



First round of break-out sessions: Substantive content of IIAs Pre-establishment¹

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Through pre-establishment commitments States undertake obligations with respect to the liberalization of their regulatory regime over foreign investment. As there is a growing trend to include these commitments in IIAs, the session has sought to address some of the key issues faced by policymakers when considering the inclusion of pre-establishment commitments.

One delegate kicked-off the session by discussing **the national experience** with pre-establishment commitments in IIAs. This perspective provided a useful starting point for examining the motives for host States in choosing this avenue as well as the challenges that this choice implies (1). A broad discussion followed identifying different relevant topics that have been organized below under the headings of **contextual issues** (2) and **concerns** (3).

1. A country's national experience with pre-establishment commitments

The delegate stated that the country experienced a change in policy from post to pre-establishment commitments in IIAs. Previously, it applied a post-establishment model that reserved the regulation of the establishment of foreign investment to domestic law. Under the new approach, obligations to liberalize the establishment of foreign investment in its territory were undertaken in the IIAs. By using the "negative list" approach, the host State agreed to a set of general liberalization obligations subject only to a reserved "negative list" of industries to which these obligations did not apply. An important and challenging task was to identify these industries.

The following **reasons** underlying this policy change were provided:

- the new approach on pre-establishment followed the domestic reform agenda as the government had decided to establish open and transparent market rules for domestic and foreign investors alike;
- the policy change aimed to secure an open, transparent and predictable environment for investors abroad and for foreign investors in the country; and
- it aimed to promote the government's intention to open up the "services market" to the outside world.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

The delegate subsequently set out the **challenges** that the decision to include pre-establishment commitments in IIAs using the “negative list” approach had posed the government, as follows:

- given the size and complexity of the country, identifying individual sectors that the government did not wish to liberalize;
- strengthening the non-discrimination regulations with respect to companies already established (e.g. in relation to competition and environmental standards) at the same time as broadening the access to markets; and
- maintaining a certain degree of policy space for managing liberalization in sensitive sectors.

2. Relevant contextual issues raised

The experts noted the importance to distinguish between the strategic political decision to include pre-establishment commitments in IIAs and their technical implementation.

With respect to the technical tools to include pre-establishment commitments in the IIAs, it was noted that, in addition to the “negative list”, host States could adopt other approaches, such as the “political commitment” model, the “positive list” liberalization model and the “regional integration” model.

The experts also noted the complexity of the discussion on pre-establishment as this can potentially relate to other provisions in the treaties and policy issues, including land rights, discrimination, performance requirements, privatization and procurement.

Finally, the experts pointed to the growing inclusion of pre-establishment commitments in IIAs, in particular in free trade agreements (FTAs). The latest UNCTAD IIAs Issues Note reports that “[a]mong those IIAs concluded in 2014, about half extend national treatment and most-favoured-nation treatment (MFN) obligations to the acquisition and establishment of investments.” This trend includes not only treaties signed by the United States, but also other countries like Colombia and Chile.

3. Concerns

The experts raised a large number of concerns that this summary has organized into three major topics.

3.1. The degree of exposure to claims relating to pre-establishment commitments

It was noted that there were very few, if any, cases filed for breaches of pre-establishment commitments. The experts put forward various arguments to explain this fact, including the reluctance of investors to sue on these grounds in order to avoid starting the relation with the State on a controversial note; the small number of IIAs that include pre-establishment commitments to date (only up to 10% of existing IIAs); and the difficulty in knowing when an investment had actually occurred in the economy of the host State.

3.2. The tension between preserving policy space and locking in commitments on liberalization

A number of points were raised in connection with this topic. First, it was noted that host States often justify their decision to include pre-establishment commitments in IIAs as a tool to signal their openness to investment and, in that way, attract more investment. However, one delegate questioned this wisdom by pointing to a study conducted in the country that showed that its FTAs with pre-establishment commitments had not resulted in higher levels of foreign investment. It was then recommended to preserve IIAs as tools for providing investment protection only and have other instruments to deal with liberalization.

Second, the experts noted that regulating foreign investment is an area subject to constant evolution and that it was therefore important to include exceptions and safeguards to avoid unduly limiting the capacity of States to introduce eventual necessary changes. Various options were put forward, including review mechanisms and the exclusion of pre-establishment commitments from ISDS.

3.3. The question of reform

It was noted that pre-establishment has not featured prominently in the agenda for reform and so the question was asked whether there was a pressing need to include it in such agenda. The points of view shared, included:

- there is no urgency to consider it for reform in light of the very few (if any) cases based on pre-establishment commitments;
- it is important to distinguish pre-establishment from other controversial topics as it is a feature that is only beginning to emerge in IIAs; and
- the question of reform should be tied to the question of the purpose of the treaty. If host States seek to use IIAs as a tool to strengthen liberalization, there is probably no need for reform. But if host States use IIAs to attain other goals, like sustainable development goals, then it is important to ask how pre-establishment commitments can serve these goals and what form of reform would be required to ensure that outcome.