



THE ENERGY CHARTER INVESTMENT FACILITATION TOOLBOX

1st edition on

Policy Guidance for Investment facilitation in the pre-establishment phase

*Energy Charter Secretariat
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1. INTRODUCTION

Background

As a result of the 2014 Review conducted under Article 34.7 of the Energy Charter Treaty¹, the Energy Charter Secretariat engaged in a series of activities to analyse the existing barriers to the establishment of energy investment, the benefits of shared principles for the establishment of investment as well as available policy options to remove such barriers by means of domestic and international rules.

After a series of activities which contained expert meetings and joint sessions with investment experts from contracting parties, observer states, third countries, international organisations, regulatory authorities and investment promotion agencies, the Secretariat prepared numerous discussion notes, reports, analyses on wide range of opportunities for further steps for the ECT Constituency (binding and soft instruments) to the establishment of energy investment.

As a result of the groundwork undertaken so far, the Energy Charter Conference mandated the Secretariat to formulate non-binding policy options, which could facilitate the removal of non-discriminatory and de facto barriers to the establishment (entry) of energy investments.

Based on the discussion that took place at the meetings of the Implementation Group and expert consultations in 2017, the Secretariat prepared the Energy Charter Investment Facilitation Toolbox (INV Toolbox), which in its 1st edition, contains a checklist of policy options for removing non-discriminatory and de facto barriers to the establishment (entry) of energy investments.

Objectives of the Energy Charter Investment Facilitation Toolbox

The Energy Charter Investment Facilitation Toolbox will gradually address ground-level obstacles to investment in the energy sector in the pre- and post-establishment phases. The INV Toolbox is intended to progressively identify variety of de iure and de facto barriers which impede investment in the energy sector and illustrate a set of actions and best practices which countries can choose and incorporate into their own regulations and investment promotion efforts in order to improve their overall investment climate and attract energy investors.

The Energy Charter Investment Facilitation Toolbox will respond to the need for specific actions aimed at unlocking and boosting investment in the energy sector. Thus, in order to promote an atmosphere of trust and mutual confidence between governments and energy investors, it is intended to release regular editions of the INV Toolbox which will address options and instruments to be considered by the countries to remove different barriers to energy investment.

¹ In 1999 and thereafter at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent to which the provisions of the Treaty and Protocols have been implemented [...].

Barriers and policy options identified in this edition of the INV Toolbox have a two-fold nature: most of them are energy specific but some barriers and ways to remove them are applicable to all sectors of the economy. Therefore, the Energy Charter Investment Facilitation Toolbox aims to complement existing investment policies of the countries and set of recommendations from the other international organisations actively engaged in the Investment Facilitation.

Why investment facilitation in energy sector matters?

Investment facilitation is one of the simplest and most cost effective tools to stimulate the flow of private investments and improve day-to-day business in the host countries and should not be neglected. Investment facilitation is about creating favourable conditions for private investment. Thus, investment facilitation should be an important component of countries' actions to eliminate obstacles and enable favourable conditions for the establishment and expansion of private investment.

Restrictive frameworks, ineffective implementation and enforcement of laws and procedures impede energy investment and may increase the cost of doing business. Moreover, these factors may lead investors to withdraw from an existing investment or cancel a planned investment. Different obstacles can occur during the initial phase of an investment or later as the nature of energy projects is dynamic and usually span long time periods.

Facilitation is also helpful in terms of attracting investment and building long-term relationships between the host country and the investors, which is beneficial for both sides. Inflow of investment contributes to the development of the economy, creation of jobs, linking local and international markets and value chains as well as improving innovation of the country. These advantages are possible only through effective implementation of investment policies and various facilitation efforts.

Countries should carefully design their promotion and facilitation activities and ensure that institutions, which carry out this work, have a clear structure and are strong enough to fulfil their mandate. Efficient policy-making coupled with the right investment policies is essential to improve the openness of the country and its attractiveness in doing energy business. This is especially crucial for countries with little track record of attracting foreign direct investment (FDI) or which are perceived as difficult places to invest.

That being said, it is important to acknowledge that investment facilitation activities alone do little to alleviate ground-level obstacles for energy investors. They have limited effects due to the complex nature of investing in energy and the existence of other external factors. Not all the countries, which attract a lot of private investment in their energy sectors, have stable and favourable investment conditions. Nevertheless, it is self-evident that countries, with high levels of bureaucracy, excessive administrative procedures, low transparency, unpredictability, complex institutional governance have little chances of attracting investment which can be relatively hampered compared to an ideal scenario.

2. Non-discriminatory and de facto barriers to the entry and establishment of energy investment

Barriers to the establishment and expansion of energy investment can take various forms. Pre-Investment barriers may be discriminatory and non-discriminatory, with direct or indirect effect, depending on their context and the way they are applied in practice. 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.

Discriminatory barriers usually take the form of controls or restrictions over the admission and establishment of foreign investment or limitations on foreign ownership and control. Discriminatory requirements may be applied to restrict foreign investment for legitimate national policy objectives. These objectives range from national security, control over natural resources, protection of critical energy infrastructure, and national development strategic objectives.

Non-discriminatory and de-facto barriers do not contribute to any development objectives. The Table 1 provides the countries with the examples of typical non-discriminatory and de facto barriers to the establishment of energy investment which had been selected during expert consultations on removing pre-establishment barriers conducted by the Energy Charter Secretariat over the past years.

Table 1 was divided into 7 categories (*obtaining approval of energy investment; transparency; regulations; bureaucracy; enforcement; institutional governance; judiciary*) and each of them consists of several ground-level obstacles which affect day-to-day operations of international and domestic investors. Discriminatory barriers are not targeted in the 1st edition of the Investment Facilitation Toolbox. For the purpose of this edition, only non-discriminatory and de facto barriers to entry of energy investment are addressed.

Table 1: Overview of government and institutional barriers to entry of energy investment

Obtaining approval for energy investment
<ul style="list-style-type: none">• Responsibility of signing off on investment approval is spread across multiple government and local agencies.• Lack of a single window for all enquiries concerning procedures for the entry of energy investment.• High cost and long time required for approval of licences and permits for energy projects.• Long duration of the administrative examination of the investment project by several different state agencies.• Excessive procedures for approving feasibility studies and environmental impact assessments by national and sub-national authorities.• Long and complicated contract award process under the public procurement rules.• Long and complicated review procedure commenced before the national competition authority.• Complicated and lengthy procedures for purchasing or leasing land as well as unclear ownership status.• Unclear criteria for administrative decisions including investment project

screening and approval of business licenses and permits.

- Lack of time limits for decision-making on permitting procedures.
- Informal pressures from state agencies to hire local employees prior to issuing approval of investment projects.
- Work permit applications may be burdensome and lengthy, and may impose restrictions on staff mobility.
- Complicated procedures might lead to more corruption.

Lack of transparency

- Accessibility to primary and secondary legislations or regulations may be difficult or complicated.
- Energy and investment goals of the country are not stated in the policy documents or official strategies.
- The informal processes are held without issuance of documents of permissions.
- Lack of accurate and timely information on energy and investment policies of the country.
- Lack of mechanisms, which provide oversight of regulatory policies, procedures and goals.
- Inaccessibility to the centralised registry of laws and regulations on a permanent basis or on request.
- Unavailability of laws and regulations in English and other foreign languages.
- Lack/Limited amount of information on energy market functioning.
- Lack of price/tariffs transparency.
- Lack of accessibility to judicial and arbitral decisions regarding energy investments.

Regulatory unpredictability, instability and discontinuity

- Lack of clear policies and long-term goals on the energy market development.
- Lack of strategic and long-term thinking within the governments about impacts of regulatory change.
- Inability of the country to set up a national action strategy with a long-term perspective.
- Lack of interim targets of the country and monitoring/review mechanisms aimed to achieve the state energy and investment goals and priorities.
- The overall contradiction, overlap and/or incoherence among energy and investment regulations and legal voids.
- Legislation is not specific enough or not designed to address the needs of the energy investors.
- Decision-makers may have significant discretion, allowing informal practices to exist into the public domain.
- Lack of prior notification requirement before enacting new laws and regulations.
- Frequent and unforeseen revisions of policies and laws, including changes that are retroactive.
- Lack of appeal mechanisms against regulatory changes, which may affect business activities of the investors.

Excessive bureaucracy

- Unclear, onerous, or unpredictable procedures of decision-making and lack of operational standards to carry out regulatory reform.
- The large number of steps involved in the decision-making process of the administration.

- Lack of skilled, professional, and accountable civil service in the energy sector.

Inefficient enforcement of rules and regulations

- Decision-making processes of national and sub-national authorities are complex and opaque.
- Unenforceable legal framework and inadequate implementation capacity of civil service for public procurement procedures.
- Large discrepancy of the decision makers in the administrative process.
- Gap between formal policies and their implementation as well as lack of fairness in application of law.

Unclear and ineffective institutional governance

- Lack of the central authority, which is responsible for policy formulation and regulatory reform within the government.
- Unclear prerogatives between different levels of the government where more than one institution is responsible for policy formulating and regulatory implementation.
- Unclear division of responsibilities between different government institutions in the central decision-making.
- Lack of coordination between the central government and local authorities.
- Lack of an independent sectorial Regulatory Authority or uncertainty which institution exercises regulatory functions in the energy sector.
- Budgetary and managerial dependence of the National Regulatory Authority on the line Ministries.
- Lack of a dedicated Investment Promotion Authority or inability of the country to assign clear responsibilities over investment promotion to develop energy investment strategy and establish favourable procedures for energy investors.

Inefficient, non-independent and unpredictable national judiciary

- Low reliability and low efficiency of national courts, which do not deliver decisions within a defined time limit.
- No clear institutional separation between the administration and the judiciary (lack of judicial independence).
- Judicial and arbitral decisions related to the energy sector are not publicly accessible.
- Poor enforcement of judgments and awards leading to the inability of an investor to enforce the award.
- Unpredictable court decisions making it difficult to predict the outcome of any dispute.
- Lack of mediation possibilities with state-owned energy entities and the government
- Lack of/inefficient national and international dispute resolution systems and lack of institution (i.e. Ombudsman) to which investors can refer in case of conflict with the state.
- Lack of appeals mechanism to correct first-instance decisions.
- Lack of clear and time-bound mechanisms for determining compensation in the event of expropriation in the energy sector.

3. Policy options for investment facilitation in the energy sector

Each country has the sovereign right to regulate and decide what conditions it gives the investors to entry and establish foreign investment within its territory. However, given the vital role that investment facilitation can play in improving investment conditions, policy-makers must prioritise this field in their overall strategy with the overriding objective to remove ground-level barriers to investors. Nevertheless, promotion and facilitation activities should not be seen as a substitute for strategic policy reforms but they should have an important role in the overall promotion strategy and be integral to sectoral reforms.

Therefore, states need to provide clear rules of the game and focus on ensuring predictable rules, removing excessive bureaucratic barriers to attract investment essential to the development of the energy sector and reduce the cost on business. It is crucial especially for small and medium energy companies, which have less resources and less cash flow to afford the time and costs of different investment burdens.

Figure 1: The principles of investment facilitation in the energy sector



This edition of the Investment Facilitation Toolbox provides guidance on which policy actions could be taken by the countries to simplify and improve their administrative and institutional capability to ensure that investors have favourable investment conditions.

International agencies and organisations can play an important role in increasing governments' awareness in providing technical assistance. At the same time, it is very important for the countries themselves to have ownership in deciding where they should use the support.

Guidance for investment facilitation in the pre-establishment of the energy investment

Policy goal 1:

Long-term and predictable energy and investment objectives

The existence and clear definition of long-term energy and investment policy goals is essential and gives clear information to the investors on directions of the country. It is also necessary to monitor the progress in implementing new regulations and ensure that energy sector stakeholders have an access to the legislative processes.

Policy actions to consider:

-  Develop and publish investment strategy and investment reform roadmap related to energy policy goals.
-  Set priorities to design clear, coherent and concrete investment policy and investment promotion reform.
-  Ensure policy coherence, policy coordination and interim policy monitoring as well as articulating benefits of the policy change clearly.
-  Strengthen regional cooperation at harmonisation of legislations/regulatory regimes within regions in order to establishing effective regional markets.

Policy goal 2:

Efficient institutional governance and policy-making

The ability of a state to manage policy change and regulatory reform is of crucial importance for all investment in the making phase of an investment. Existence of strong institutions and effective coordination between these institutions are key pre-requisites for effective policy-making. Strong institutions help to maintain a predictable and transparent environment for investors. Effective coordination decreases the risk of policy duplication, and contradictory objectives, which can undermine investor confidence.

Policy actions to consider:

-  Simplify administrative burdens by establishing one stop investment agency for licenses, permits and other procedural requirements for cost effectiveness of energy investors.
-  Establish single window, which can act as a focal point to which all energy investors can refer in case of procedural steps to be taken.
-  Organise frequent and structured regulatory reviews aimed at improving implementation and replacing laws, which are obsolete or inefficient.
-  Improve independence, accountability and transparency of sectorial Regulatory Authorities aimed at effective enforcement of regulations including budgetary independence from line ministries and appoint top management that is free from political pressures.
-  Strengthen cooperation between regional National Regulatory Authorities to promote a level playing field by sharing common practice and good examples and

coherent measures.

- ✚ Give reform oversight and management authority to a body that cuts across the whole of government
- ✚ Ensure that there is a competition authority provided with enough resources and technological knowledge to appropriately address challenges of competition in the energy sector.
- ✚ Ensure that consistent prerogatives between the competition authority and the energy regulator are clearly structured, so as to enhance policy coherence and provide greater confidence.
- ✚ Clearly define institutions responsible for public procurement procedures.
- ✚ Engage with local institutions dealing with the groundwork on setting up business, securing financing and developing energy projects to remove ground-level administrative obstacles for all investors.
- ✚ Promote information-sharing mechanisms between different layers of the government to promote complementarities and coherence across regulations.

Policy goal 3:

Effective bureaucracy

Complex government systems may result in red tape, long procedures and uncertain outcomes. Overlapping and sometimes conflicting rules and procedures across ministries and sub-national agencies can also create administrative burdens on investors.

Policy actions to consider:

- ✚ Reduce investment screening procedures and investment requirements.
- ✚ Remove bottlenecks by facilitating procedures for acquisitions of permits and licences.
- ✚ Establish effective procedures for work permits and visa regime.
- ✚ Develop roadmaps and guidelines for domestic institutions as the tools for bureaucratic process simplification.
- ✚ Enhance automation of investment approval procedures.
- ✚ Facilitate business licencing process for energy projects by means of establishing a one-stop-shop and giving it adequate authority and technical capacity to facilitate the issuance of permits.
- ✚ Streamline administrative and bureaucratic procedures and avoid duplication of mandates and prerogatives of government agencies.
- ✚ Reduce costs and the excessive procedures for construction permits and registration of properties.
- ✚ Hire a staff with public and private sector experience, securing operational freedom and high-level reporting channels
- ✚ Ensure time-bound decision making processes.
- ✚ Promote accountability and sound governance through whistle-blower laws.

Policy goal 4:

Transparent administrative and regulatory regimes

The level of transparency in decision-making and accessibility of the investors to engage in the consultations on regulatory change are the key determinants for the entry of new investment. Ability of the state to provide accurate and up-to date information on any aspect of investment activity gives the investor enough confidence to make sound and timely investment decisions and reduces the risk of biased decisions of institutions and staff.

Policy actions to consider:

- ✚ Guarantee transparent rules and procedures for public procurement.
- ✚ Ensure that regulations are easily accessible and understandable to all investors.
- ✚ Collect and publish information on investment entry regimes.
- ✚ Encourage the use of transparency principles among national and sub-national authorities and business.
- ✚ Make available to the public all relevant materials that explain the regulatory change, expected benefits and risks.
- ✚ Regularly upgrade the investment conditions by establishing fora for frequent communication with investors, by establishing feedback mechanisms for investors, by adapting the investment conditions to the specific needs of investors.
- ✚ Establish investment promotion agencies, industrial development agencies that can provide investors with the necessary information to influence their investment decisions.
- ✚ Establish an ombudsman institution which would act on behalf of investors and collect views of energy companies in order to present them to the government.
- ✚ Ensure transparency on tariff regulations.

Policy goal 5:

Favourable investment rules and conditions

The state of a country's investment climate is a key factor in determining a country's ability to attract foreign investment and develop small and medium enterprises. In order to achieve a competitive investment environment, countries must work towards developing robust and clear investment rules that give assurance to investors that the host state is committed to attracting foreign investment.

Policy actions to consider:

- ✚ Improve the effectiveness of policies and efforts aimed at attracting and facilitating investment including establishing enhanced investor entry regimes and streamlining investment procedures.
- ✚ Conduct an evaluation of entry regimes and circulate investor surveys to identify procedural barriers.
- ✚ Make energy investment facilitation a priority within the overall strategy of the country.
- ✚ Ensure consistency of domestic investment legislation with the country's international legal commitments in its bilateral and regional investment

agreements.

- ✚ Offer new energy investors favourable and stable investment incentives.
- ✚ Align government and local policies that could have an impact on energy investment.
- ✚ Coordinate the development of energy investment conditions between national and sub-national authorities.
- ✚ Facilitate access to land for all energy investors.
- ✚ Enter international agreements that commit governments to sound policies.
- ✚ Assist small and medium enterprises in entering the energy markets and implementing regulations.

Policy goal 6:

Effective national judiciary

A transparent, predictable and reliable judicial system is a crucial element of favourable energy investment climate. It also reduces the risk of biased decisions in case of breach of contracts by the states or gives the opportunity to the investors to challenge decisions of the government institutions.

Policy actions to consider:

- ✚ Ensure that contracts between states and investors can be enforced.
- ✚ Ensure that judgements and judicial decisions are publically available.
- ✚ Improve predictability and timeliness of judicial decisions and enhancing court systems.
- ✚ Provide an appeal mechanism to correct first instance decisions.
- ✚ Promote the usefulness of alternative conflict settlements (e.g. mediation), which reduces the risk of lengthy and costly legal disputes.
- ✚ Give an access to transparent Investor-State Dispute settlement as an accountability mechanism for States' conduct.

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