

International Practice on Pre-investment Conditions

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1. Sustainable Developments and the Obligation of Entry in the Energy



(1) Basic datasets

- ◆ \$68 trillion investment (7.4 trillion renewables) is required in the global energy sector by 2040 to maintain the current development trend (IEA, WEO 2015, New Policy Scenario)
- ◆ Increasing investment in renewable energy technologies \$270 billion in 2014 to \$400 billion in 2030 to achieve 2 degree target (IEA, WEO Special Report, 2015)



(2) Mitigation of National Interests and the Obligation of Entry

- ◆ The UN Sustainable Development Goals (SDGs)
 - ◆ The UN Sustainable Energy for All (SE4All)
 - ◆ The World Energy Council
 - ◆ UNCTAD
 - ◆ World Bank
 - ◆ OECD
 - ◆ G20 Energy Ministerial
- Investment in the energy sector has important role in enhancing sustainable development and energy security.



Communiqué of G20 Energy Ministers Meeting (2 Oct 2015, Istanbul)

Sustainable Development

“We recognize the importance of a conducive enabling environment for increased investments and sustainable growth of the power sector, taking into account national circumstances, including available indigenous energy sources, needs and priorities.”

“We recognize **the important role of the private and public sectors in making the investments** and developing the technologies and good practices **needed to enhance productivity, efficiency and sustainable development.** “

Energy Security

“We support continued investments in the energy sector, taking into account the importance of current investments for ensuring future energy security.”

2. The Barriers at the Establishment of Investment and the Existing Measures



(1) Barriers: Discriminatory and Non-Discriminatory

i. **Discriminatory** Barriers

ii. **Non-Discriminatory** Barriers

a. **Regulatory** Barriers at the Establishment of Investment

The rules that have the effect to restrict the FDI

- ✓ the admission and establishment of foreign investments
- ✓ the foreign ownership and control of local business

❖ Admission and Establishment(UNCTAD, 2002)

❖ Code of Liberalization of Capital Movements(OECD)

b. **Administrative** Barriers at the Establishment of Investment

Typical administrative barriers

- ✓ Bureaucratic Procedures (lengthy process, too many steps)
- ✓ Transparency (Delay, unclear decision making process, non-issuance of formal documents)
- ✓ Regulative unpredictability (arbitrary application, sudden change of interpretative rules)
- ✓ Procurement (Local content requirement, import permissions)
- ✓ Labor permission for foreign employees

2. The Barriers at the Establishment of Investment and the Existing Measures



(2) Hard Obligations

i. Discriminatory Barriers

- ✓ NT
- ✓ MFN

ii. Non-discriminatory barriers

- ✓ Prohibition of Performance Requirement
- ✓ Promotion and Protection
- ✓ Fair and Equitable Treatment
- ✓ Umbrella Clause and Investment Agreement

2. The Barriers at the Establishment of Investment and the Existing Measures



(3) Mitigation of National Interest and the Right of Entry

i. Exceptions of Hard Obligations

- ✓ Scope of BIT and IIAs
- ✓ Reservation on Non-conforming measures
- ✓ Reservation from Dispute Settlement



Scope of the Protection

- ASEAN Investment Agreement (2009)
- EU-Korea FTA (2010)

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 :

- a. mining, manufacturing and processing of nuclear materials;
- b. production of, or trade in, arms, munitions and war material ;
- c. audio-visual services



Reservation of Non-Conforming Measures

■ Energy Charter Treaty

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)



Reservation of Dispute Settlement

- Canada - Peru BIT(2006)
- US - Columbia BIT (2006)

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.

2. The Barriers at the Establishment of Investment and the Existing Measures



(3) Mitigation of National Interest and the Right of Entry

ii. Soft Obligations

- Initiatives on cutting red tape: Balance between the overall investment strategy and legitimate national policy objectives.
 - **The evidence based regulation through the empirical data**
 - ✓ Improving risk assessments
 - ✓ Improving impact assessments for new legislations
 - ✓ Reviewing the existing regulations(OECD, Promoting inclusive growth through better regulation, 2016)
 - Regional regulatory cooperation in the Energy
 - ✓ ECOWAS (Africa)
 - ✓ ACER, CEER (EU)
- Initiatives on improving administrative environment
 - Initiatives by World Bank, OECD to provide the empirical data
 - ✓ Doing Business Report (World Bank), The Regulatory Policy Outlook (OECD), Policy Framework for Investment (OECD) etc
 - ✓ Capacity building in cutting administrative costs

3. Pre-Investment Protection under Article 10 and Supplementary Treaty



(1)The Definition of Pre-Investment

- An obligation of **best endeavour** to protect the making of an investment
Art. 10.2
"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)".



(2)The Substantial Protection under the ECT and the Supplementary Treaty(ST)

- The List of Obligations
 - ✓NT, MFN (ECT Art. 10.3, ST Art.2.1.2)
 - .
- Exceptions under the ST
 - ✓Report of Non-Conforming Measures (Annex EX)
 - ✓Privatization (Annex PR)
 - ✓Dispute Settlement (Annex DS) (to be decided)

3. Pre-Investment Protection under Article 10 and Supplementary Treaty



(3) Negotiation of the ST

➤ Article 10.4 of the ECT

The negotiation was put on hold since 2002.



(4) The Blue Book (the ECT Article 10.9)

➤ Registration of the non-comforting measures (NT, MFN)



The latest version of Blue Book is available on the ECT website.

<http://www.energycharter.org/what-we-do/investment/the-blue-book/>

Thank you!