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**Energy Investment Risk Assessment**

**2017**

**Questionnaire**

**EIRA Project Risk areas, indicators and questionnaire**

**Scope:**

The Energy Investment Risk Assessment (EIRA) aims at assessing policy, regulatory and legal risks in relation to foreign investment in the energy sector. The EIRA focusses on the legal and regulatory environment, as well as compliance by the state with its obligations. Not included in the scope are risks like economic risks, geopolitical risks and natural hazards.

**Risk areas:**

1. **Unpredictable policy/regulatory change** – This pertains to the risk of unforeseen change in laws and regulations which have the potential to materially impact investors in the energy sector. Investors feel more confident when a state has solid goals. Policy changes occur, but what counts for investors is the predictability of the changes and being given the ability to adapt. Unexpected changes in laws or regulations by the state or a regulatory body can increase the costs of operating a business, reduce the attractiveness of investment and/or change the competitive landscape. It follows thatinvestors therefore face risks when there is uncertainty of legal and regulatory change in a country. As a result, they might become hesitant, place investments elsewhere or seek risk reducing measures. States face the risk of underinvestment in vital areas of the energy sector or disputes arising from regulatory change.
2. **Discrimination between domestic and foreign investors** –Foreign investors need clarity on the true extent to which markets are competitive within the host state. This would include the likelihood of not being treated equally which would entail an unfair advantage to domestic investors as recipients of certain rights and privileges granted by the host state to the exclusion of foreign investors. When foreign investors are faced with discrimination, which can result from biased decision-making, discriminatory market rules or anti-competitive behaviour (including currency and capital restrictions), free flow of capital is potentially hindered and countries might not be able to attract the needed investment. Discrimination also includes ‘protectionism’ which refers to government actions and policies that would restrain any trade and investment with the intent of protecting local businesses and investments from foreign competition which would be onerous to any foreign investor and the investment climate in general.
3. **Breach of state obligations** – Breach of state obligations including losses arising out of breach or repudiation of a contract with the investor (e.g. a concession or a power purchase agreement). This would also include breach of contractual obligations by state-owned enterprises acting as an arm-extension of the state or an arm-length basis as opposed to acting in pure commercial capacity. In the event of an alleged breach or repudiation, where the investor invokes the dispute resolution mechanism (i.e. arbitration) set out in the underlying contract, in the case where an award has been obtained, here the risk would entail the inability of an investor to enforce the award, whether it orders payment or reinstatement of a contract.

**Contribution of EIRA towards reducing policy, legal and regulatory risks:**

Conclusions and recommendations of EIRA aim to assist countries and investors on:

1. Competitive markets where foreign investment is treated equally relative to domestic investment;
2. Effective management of legal and regulatory change;
3. Efficient institutional governance and policy making;
4. Consistency and effective implementation of energy sector policy and regulation;
5. Effective prevention or management of disputes, avoiding costly arbitration and with objective of retaining trust between parties, necessary for further future investment;
6. Respect of obligations by the host state;
7. Improvement of energy investment climate.

**Main indicators:**

For the risk areas four main indicators have been identified:

1. **Policy priorities and specific goals relevant to the energy sector**
2. **Decision-making processes**
3. **Oversight of market functioning, private sector and regulated companies**
4. **Rule of law** **(compliance with national and international obligations)**

The risk areas and the main indicators relate as follows:

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| **RISK AREAS**/Main indicators | 1. Policy priorities and specific goals relevant to the energy sector | 2. Decision-making processes | 3. Oversight of market functioning, private sector and regulated companies | 4. Rule of law (compliance with national and international obligations) |
| **A. Unpredictable policy/ regulatory change** | x | x |  | x |
| **B. Discrimination between foreign and domestic investors** | x | x | x | x |
| **C. Breach of state obligations** |  |  |  | x |

For each main indicator sub-indicators have been identified:

**Main indicator 1: Policy priorities and specific goals relevant to the energy sector**

Sub-indicator 1: Existence of policy priorities and specific goals relevant to the energy sector

Sub-indicator 2: Robustness of goals

Sub-indicator 3: Confidence in the implementation of goals

**Main indicator 2: Decision-making processes**

Sub-indicator 1: Institutional governance

Sub-indicator 2: Transparency

**Main indicator 3: Oversight of market functioning, private sector and regulated companies**

Sub-indicator 1: Regulatory effectiveness

Sub-indicator 2: Restrictions on FDI

**Main indicator 4: Rule of law (compliance with national and international obligations)**

Sub-indicator 1: Contract enforcement, domestic dispute settlement and ISDS

Sub-indicator 2: Respect for property rights

**Questionnaire**

**Main indicator 1:** **Policy priorities and specific goals relevant to the energy sector**

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| **Sub-indicators** | **Questions** | **Additional information/clarifications** |
| **1. Existence and robustness of energy specific goals**  *[Existence and clear definition of energy**policy goals relevant to the energy sector. Having long-term goals gives direction to investors and reduces uncertainty.]* | 1. Does the Government have key priorities or goals for the energy sector policy which fit to a long-term perspective ? [Y/N]  [e.g. goals for energy security, diversification, access to energy, CO2-reduction, renewable energy and energy efficiency] |  |
| 2. Are the reasons for the selection of these goals clearly stated and realistic? [Y/N] | Please provide reasons for your answer. |
| 3. Do the goals give guidance to investment in the energy sector? [Y/N] |  |
| 4. Are changes in the goals predictable? [Y/N] |  |
| **2. Existence and robustness of investment goals**  *[This sub-indicator looks at the existance of the investment policy relevant to the energy sector. It relates to the predictability of the said goals and their linkage to the energy sector priorities.]* | 1. Does the government have a long-term investment strategy document? [Y/N] |  |
| 2. If yes, is this investment strategy document well based on actual needs in the energy sector of the host country? [Y/N] | Please provide the investment strategy document. |
| 3. Does the investment strategy offer clear guidance for investors e.g. about what energy subsectors are to be targeted for investment promotion? [Y/N] |  |
| 4. Does the host country offer attractive incentives for foreign investors? [Y/N] | Please provide details of what are these incentives. |
| 5. If so, are these incentives stable? [Y/N] | Please provide reasons for your answer. |
| **Additional remarks:**  Are there any investment related risks in your country regarding *Policy priorities and specific goals relevant to the energy sector* which you want to bring to the attention? Please describe. | |  |

**Main indicator 2:** **Decision-making processes**

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| **Sub-indicators** | **Questions** | **Additional information/clarifications** |
| **1. Institutional governance**  *[The key pre-requisites for effective policy making are the existence of strong institutions, and effective co-ordination between these institutions. Strong institutions help to maintain a predictable and transparent environment for investors. Similarly, effective co-ordination decreases the risk of policy duplication, and contradictory objectives and targets, which can undermine investor confidence. Complex government systems may result in red tape, long procedures and uncertain outcomes.*  *Overlapping and sometimes conflicting rules, procedures*  *and regulations across ministries and levels of government, including between the central and provincial levels can also create administrative burdens on investors.]* | 1. Do you consider roles and responsibilities between different levels of government clear enough where more than one institution/agency is responsible for policy formulation with respect to investing in energy? [Y/N]  1a. Is the governmental structure too complex and thereby leading to long delays in decision-making? [Y/N] | For 1a. please provide instances of the problems faced. |
| 2. Does the country have regular consultation with investors throughout the entire project lifetime to address complaints by investors which may require changes in the investment legislation? [Y/N]  2a. If yes, is such consultation mandatory under a law/regulation? [Y/N] | Please provide the law/regulation. |
| 3. Does the country conduct periodic and regular reviews of investment procedures and policies ? [Y/N] | Please provide the evidence of periodic reviews of investment procedures and policies. |
| 4. Is there dedicated investment agency/body responsible for monitoring the overall investment policy formulation process and developing investment strategy? [Y/N]  4a. If yes, does this agency/body have direct access to the centre of government and key ministries to facilitate its role? [Y/N]  4b. If yes, does this agency/body have an efficient coordination mechanism in place for inter-governmental cooperation? [Y/N]  4c. Is this investment agency effectively cooperating with other government stakeholders to address complaints raised by investors? [Y/N]  4d. If there is no lead investment promotion authority, has the country assigned clear responsibilities over investment promotion to a lead ministry to develop investment strategy and establish favourable procedures for investors? [Y/N] |  |
| 5. Has the host country established an investment promotion authority? [Y/N] | Please provide the name and website link. |
| 6. Has the host country established a one-stop-shop investment approval authority? [Y/N] | Please provide the link to website and the law under which this is established. |
| **2. Transparency**  *[This sub-indicator gauges the level of transparency in formulation of policies. It highlights that policies are more likely to be sound and not produce unintended side effects if they are formed in a structured and transparent way and after gathering inputs from all interested parties.]* | 1. Is there clearly defined mechanism for consultation about policy formulation between governmental institutions and private sector stakeholders ? [Y/N]  1a. Is this mechanism provided under a law or regulation? [Y/N]  1b. Are the procedures for policy and decision-making efficient and transparent? [Y/N]  1c. Do investor/private sector stakeholders have equal right to submit their proposals in these consultations? [Y/N]  1d. Do private sector stakeholders get enough time to properly study new laws and regulations which may affect their business operations in the host country? [Y/N] | Please provide the relevant law/regulation. |
| 2. Does the government provide clear, structured and up-to date information on the investment conditions/regime? [Y/N]  2a. Are draft laws made available to the industry on time (electronically or otherwise) and well in advance before the laws come into force? [Y/N]  2b. Are relevant (draft) policies laws made available in languages which are most relevant for foreign investors (e.g. English)? [Y/N] | For 2a. and 2b if yes then please provide link to website where these documents are available. |
| 3. Is there a single window for all enquiries concerning investment policies and applications to invest ? [Y/N]  3a. Does the host country provide structured and easy access to information on legal and regulatory matters, financing options and bureaucratic conditions? [Y/N]  3b. Does the host country provide clear information on necessary steps to start or expand business activity or streamline license procedures for both foreign and domestic investors? [Y/N] | Please provide documents and website links through which such information is accessed by you. |
| 4. Does the country have a centralized registry of laws and regulations which are available electronically ? [Y/N]  4a. If no, are they available on request? [Y/N]  4b. If yes, are they available in English and other foreign languages? [Y/N] | Please provide website links or documents detailing the process for accessing laws and information. Please also detail how information is accessed by you. |
| 5. Is there a prior notification mechanism before enacting new laws/regulations/procedures/applicable standards ? [Y/N]  5a. If yes, is this provided under any law or regulation? [Y/N] | Please provide copy of the law/regulation. |
| 6. Are stakeholders consulted while formulating regulatory changes of interest to them? [Y/N]  6a. If yes, do stakeholders have an opportunity to comment on proposed new laws/regulations/policies prior to their implementation ? [Y/N]  6b. Do government officials meet sufficiently often with business representatives to discuss concerns and proposed regulatory changes? [Y/N] | Please provide details of the consultation mechanism and where is this available.  Please provide details of how the government contacts stakeholders for consultation. |
| 7. Are there clear criteria and transparent procedures for administrative decisions including investment project screening and approval mechanisms ? [Y/N]  7a. If yes, are they stated in any law and/or regulation? | Please provide copy of the law/regulation. |
| 8. Does the host country conduct regular stakeholder exchange on regulatory environment and institutional performance? [Y/N]  8a. If yes, is this conducted under any law and/or regulation? | Please provide copy of the law/regulation. |
| **Additional remarks:**  Are there any other investment related risks in the energy sector regarding *Decision making processes*? Please describe. | |  |

**Main indicator 3: Oversight of market functioning, private sector and regulated companies**

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| **Sub-indicators** | **Questions** | **Additional information/clarifications** |
| **1. Regulatory effectiveness**  *[This sub indicator addresses the existence of a regulator, whether it is independent, transparent and established in law. This is to ensure that there is a monitoring process in place for the energy sector. It reduces the risk of biased decision-making, discriminatory market rules or anti-competitive behaviour of market participants.]* | 1. Does the host country efficiently enforce and implement regulations in the energy sector? [Y/N] | Please provide justification of your position. |
| 2. Do you consider the energy regulatory authority (e.g. for tariffs and permits) independent from the government? [Y/N] | Please provide reasons for your response. |
| 3. If there is no dedicated regulatory authority, has the country assigned clear regulatory responsibility to a lead ministry to develop sound regulatory regime? [Y/N] | Please provide the name of the ministry. |
| 4. Does the energy regulatory body publish its proposals and decisions affecting market actors well in advance prior to their implementation? [Y/N] | Please provide documents and website links through which such information is accessed by you. |
| 5. Does the energy regulatory body conduct periodic and regular consultations on regulatory matters with private sector stakeholders? [Y/N] | Please provide documents and website links through which such information is accessed by you. |
| 6. Does the energy regulatory body deal with competition issues? [Y/N]  6a. If no, is there a separate governmental body dealing with competition issues, including the energy sector? [Y/N] | Please provide the name of the relevant competition authority and a link to their website (if available). |
| 7. Is there a process for appealing against the regulatory decisions if private sector stakeholders/investors believe that implemented changes seriously (will) affect their business activities? [Y/N]  7a. If yes, is this conducted under the purview of any law and/or regulation? [Y/N] | Please provide copy of the law/regulation. |
| 8. Does the host country have efficient procedures in place for approval of business licenses and permits? [Y/N] | If yes, please provide documents and website links through which information regarding these procedures is accessed by you. |
| **2. Restrictions on FDI**  *[This sub-indicator intends to capture regulatory restrictiveness. It reflects the extent of countries’ commitments not to discriminate in the treatment afforded to domestic and foreign investors while granting (1) market access (2) in operations during the post establishment phase.]* | 1. Does the country gives equal treatment in the application of laws and regulations between domestic and foreign investors? [Y/N]  1a. If yes, is this equal treatment established in law? | Please provide copy of the law/regulation. |
| 2. Are investors not allowed to invest in certain zones or regions in the energy sector within the? [Y/N]  2a. If yes, has it been applicable to domestic and foreign investors alike? [Y/N] | If yes for 2, which zones or regions and why. |
| 3. Does government provide any outward investment support or any other facilitation services? [Y/N] | If yes, please provide details. |
| 4. Are foreign investors required under a law or regulation to partner with the State/state owned enterprises or local enterprises before undertaking projects in the energy sector? [Y/N] | Please provide copy of the law/regulation. |
| 5. Is employment of foreign personnel permitted under a law or regulation? [Y/N]  5a. If yes, is employment of foreign personnel time bound? [Y/N]  5b. Does the country help investors to remove bureaucratic obstacles i.e. facilitating visa, work permits? [Y/N] | Please provide copy of the law/regulation. |
| 6. Is land ownership permitted to foreign investors for setting up energy projects under a law or regulation? [Y/N]  6a. If no, can foreign investors acquire land by other means (for example lease)? [Y/N] | Please provide copy of the law/regulation. |
| 7. Is there local content requirement imposed upon foreign investors in the energy sector under law? [Y/N]  7a. If yes, is it more than 50%? [Y/N]  Please provide details if such requirements are imposed in only one or few energy sub-sectors. |  |
| 8. Are there any currency restrictions and/or foreign exchange controls applied to foreign investors under a law or regulation? [Y/N]  8a. If yes, do these exchange controls include:   * Banning use of foreign currency? [Y/N] * Limiting currency exchange to government approved exchangers? [Y/N] * Fixed exchange rates? [Y/N] | Please provide copy of the law/regulation. |
| 9. Does the state have capital control measures that restrict the flow of capital in and out of a domestic economy?  9a. If yes, what do these capital controls include:   * Taxes [Y/N] * Tariffs [Y/N] * Legislation [Y/N] * Volume [Y/N] |  |
| **Additional remarks:**  Are there any other investment related risks in your country’s energy sector regarding *Oversight of market functioning, private sector and regulated companies*? Please describe. | |  |

**Main indicator 4: Rule of Law (compliance with national and international obligations)**

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| **Sub-indicators** | **Questions** | **Additional information/clarifications** |
| **1. Contract enforcement, domestic dispute settlement and ISDS**  *[This sub-indicator attempts to answer the following issues:*  *In case of breach of contract by the host state is recourse available to foreign investors; are there adequate domestic dispute resolution mechanisms available (arbitration, mediation etc.) to foreign investors; is the judicial system transparent and time bound; in case of breach whether the investor have recourse to international arbitration.]* | 1. Is appeal mechanism in place for private sector stakeholders if they disagree with proposed regulatory changes which may affect their business activities in the host country? [Y/N]  1a. If yes, is appeal mechanism established by any law/regulation? [Y/N] | Please provide copy of the law/regulation. |
| 2. Do you consider judiciary proceedings efficient enabling national courts and arbitral tribunals to deliver decisions in an effective manner ? [Y/N] | Please provide justification for your position. |
| 3. Are administrative, judicial and arbitral decisions related to the energy sector publically accessible? [Y/N] | Please provide details of the administrative, judicial and arbitral decision and where are these available. |
| 4. Does the state have a positive stance on mediation with private investors in case of a dispute? [Y/N] | Please provide justification for your position. |
| 5. Is there an investment ombudsman or a similar institution to which foreign investors can refer in case of conflict? [Y/N] |  |
| 6. Do private sector stakeholders have confidence in the host country to allow enforcement of foreign judgments and foreign arbitral awards? [Y/N] | Please provide justification for your position. |
| 7. Has an arbitral award/judicial decision ever been enforced against the state in the energy sector? [Y/N] |  |
|  | 8. Have private sector stakeholders in the energy sector experienced a breach of contract event (by the government) in the last 5 years? [Y/N]  8a. If yes, In which sector(s) have you experienced a breach of contract event?   * Oil, gas, mining [Y/N] * Electricity and power [Y/N] * Transportation [Y/N] * Other energy subsectors [Y/N] | If other energy subsectors, which ones? |
|  | 9. Have private sector stakeholders in the energy sector had to renegotiate a contract with a host government in the last 5 years? [Y/N]  9a. If yes, In which sector(s) have you experienced a need to renegotiate a contract with a host government:   * Oil, gas, mining [Y/N] * Electricity and power [Y/N] * Transportation [Y/N] * Other energy subsectors [Y/N] Which? | If other energy subsectors, which ones? |
| **2.Respect for property rights**  *[Risk of loss arising from certain government actions or restrictions that may inhibit an investor’s rights to title of ownership or reduce or eliminate ownership of, control over, or rights to the investment. This also relates to the risk of inappropriate compensation to the investor for the property (i.e. which is not based on the market value of the investment).]* | 1. Does the host country provide in its laws a clear mechanism for determining compensation in the event of expropriation in the energy sector? [Y/N] | Please provide copy of law/regulation where clear mechanism is stated. |
| 2. Does the host country provide in its laws a clear obligation on a time frame within which compensation needs to be made in case of expropriation? [Y/N] | Please provide copy of law/regulation where clear mechanism is stated. |
| 3. Do private sector stakeholders face any restrictions under law or regulation on the transfer of technology or intellectual property rights in the energy sector? [Y/N] | If yes, please provide further information which restrictions and why. Also, please provide copy of the law/regulation under which these restrictions are imposed. |
| **General questions:**  Is the host country a party to the Energy Charter Treaty? [Y/N] If not, would the industry/private stakeholders welcome the accession of the host country to the Energy Charter Treaty? | |  |
| **Additional remarks:**  Are there any other investment related risks in your country regarding *Rule of Law (compliance with national and international obligations)*? Please describe. | |  |

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