International Practice on Pre-investment Conditions

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Groundwork on Eliminating Barriers to the Establishment of Energy Investments

- Chapter 1. Introduction
- Chapter 2. Identification of barriers to the establishment of energy investment
- Chapter 3. Different legal instruments addressing and removing such barriers s
- Chapter 4. Lesson from the past: the negotiations of the Supplementary Treaty ,
- Chapter 5. The point of view of host governments; The investors' point of view: covering risk in the pre-investment phase: reducing costs and securing legal protection; corporate strategies to overcome obstacles to the establishment of energy investments; the debate on market access and privatisation.
- Chapter 6. Conclusions and policy recommendations

Groundwork on Eliminating Barriers to the Establishment of Energy Investments

- Schedule
  - 2 May 2016: meeting of Investment Group
  - 31 May: Deadline for the draft report
  - 14 June 2016 : meeting of the Investment Group ("Presentation of the draft" !)

- Energy Charter Secretariat would like to conduct a **survey** on the practice on the pre-establishment protection to specify the existing obstacles.
  - The governmental officials
  - The companies

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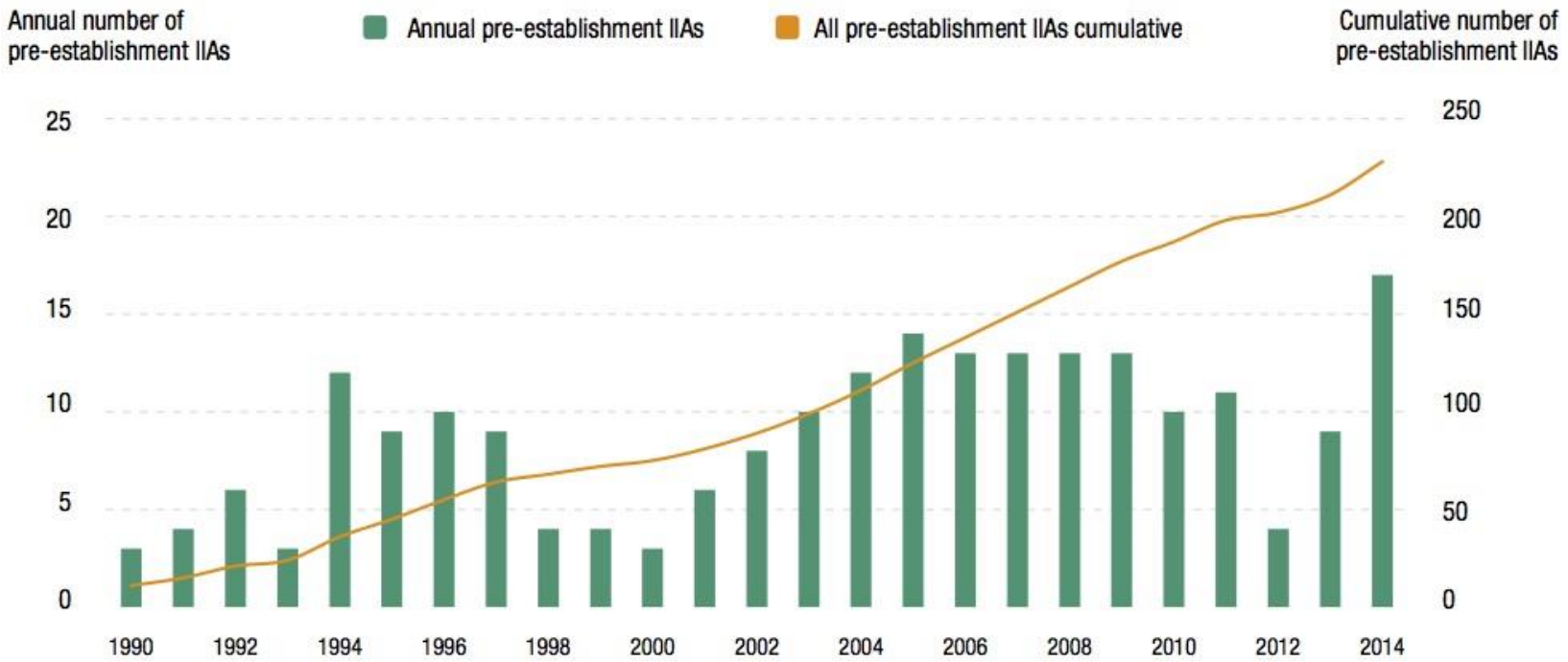
Pre-Investment Protection

- Expand substantial protection of BITs and IIAs to phases such as establishment, acquisition, expansion of investment
- A policy change from full restrictiveness to full liberalization would increase inward FDI stocks by about 25% of OECD countries [source: 2011-OECD Working Paper on Trade Liberalisation]

Pre-Investment Protection in BITs and IIAs

- By the end of 2014, **228** instruments (125 IIAs and 103 BITs) contain pre-investment protections
- Since 2015, **11** instruments (9 IIAs and 2 BITs) among the 19 instruments has been signed.

Source: UNCTAD IIA Database,



Liberalization/Protection Approach

- Liberalization approach
  - Mostly taken by the United States, Canada, Japan
- Protection approach
  - Mostly taken by European countries, emerging/developing countries

The third approach exists..

Transparency, fair and equitable treatment (FET) and non-discrimination on admission and permission phases are found widely among the BITs and IIAs concluded including emerging/developing countries.

Types of Measures against Pre-Investment Barriers

Discriminatory Measures

- National Treatment
- Most Favoured Nation Treatment

Non-Discriminatory Measures

- Investment Promotion/Fair and Equitable Treatment
- Prohibition of Performance Requirements

Types of Measures against Pre-Investment Barriers

- Promotion and Admission of Investment
  - Iran-Turkey BIT(1995 signed, 2005 came into effect.)
    - 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.**

Types of Measures against Pre-Investment Barriers

- National Treatment, Most Favoured Nation Treatment

  Trans-Pacific-Partnership "TPP" (2016 signed)

  Article 9.4:

  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:

  1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party 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...

Types of Measures against Pre-Investment Barriers

- Performance Requirement
  - Comprehensive Economic and Trade Agreement "CETA" (2014 signed)
    - Article 8.5
    - A Party shall not impose, or enforce the following requirements, or enforce a commitment or undertaking, in connection **with the establishment, acquisition, expansion**, conduct, operation, and management of any investments in its territory to: (listing PR)

Types of Measures against Pre-Investment Barriers

- Definition of Investment/Investor

  Japan-Mongolia EPA (1995 signed)

  Article 10.2

  (e) the term "investment activities" means establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of an investment

Arbitration Practice

PSEG v. Turkey (ICSID CaseNo.ARB/02/5), Decision of 4 June 2004, Award of 19 January 2007 (US-Turkey BIT)

- Question: Whether "pre-investment expenditure" in the case consists "investment"
- Tribunal: **Yes. (the concession contract existed)**
- "(T)he Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract"

Arbitration Practice

Venezuera v. Autopista Concesionada de Venezuela (Aucoven), C.A (ICSID Case No. ARB/00/5), Award of September 2003

- Question: Whether "pre-investment expenditure" in the case consists "investment"
- Tribunal: **Yes. (the concession contract existed)**
- The specific wording - "all losses or damages, including lost profits and damnum emergens" to be compensated under the concession contract.

Formulation of Pre-Investment Obligations

- Positive list

  Selective liberalization by drawing up a list of industries in which investors enjoy pre- establishment rights

- Negative list

  Liberalization across the board with the exception of those industries and sectors that are specifically listed

- Market Access

- Reservations/Exclusion from ISDS

- Obligation to endeavor

Pre-Investment Obligation under ECT

- Article 10 "Obligation to endeavour"

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)

3. For the purpose of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favorable.

Pre-Investment Obligation under ECT

- Article 10.4 "A Supplemental treaty"

A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area...

- ✓ Labour and Environment
- ✓ Obligation of Investors
- ✓ Investor State Dispute Settlement
- ✓ Privatizations
- ✓ REIO(Regional Economic Integration Oganizations)

Conclusions

- A growing trend towards pre-investment protection in BITs and IIAs
- Measures against barriers at pre-investment stage:
  - Early periods: transparency, fair and equitable treatment, non-discrimination at admission of investment
  - Since mid-1990s: NT, MFN, PR expansion to establishment, acquisition, expansion of investment (liberalization approach)
  - Some of BITs and IIAs expand the definition of "investment activities" or "investor" to include establishment, acquision, expansion
- Some arbitral practice construe pre-investment protection as a part of definition of investment where the concession contract exists

INTERNATIONAL ENERGY CHARTER

Thank you!