International legal framework for investments in the energy sector

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International legal framework for investments in the energy sector

- Securing diversified energy investments through international investment law
- Securing diversified energy investments through project-specific intergovernmental and host government agreements
- Unintended consequences of the EU’s CBAM (in its current form)

Securing diversified energy investments through international investment law

- For many years, customary international law has required host States to provide a minimum standard of treatment to foreign nationals, regardless of their own domestic laws (Neer Case, 1926)
- This standard has been developed and codified through a network of bilateral investment treaties (BITs), free trade agreements and multilateral treaties such as the Energy Charter Treaty (ECT)
- Many modern BITs, free trade agreements and the ECT offer investors the opportunity to directly initiated international arbitration claims against the host State at a neutral forum

Securing diversified energy investments through project-specific intergovernmental and host government agreements

- In recent years, investor-State arbitration has been subject (rightly or wrongly) to criticism, particularly within the European Union
- This has led to States withdrawing from investment protection treaties (including some EU states from the ECT) and to reduction of investment arbitration protection within new investment protection treaties
- Alternative project-specific investment protection structures include intergovernmental agreements (IGAs), and host government agreements (HGAs)
- These address issues such as change of law, taxation, environment, employment and social impact

Unintended consequences of the EU's CBAM (in its current form)

- EU Regulation 2023/956 of 10 May 2023 establishes a carbon border adjustment mechanism (CBAM)
- This is intended to help meet the 2050 climate-neutral objective by addressing the risk of carbon leakage (recital 10)
- As electricity is responsible for 30% of the EU's greenhouse gas emissions, imported electricity is included in the scope of the Regulation (recital 40)
- Under Article 7 and Annex IV, embedded emissions in imported electricity must be calculated as the average CO_2 intensity of **fossil fuel** electricity produced within the relevant geographic area, unless
  - the electricity is covered by a power purchase agreement with a specific green producer
  - the green installation is directly connected to the EU or there is no network congestion
  - the relevant amount of electricity has been firmly nominated by all relevant operators

Thank you!

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