment protection. Mexico has concluded 10 BITs and other IIAs granting pre-investment protection, of which 9 cover NT, MFN and PR.[95]

Brazil[96]

Brazilian practice regarding pre-investment protection is mainly limited to extending MFN to the permission of investment stage. The two recent Cooperation and Investment Facilitation Agreements signed in 2015 granted NT and MFN to the "expansion (expansión, expansão)" of investment.[97]

[91] Art.2.1 (NT, MFN), art.2.b (FET)
[92] Art.28.1 (MFN), 28.2(NT: obligation for the EC side)
[93] 80 BITs and IIAs signed or in effect(as of August 1st, 2016)
[94] 48 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[95] NAFTA (1992), Mexico-Chile BIT (1998), Mexico-Uruguay FTA(2003), Japan-Mexico EPA(2004), Mexico-Peru FTA(2011), Central America-Mexico FTA(2011), Protocol Pacific Alliance(2014), Mexico-Panama FTA(2014), TPP(2015)
[96] 36 BITs and other IIAs signed or in effect(as of August 1st, 2016)
[97] Article 5 of Brazil-Colombia (2015), article 5 of Brazil-Chile(2015)

CHAPTER 6. INITIATIVES FOR NON-BINDING INTERNATIONAL INSTRUMENTS

Removing barriers and securing sufficient return for private investors, protecting public interest of the host state and, improving the rule of law and good governance are all key steps towards mobilising energy investments. In this regard, non-binding international initiatives and cooperation have played a major role.

6.1. International cooperation

The entry of foreign investors is negatively impacted by the presence of barriers that have a direct and indirect restrictive effect to the establishment of investments. Various barriers arise out of outdated and poorly designed institutions and the lack of administrative capabilities. This includes the existence of excessive and overlapping regulations, arbitrary application of these regulations, lack of transparency, political interventions, and bureaucratic procedures.

In order to balance investor protection at establishment with public interest of the host state, improving the investment climate based on the rule of law and good governance is required. UNCTAD's Global Action Menu for Investment Facilitation provides policy options to improve transparency and information available to investors, ensure efficient and effective administrative procedures, and enhance predictability of the policy environment, among others.[98]

The OECD also supports the view that investment policies should be characterized by openness, transparency and predictability. These are 'the core values that underpin the investment instruments'. The OECD Guidelines promote these principles, particularly in relation to national security-related investment policies, so that such policies are implemented with minimum impact on international investment.[99]

Specifically for the energy sector and in addition to UNCTAD's Global Action Menu the Energy Charter Secretariat is developing an Investment Facilitation Toolbox which will contain non-

[98] Extensively discussed in UNCTAD, World Investment Report 2016; Guidance provided through UNCTAD's Global Action Menu for Investment Facilitation

[99] See further OECD Working Papers on International Investment, Wehrlé, F. and J. Pohl, Investment Policies Related to National Security: A Survey of Country Practices.

binding policy options, which could facilitate the removal of non-discriminatory and de facto barriers to the establishment of energy investments. The objective of this soft instrument is to alleviate ground-level obstacles to investment-making process.

6.2. Transparency

Often investors are not well informed about the existing regulations that set out the conditions foreign investors must fulfil when they invest in the host state. In this respect, the Energy Charter Conference keeps a regular record of discriminatory measures, with regard to the establishment or the acquisition of energy investments, notified by the Contracting Parties [Article 10(9) of the ECT]. The so-called Blue Book contains a collection of discriminatory measures specific to the energy sector.[100]

In the context of the OECD, member states notify and register non-conforming measures in the Code of Liberalisation of Capital Movement.[101] Despite being non-energy specific, the list of non-conforming measures under the Code include screening measures in its scope and provide transparency on potential investment barriers.[102]

6.3. Reduction of red tape

According to the OECD, cutting the red tape is the primary challenge in removing barriers to trade, investment and entrepreneurship, and balancing the overall investment strategy with other legitimate national policy objectives.

Undertaking risk and impact assessment of regulations, based on empirical data, is essential for simplifying regulatory and administrative processes. In this regard, the OECD offers a systemised format for risk and impact assessment in policy discussions and empirical data. The core idea of the Regulatory Impact Analysis (RIA) is to develop evidence based regulation regarding the assessment of the risk that the regulation is intended to deal with, and the impact assessment of new and existing regulations. By 2009, the practice of RIA has been adopted by

[100] See The Blue Book:
http://www.energycharter.org/what-we-do/investment/the-blue-book/
[101] the Code of Liberalization of Capital Movement: http://www.oecd.org/daf/inv/investment-policy/codes.htm
[102] Article 3 sets the exception that the measures required for maintenance of public order and security are not prevented. Thus, not included to the list.

more than 30 OECD member states.[103] World Bank also supports adoption of RIA requirements by its client countries, and the OECD and the World Bank jointly conduct the project on the RIA.[104]

With regard to administrative and regulative simplification, establishment of a one stop investment agency has also been adopted by many states such as Canada and Yemen. The OECD policy recommendation also refers to "one stop shop agency" for licenses, permits and other procedural requirements for cost effectiveness of investors as a possible critical factor in investment decisions.[105]

6.4. Regional economic cooperation

Regional economic cooperation also plays an important role in cutting through the red tape, in the context of investment facilitation. **ECOWAS** identified the red tape issues as a major obstacles in boosting internal and foreign direct investment. It created a Private Sector Department with a view to create an enabling environment both for internal investments and FDI.[106] In the field of energy, ECOWAS adopted the Energy Protocol in 2003, and subsequently adopted other common policies aimed at integrating national capacities and power generation systems to form a unified regional market system. The regulatory and policy integration in ECOWAS's energy field is primarily intended to boost economic development and to offer stable energy supplies to the ECOWAS countries by the year 2018. ECOWAS set up the ECOWAS Regional Electricity Regulatory Authority in 2008 as a cross border framework for regulatory cooperation. The purpose of this body is to improve governance in the energy field and to increase private sector involvement in developing the electricity infrastructure.[107]

The **EU** has also been active in building an EU-wide energy regulatory framework. In 2003, the European Commission established the European Regulator's Group for Electricity and Gas as its official advisory body on regulatory internal energy market issues. This was later succeeded by

[103] OECD, Regulatory Impact Analysis (2009), p.17. The empirical reports on each state, and other relevant reports are found in OECD RIA site at http://www.oecd.org/gov/regulatory-policy/ria.htm
[104] For example, Introductory Handbook for Undertaking Regulatory Impact Analysis(RIA)(2008),
[105] OECD, *Policy Framework*, p.39
[106] The West African Common Industrial Policy (WACIP) (2010), p.18.
[107] ECOWAS, *Diagnostic Report on the Institutional and Regulatory Interfaces of the Ecowas Regional Electricity Regulatory Authority*, p.6.

the Agency for the Cooperation of Energy Regulators (ACER) in 2011. In the EU, the institutional framework to promote cooperation of energy regulators and the National Regulatory Authorities (NRAs) is provided by ACER, and partially by the Council of European Energy Regulators (CEER) which is a voluntary group of NRA officials who complement the work of ACER. These institutions have provided a framework for the exchange of best practices, the promotion of competitive and transparent markets and, the development of common approaches to regulatory issues. This EU regulatory cooperation also includes simplification of excessive regulations – for example, Romania[108] and Croatia[109] both simplified licensing for EU member countries in 2015. The CEER also worked on international issues such as regulatory convergence with the neighbouring countries.[110]

CHAPTER 7. INTERIM CONCLUSIONS: FUTURE PERSPECTIVES FOR PROTECTING AND PROMOTING PRE-INVESTMENT ACTIVITIES IN THE ENERGY SECTOR

7.1. Discussion among country representatives and international organisations

Throughout its activities in 2016, the Energy Charter Secretariat collected useful information from delegates and country representatives, including responses to an *ad hoc* questionnaire.

Regarding *the need for pre-investment obligations under IIAs for energy investments*, [111] there was a general understanding that foreign direct investment plays a key role in mobilising the energy investment required for sustainable development.

However, it was also found the competing need to connect foreign investments to the local economy, through the creation of labour opportunities, manufacturing and supply of equipment, and technology transfer. In fact, many states regulate the conditions for the admission and

[108] Order No. 91/2015 of the National Energy Regulatory Authority, 25 June 2015

[109] Amendments to the ordinance on licences for performance of energy services and maintaining the register of issued and revoked licences for conducting energy activities (114/2015) pursuant to Article 17, Paragraph 2 of the Energy Act, 21 October 2015

[110] CEER annual report 2011, 2013.

[111] Working questions A1-A4, B1-B3, C1,

establishment of foreign investors, and/or impose limitations on foreign ownership and control and, performance requirements.

UNCTAD, OECD and WBC-IFC pointed out that lack of good governance (i.e. transparency, efficiency in administrative process, fairness in application of law) and incoherence in the existing domestic legislations were major obstacles to energy investment. MEDREG (Association of Mediterranean Energy Regulators) referred to political instability and/or lack of clear institutional frameworks, including geopolitical barriers (e.g., conflicts or tensions between countries) as some other reasons for restricted investments.

Overall, the need to mobilise more investments towards sustainable development and energy security was recognised. While placing restrictions and limitations to the admission of investments were recognised as part of a country's sovereign right to protect its prevailing public interests, there was general agreement on the need to eliminate barriers arising from inconsistent legislation, corruption, and administrative deficiencies.

As regards the role of treaty obligations in regulating pre-investment activities within the energy sector, [112] many representatives indicated that clear, coherent, and comprehensive domestic laws and processes would be more effective than negotiating relevant provisions under IIAs.

7.2. Response from the industry

In an *ad hoc* survey conducted by the Energy Charter Secretariat, business actors emphasised the impact of administrative deficiencies in creating *de facto* barriers. The most commonly reported barriers were procedural costs, the lack of transparency, and performance requirements. All the respondents reported that legal and regulatory risks (such as lack of transparency in procedure and inconsistency of the existing regulations) as well as political risks were negatively evaluated in their feasibility studies while taking investment decision.

[112] Working questions C2-C3,

Barriers identified by the industry survey

- Bureaucratic Procedure
  - The number of procedural steps, and length of time it takes for each step
  - The required approvals from several different agencies
  - The overlap and contradiction among regulations
- Excessive Regulations
- Lack of Transparency
  - The accessibility to the requirements under the laws and the regulations
  - The unclear decision making process, the unclear responsibility
  - The large discrepancy of the decision makers in the administrative process
  - The informal processes without issuance of documents of permissions
- Regulative unpredictability (arbitrary application, sudden change of interpretative rules)
- Procurement (Local content requirement, import permissions)
- Labor permission for foreign employees (pressure to hire the local employees)

7.3. Further directions

In assessing the need for covering pre-establishment activities in energy investment, the activities of the Energy Charter Secretariat provided useful conclusions.

i. Recommendations for binding obligations

First, placing binding NT and MFN obligations under IIAs would have the effect of lowering or removing discriminatory and non-discriminatory barriers to the entry of energy investment. However, this should be without prejudice to the concurrent public interests of protecting or creating links to the local economy (by means of *ad hoc* provisions to this effect, including exceptions). Therefore, removing barriers, while balancing relevant public interest, will concretely mobilise the energy investments required to achieve universal access to energy and energy transition.

Second, common and binding rules in IIAs on the entry and establishment of energy investments would provide legal certainty on investment protection to investors when they engage in the complex activities leading to investment decisions. In the absence of clear rules under the existing IIAs or under a new legal instrument, the arbitral tribunals are left to exercise their interpretative powers in a *vacuum* which may lead to inequitable or undesired results.

Finally, multilateral binding rules on the establishment of energy investments would contribute towards strengthening predictability and transparency as well as increasing coherence in cross-border investment. Indeed, common rules would create a level playing field for energy investors in cross border projects. With a binding instrument to enforce the principles of transparency and predictability, investors would be able to mitigate legal and regulatory risks and enjoy the same opportunities while competing under the same conditions.

ii. Recommendations for soft instruments

In the absence of political momentum for negotiating binding international obligations, there is an opportunity for lowering or removing non-discriminatory barriers to energy investments through non-binding soft instruments.

Investment facilitation and regulatory cooperation are important domestic and international options that can assist energy investors in taking sound business decisions and in eliminating non-discriminatory barriers such as poor implementation, lack of transparency and excessive bureaucracy.

In addition, promoting transparency within ISDS can also contribute to achieving investment protection. Indeed, the reference in IIAs to transparency instruments (such as the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration) will increase the publicity of case laws regarding investment protection, thus creating a consolidated and predictable doctrine on this matter.

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