

SPECIAL PAPER SERIES

HANDBOOK ON GENERAL
PROVISIONS APPLICABLE TO
INVESTMENT AGREEMENTS IN
THE ENERGY SECTOR



INTERNATIONAL
ENERGY CHARTER

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PREFACE

Dear reader,

We all realize that energy contracts are negotiated with a view to allocate benefits and responsibilities for years to come. Negotiating such complex and lengthy contracts is a challenge under any circumstances. This exercise would normally encompass contributions from and assessments of multiple people and would factor-in multiple aspects such as financial modelling, taxes, environmental considerations and social impacts. However, governments often face challenges associated with a lack of expertise, imbalance of financial resources, time pressure and other factors, not necessarily always within their control. Thus, it is important to support governments to acquire expertise in contract negotiations for complex and long-term projects. A well negotiated contract, with the full understanding of the government of all the potential policy options involved, reduces potential conflicts and facilitates its correct implementation for the benefit of both the parties, the country and the foreign investor.

Therefore, this Handbook makes an attempt to offer guidance to governments on possible drafting and negotiation approaches that can be considered on a voluntary basis when preparing for entering into complex negotiations in the energy sector. The Handbook is divided into several chapters, most frequently encountered or otherwise dealt with in complex agreements in the energy sector. Presentation of the chapters and their contents serves the idea of reproducing relationship emerging between parties to a hypothetical agreement, which would be attained by means of further analysis such as information to be assessed, negotiation goals, current trends, main policy options to adapt, and the like, depending on the nature of a chapter discussed and breadth thereof.

Energy projects differ in scope, have unique technical facets, and are subject to numerous legal requirements, including those arising from international law and relevant supra-national and national legal systems. Whilst the utmost has been done to develop generic guidance which meets these multiple requirements, legislative frameworks are inevitably complex and varied and it is recommended that specialized advice be obtained in this regard in relation to any specific project.

The Handbook is a result of the vast experience of the Energy Charter Secretariat blended with a valuable support of the Legal Advisory Task Force (LATF), which currently consists of over eighty senior legal experts from leading energy companies, academic institutions and international law firms. The Energy Charter Secretariat is open to and grateful for any suggestions and opinions that may come forth in the process of going through the Handbook, and it will continue working on further refining and broadening thereof. I hope it will be a valuable tool for government officials empowering them in their negotiations of complex investment agreements in the energy sector.

Dr. Urban Rusnák

Secretary General

Energy Charter Secretariat

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I. Entry into Force

1. Overview

- When an agreement formally enters into force, it has legal effect between the parties. The existence of an entry into force clause should be fairly uncontroversial and straightforward because all parties will insist upon having a clear date when their contract takes effect.

2. Types of Entry into Force clauses

- Most contracts will enter into force on a particular date, known as the “Effective Date”, which should be specified in the contract. However, depending upon the political structure of the state where the energy project is carried out (the “Host State”), some contracts may need to be ratified before they can take effect.
- In the case of a production sharing contract, the Effective Date is the date the parties execute the contract or the date the petroleum exploration license becomes effective or the date the exploration period begins.
- A host government mining contract becomes effective on the date both the parties sign it. Some countries may have additional regulatory requirements that an investor must meet before a contract becomes effective. For instance, the investor may be required to conduct a feasibility study showing that the proposed mining plan is practical and will likely be profitable. Though the requirement of each Host State may differ slightly, an investor should be prepared to present proof of the existence of a deposit to the Host State. In some cases, the investor may also be required to obtain a mining license.

Box 1

Entry into force requirements for host government mining contracts:

Example 1

In the case of a recent investment agreement between an Asian nation and an investor, the contract specified that in addition to signing the contract, the investor must also register it with the state administrative authorities, prepare a feasibility study of the project and present it to the appropriate government authorities. Moreover, the local taxation authorities must consider the losses and capitalize the expenses of the investor for depreciation purposes.

Example 2

A mineral development contract signed between an African nation and a mining company was to enter into force after the last to occur of the following events: (1) attestation by the Minister of Justice (2) ratification by the national legislature (3) approval by the President of the Republic and (4) publication in handbills.

3. Information to be assessed

- Generally, the Effective Date for host government contracts will be after some preconditions have been met. For instance, the parties may be required to fully and validly execute the contract before the Effective Date. In the case of most solar and wind projects, to become effective, the investor must obtain regulatory approval prior to making any installation.

- As mentioned earlier, some contracts may only enter into force upon the exchange of instruments of ratification. In such cases, it is important for the investor to ensure that the instrument of ratification is signed by the appropriate official of the respective national government. The document must include the title of the person who has signed it and, the date and place of issue. The signature of the appropriate official validates the instrument of ratification. Ratification by the domestic legislative bodies generally takes place within 60-90 days after the exchange of instruments of ratification. It must, however, be noted that though ratification is a straightforward process, domestic legal and political hurdles may cause delay. Some countries may not require legislative approval, whereas, others may require bicameral legislative approval. Still others may require approval by the supermajority of legislators. Those drafting contracts should be aware of the specific ratification processes in various countries as well as the broader political dynamics that may hinder or facilitate ratification in a particular state.
- In addition, the parties may consider including a representation and warranty as to the legal status of the host government contract. This can give the investor assurance that the Host State has the power to make and carry out the contract, as well as perform its obligations under the contract. Other representations that an investor may ask the Host State to make include a statement that the execution and performance of the contract will not conflict with or result in a material breach of or constitute default under the terms of any international treaty.
- Some contracts also contain a clause that ensures no representation in the contract fails to state a material fact necessary to make the representation that is known or reasonably should be known to both the parties at the time of making the contract. An investor may seek additional assurances and include representations in a situation where the Host State is particularly susceptible to instability or political uncertainty.
- Since production sharing contracts most often involve exploration and resource extraction, the contract should contain benchmarks for beginning the various phases of work – initial and subsequent exploration, relinquishment, and ultimately, extraction. These benchmarks allow for some degree of flexibility given the uncertainty involved in exploration. In drafting these contracts, parties should consider incorporating smaller benchmarks and targets in order to ensure that certain performance is being achieved in a timely manner.

Box 2

A recent African Model Production Sharing Agreement was effective for a period of 28 years from the Effective Date. The 28 years were split into two phases, the exploration period and the production period. The contract further subdivided the exploration period into three phases. The host state had the right to terminate the contract if these benchmarks were not met.

- Like production sharing contracts, host government mining contracts should also set out periods for preparation, exploration, and extraction. The contract should build in specific benchmarks to ensure timely progress and to protect the investment. Time periods of validity of each sub-period in mining contracts can vary and depend on the complexity of the mining operation, the mineral that is to be extracted, as well as the size of the deposit. Specifics of the procedures will also vary based upon the domestic mining regulations of the Host State. An investor should generally seek the advice of local counsel to ensure that the contract complies with local regulations that all necessary approvals have been obtained.

4. Model clause options

Host government contracts for cross border pipelines and electricity projects

Box 3

Entry into Force:

“Provided this Agreement has been signed, it shall be implemented from the date on which the Intergovernmental Agreement has entered into force in accordance with the Effective Date. This Agreement is subject to ratification and shall enter into force when the ratification procedure is completed by the State.”

Clause option for production sharing contracts

Box 4

Exploration Period:

“The initial term of the Exploration Period provided by this Agreement shall be ___() years, commencing on the Effective Date hereof. The Contractor shall begin Petroleum Operations within ninety (90) days after the Effective Date and shall notify the Ministry of the date on which it has commenced Petroleum Operations.

The Exploration Period shall have a first extension and a second extension, following the initial term, for successive terms of ___() years and ___() years, respectively, each upon the Contractor's application to the Minister at least thirty (30) days prior to the termination date of the current term of the Exploration Period, provided that the Contractor has fulfilled the exploration work and expenditure obligations set forth in section [] for the current term under this Agreement.

In order to enable the Contractor to complete drilling, logging, testing or plugging of any exploratory well which is actually being drilled, logged, tested or plugged at the end of the second extension of the Exploration Period, the Minister shall grant a further extension to such second extension for such a time as he determines may be reasonable, which in any event shall not extend the term of the second extension by more than six (6) months.

In order to expeditiously complete the evaluation of a discovery, the Minister shall extend the term of the Exploration Period for an additional ___() months term beyond the second extension period for each area designated as an Appraisal Area upon the Contractor's submission to the Minister, at least sixty (60) days prior to the termination date of the second extension, of an appraisal work programme and budget under Section 5.3.2; provided, however, that the Contractor has fulfilled the exploration work and expenditure obligations set forth in Section 5.1 for the current term under this Agreement. Thereafter, if the Contractor shall determine that an Appraisal Area does not contain a Commercial Discovery and if no further extension is granted under Section 2.2.5, the Exploration Period for the relevant Appraisal Area shall terminate.

Upon justification by the Contractor and in addition to the extensions set forth above, the Minister may extend the term of the Exploration Period in respect to the Appraisal Area of a Natural Gas discovery for a period up to ___ () years for the purposes of further appraising and evaluating the Natural Gas discovery and establishing its economic viability as well as preparing a preliminary development scheme of a Natural Gas project.”

II. Amendment clause

1. Overview

- Generally, most contracts will contain a provision that the contract embodies the entire agreement between the parties, and it supersedes or replaces any other prior agreement between the parties related to the subject matter. Amendment clauses are a useful tool to protect the original terms of the contract and to avoid changes without the consent of the parties. Amendment clauses are common to all types of investment contracts.
- When there is a shift in the balance of risks and rewards, parties may be faced with situations which require them to renegotiate the contract. Accordingly, mechanisms are needed that can enable the parties to smoothly modify the terms and conditions of the contract. The “Periodic Review” clause provides such a mechanism by requiring the parties to meet at pre-decided intervals to review the

terms of the contract and evaluate whether circumstances have changed since the parties signed the original contract.¹

2. Types of amendment clauses

- Essentially all investment contracts will limit amendments to the original agreement. The parties want certainty in the contract terms and will only allow amendments in writing. Amendments are typically allowed only if there has been a change in circumstances, and only with the written consent of all the parties.

3. Model clause options

Amendment clause option for host government agreements (cross border pipelines, electricity projects)

Box 5

“Except as may be expressly provided therein, the Host State shall not amend, rescind, terminate, declare invalid or unenforceable, or otherwise seek to avoid or limit this Agreement or any Project Agreement without the prior written consent of the Project Investors, and/ or any other Project Participants which are parties to such agreements.”

Clause option for production sharing contracts

Box 6

“This Agreement may not be amended, modified, varied or supplemented, except by an instrument in writing signed by the Company and the Minister.”

Clause option for host government mining agreements

Box 7

“The Parties mutually agree that this Project Contract may be amended by the written consent of the parties and will be revised as necessary. For the purpose of this Project Contract, the Ministry of Mines is authorized to approve decisions concerning amendments for the Government and [the company], or its successor, is authorized to approve decisions concerning amendments for [the company].”

III. Termination Clause

1. Overview

- In general, energy contracts will terminate when the project has been completed or a particular period of time has elapsed. Many contracts may contain provisions that provide for the renewal of the

¹ While Periodic Review clauses are not often used, there are some contracts that include this provision. One example is the Model Mine Development Agreement prepared by the International Bar Association in 2011.

contract. Because most energy related contracts remain in force for significant periods of time, almost all of them also provide for premature termination if specific benchmarks are not met.

2. Types of termination clauses

- Termination of host government contracts is limited to particular circumstances. For instance, if the investors have not taken steps to commence the construction phase of a pipeline system within a number of months after the Effective Date, or if there is a delay of a specified number of months (generally 3-6 months) in the construction of the pipeline system for any reason other than *force majeure*, then the Host State has the right to provide a written notice of termination to the project investors.
- Production sharing contracts provide a number of avenues for termination at different junctures. For example, a contractor may be given the option, at the end of the initial exploration period, to proceed to subsequent exploration or to relinquish the entire contract area to any further commercial discovery through written notice (For more information on this topic please see the Chapter on “Obligations”). Conversely, some production sharing contracts only automatically remain in effect during the initial exploration period. After the expiration of the exploration period, the contract only remains in effect as to any development area, or any area where there has been a discovery. The Host State may also terminate the contract with written notice in specific circumstances. This includes situations where the contractor knowingly submitted a false statement to the Host State that was material to the consideration or execution of the contract, or if the contractor extracted materials that were not authorized under the contract.
- Host government mining contracts allow either party to terminate the contract upon the occurrence of specific circumstances. For example, if the mining company commits a material breach, then the Host State may revoke the contract and may be entitled to recover damages. Similarly, the mining company may terminate the contract if the Host State interferes with the company’s operations such that it is not able to maintain normal operations of the facility. In such a situation, the mining company may also be entitled to recover damages.
- Host government mining contracts are often renewable, provided that the parties have complied fully with the terms of the contract. For instance, a recent gold mining agreement specified that it was valid for a period of six months for preparation, a period of up to two years for completing exploration, and a period of ten years for exploitation from the Effective Date. If at the end of the exploration work, or at any time during the exploration, the investor determined that the mineral resource was not sufficient to warrant further exploration or did not constitute an economically viable mineral deposit, it had the right to terminate exploration activities with notice to and acceptance by the internal Ministry of Mines.

3. Information to be assessed

- Those drafting host government contracts should be mindful of the role of successors and permitted assignees. Generally, host government contracts contain provisions that allow project investors to transfer their rights under the contract and any other agreement related to the project. Nevertheless, the Host State may be entitled to terminate the contract if it is assigned by the investor to other entities without the Host State’s consent, if the investor fails to issue shares in accordance with the contract, or if the shares of the investor are transferred other than as permitted by the Shareholder’s Agreement.
- Termination by the Host State may be unilateral if the investor fails to fulfill any material and significant obligations under the contract for a predetermined period and this obligation is not excused by *force majeure*. If the Host State seeks to terminate the contract for a material breach, it must notify the investor in writing of the specific cause for termination. Additionally, the investor must be

provided a time period to address the Host State's concerns. If the investor does not comply with the notice, then the Host State may terminate the agreement.

- Wind and solar agreements typically provide investors with few opportunities to cure a default than traditional pipeline or electricity projects. For instance, these contracts usually contain a clause stating that any potential insolvency of the investor will give the Host State a right to terminate the contract.
- In the case of production sharing contracts that involve multiple contractors, the Host State has the right to terminate the contract if there is a violation by one contractor. However, the Host State does not generally exercise this right if any other contractor is willing to carry out the obligations of the defaulting party or if the non-defaulting party acquires the participating interest of the defaulting party and provides a guarantee to the Host State.

4. Model clause options

Clause option for host government agreements (cross border pipelines, electricity projects)

Box 8

ARTICLE [] TERMINATION

"This Agreement shall terminate upon the latter of the termination or expiration of all Host Government Agreements [and Project Agreements.]"

ARTICLE [] TERMINATION OF HOST GOVERNMENT AGREEMENT

1. No State may terminate a Host Government Agreement to which it is a party pursuant to Article [] of such Host Government Agreement other than pursuant to the procedure set out in this Article.
2. If any State, [acting reasonably,] has grounds, pursuant to Article [] of a Host Government Agreement to which it is a party, to terminate such Host Government Agreement (the "Proposing State"), it shall as soon as possible notify, in writing, all other States of its grounds for termination and request their collective consent to such termination (the "Proposed Termination").
3. If any State receives a notice pursuant to Article [] above, it may:
 - (a) Consent to the Proposed Termination, by notifying all States of the same in writing; or
 - (b) Call a meeting of all States to discuss and conclusively decide upon the Proposed Termination; or
 - (c) Reject the Proposed Termination, by notifying all States of the same in writing.
4. If a meeting is called under Article [] above, and if at such meeting the States agree to give their collective consent to the Proposed Termination, such consent will be recorded in writing and signed by all States.
5. If and when all States have notified the Proposing State of their consent to the Proposed Termination, whether by letter or following a meeting of States, the Proposing State may then terminate the relevant Host Government Agreement via the termination procedure therein and pursuant to its terms and conditions.

Any disputes or disagreements between States arising out of or in connection with this Article shall be dealt with in accordance with the requirements of Article [].

Clause option for host government wind power agreement

Box 9

Events of Default of [Investor]

"The following shall constitute Events of Default of BPA upon their occurrence and no cure period shall be applicable:

- (i) *[Investor's] dissolution or liquidation, provided that division of investor into multiple entities shall not constitute dissolution or liquidation; or*
- (ii) *[Investor's] general assignment of this Agreement or any of its rights hereunder for the benefit of creditors.*

The following shall constitute Events of Default of Investor upon their occurrence unless cured within ninety (90) days after the receipt by Investor of written notice thereof from Seller:

- (i) Investor fails to purchase the entire Energy Output of the Investor Wind Turbines in accordance with Section [];
- (ii) Investor defaults on its obligations under the Delivery Arrangements Agreement, and such default renders Seller unable to deliver the Energy Output at the Point of Delivery or affects Seller's right to be paid under this Agreement for delivery at the Point of Delivery for its Energy Output;
- (iii) Investor's assignment of this Agreement or any of Investor's rights under this Agreement without obtaining Seller's prior written consent pursuant to Section []; or
- (iv) Investor's failure to comply with any other material obligation under this Agreement after receipt of notice thereof.
- (v) Investor's failure to make any payment when required under this Agreement shall constitute an Event of Default unless
 - (1) Investor shall have cured the same within thirty (30) days after receipt by Investor of written notice thereof or
 - (2) Investor has filed in good faith a Billing Dispute with respect to such unpaid amounts and complied with Section [].

Clause option for production sharing contracts

Box 10

ARTICLE []

TERM AND TERMINATION OF THE CONTRACT

"The term of this Contract shall be for the period of the License and any Lease granted thereunder, unless the Contract is terminated earlier in accordance with its terms, and shall be deemed to have been terminated, if for any reason, the Contractor ceases to hold such License or Lease.

[Subject to [SPECIFY RESERVATIONS IF ANY]], the Contractor shall have the right to terminate this Contract

- (a) with respect to any part of the Contract Area other than a Development Area then producing, or that prior thereto had produced Petroleum, upon giving [ninety (90) days] written notice of its intention to do so; and
- (b) with respect to any Development Area in which Petroleum is being produced, or that prior thereto had produced Petroleum, upon giving at least one hundred and [eighty (180) days] written notice of its intention to do so.

This Contract may, subject to the provisions herein below and Article 31, be terminated by the Government upon giving [ninety (90) days] written notice with reasons to the other Parties of its intention to do so in the following circumstances, namely, that the Contractor or a Party comprising the Contractor ("the Defaulting Party")

- (a) has knowingly submitted any false statement to the Government in any manner which was a material consideration in the execution of this Contract; or
- (b) has intentionally and knowingly extracted or authorized the extraction of hydrocarbon not authorized to be extracted by the Contract or without the authority of the Government except such extractions as may be unavoidable as a result of operations conducted hereunder in accordance with generally accepted modern oilfield and industry practices which, when so extracted, were immediately notified to the Government or
- (c) is adjudged bankrupt by a competent court or enters into or scheme of composition with its creditors or takes advantage of any law for the benefit of debtors; or
- (d) has passed a resolution to apply to a competent court for liquidation of the Company unless the liquidation is for the purpose of amalgamation or reconstruction of which the Government has been given notice and the Government is satisfied that the Company's performance under this Contract would not be adversely affected thereby and has given its approval thereto; or
- (e) has assigned any interest in the Contract without the prior consent of the Government as provided in Article []; or
- (f) has failed to make any monetary payment required by law or under this Contract by the due date or within such further period after the due date as may thereafter be specified by the Government; or
- (g) has failed to comply with or has contravened the provisions of this Contract in a material particular; or
- (h) has failed to comply with any final determination or award made by a sole expert or arbitrators; or
- (i) has failed to carry out or observe any of the terms and conditions of the License or Lease or the 67 provisions of the Acts or Rules in force thereunder.
- (j) on notice of termination as provided in Article [].

PROVIDED THAT where the Contractor comprises two or more Parties, the Government shall not exercise its rights of termination pursuant to Article [], on the occurrence, in relation to one or more, but not all, of the Parties comprising the

Contractor, of an event entitling the Government to terminate the Contract,

- (a) if any other Party or Parties constituting the Contractor (the non-Defaulting Party or Parties) satisfies the Government that it, or they, is/are willing and would be able to carry out the obligations of the Contractor.*
- (b) where the non-Defaulting Party or Parties with the consent of the Government has/have acquired the Participating Interest of the Defaulting Party pursuant to the provisions of the Operating Agreement and has/have procured and delivered to the Government a guarantee or guarantees as referred to in Article 29.1 in respect of the Participating Interest of the Defaulting Party acquired by the non-Defaulting Party or Parties.*

This Contract may also be terminated by the Government on giving the requisite notice specified above if the events specified in Article [] occur with respect to a company which has given a performance guarantee pursuant to Article [] subject however to Article [].

If the circumstance or circumstances that give rise to the right of termination under Article [] are remedied (whether by the Defaulting Company or by another Party or Parties in its behalf) within the ninety (90) day period, or such extended period as may be granted by the Government, following the notice of the Government's intention to terminate the Contract as aforesaid, such termination shall not become effective.

On termination of this Contract, for any reason whatsoever, the rights and obligations of the Contractor shall cease but such termination shall not affect any rights of any Party which may have accrued or any obligations undertaken or incurred including obligations under Article [], by the Contractor or any Party comprising the Contractor and not discharged prior to the date of termination.”

Clause option for host government mining agreements

Box 11

TERMINATION OF THIS AGREEMENT

“This Agreement shall be terminated only in the following circumstances:

After the expiry of the initial term specified in Clause [], if the Investor has not extended the term in accordance with Clause [];

If this Agreement⁷ is assigned by the Investor to other entities or persons without the Government's consent, and the Government gives a notice of termination to the Investor;

If both Parties consent to the termination of this Agreement, upon request by the Investor;

If the activities of the Investor are permanently halted by competent authority on the grounds of its bankruptcy, and its activities are not resumed within 120 (one hundred and twenty) Working Days from the date the Cabinet Member responsible for Mineral Resources gave written notice to the Investor to resume its activities;

If the Investor fails to supply a third party operated copper smelter as required by Clause [] or;

If the Government terminates this Agreement on a unilateral basis in accordance with Clause [].”

THE PARTIES

1. Overview

- Energy is a highly-regulated sector. Consequently, domestic regulations of the Host State may place restrictions on which entities can and cannot become parties to energy investment contracts. For instance, some domestic regulations may require foreign companies to incorporate a local entity that will be the party to the investment contract. Likewise, certain regulations could assign state-owned enterprises the power to enter into investment contracts, either in their own name or on behalf of the Host State.
- Within the confines of such domestic regulations, decision-makers aim to strike a balance between: (i) including, as parties to the investment contract, all entities which have specific rights and obligations pivotal for the development of the contract; and (ii) limiting the number of parties to avoid complicating the already elaborate process of structuring and negotiating energy investment contracts.
- Decision-makers may have an interest in including provisions that will help them become aware of any transactions that can impact ownership of the relevant project. Shareholding changes or transfer of rights are examples of such transactions.

2. Terminology

- Generally, the clause introducing the parties is simply called “The Parties”. Reference to the parties can sometimes also be found in the “Preamble” and the “Definitions” section of the contract.

3. Purpose and objective

- Proper determination of the parties to an investment contract is of utmost importance. It establishes who is legally entitled to demand the fulfilment of obligations under the contract, and from whom.
- It is crucial to devise all processes involved in the project, as well as the actors whose collaboration is necessary. Actors that can potentially paralyse the project, by refusing to collaborate, should either be included as parties to the contract or their performance should be regulated through a separate contractual instrument. Some potential stakeholders are:
 - **Specialized governmental agencies** in charge of energy policies, fiscal controls or law enforcement that may want to be in the loop during the negotiation and performance of large scale energy-related projects.
 - **Financial entities** such as banks, funds and insurance companies, which may be involved in financing the underlying operations of the project or in guaranteeing fulfilment of the obligations under the investment contract. Normally, a separate contract will govern their participation in the transaction.
 - **Corporate groups and conglomerates** that operate as a single economic unit. Such corporate groups typically assign a subsidiary to act as a party to the investment contract. However, in some cases, it may be advisable to clearly identify the parent company and require its direct participation in the contract.
 - **Local communities** that may be affected by the energy project, mainly the environmental issues. The Host State may mandate consultations with the affected population before concluding the investment contract. These communities, however, will normally not be parties to the contract. Sometimes, the Host State may opt to include some stakeholders in the contract, although not as parties. For instance, for dispute prevention and conflict management purposes, the Host State may want to include an obligation to notify the state entity in charge of legal defense in investment treaty related disputes. Often, the existence of a conflict is brought to the attention of high level

government officials only when they receive an arbitration notice. This potentially hinders the Host State's appropriate defense and response to the dispute.

- A number of cross-border investment contracts differentiate between identified groups of interested entities with a view to providing different allocations of rights and liabilities for particular breaches and their consequences. (These differentiated groups also serve other purposes, typically for tax treatment, for government facilitation, and for freedom of movement of personnel and goods.) For instance, the ECT Model HGA recognises three circles of interest on the investors' side. Each successive broader circle embraces the categories in the narrower one. By contrast, the geographically and structurally simpler investment in the Investment Agreement between the Government of Mongolia, Ivanhoe Mines Mongolia Inc. LLC, 2009 (the Ivanhoe IA) uses a more streamlined, two-tier grouping consisting of the project company (the "Company") at the centre and "the Company and its Affiliates" as an extended group. Even in this simpler example, however, the definition of "Affiliates" contains a convenient fiction that any member of each of the two parent groups "shall be considered an Affiliate" of any member of the other.

Box 1

Investor grouping under the ECT Model HGA:

"At the centre is the "Project Investor". This is either the joint venture entities that hold and undertake the project or the special purpose vehicle they have incorporated for that purpose.

At the intermediate level are "Interest Holders." This group includes the Project Investor and those entities that have a direct interest in the pipeline and its operation or an intermediate ownership interest. It encompasses the operating company, users affiliated to it and to the Project Investor and its owners.

Finally, the broadest circle consists of "Project Participants": that is, all those entities that have a recognised economic interest in the investment, comprising all Interest Holders, plus those who have financed them, and contractors, shippers and insurers of the physical structure and of the Project Activities.

Similar schemes can be seen in other cross-border pipeline agreements:

The Host Government Agreement between and Among the Government of the Republic of Turkey and the MEP Participants, 1999 (BCT HGA) uses the three groupings "MEP Participants" ⇒ "Interest Holder" ⇒ "Project Participant"

The West African Gas pipeline Project International Project Agreement between the Republics of Benin, Ghana, Nigeria and Togo and the West African Gas Pipeline Company Limited, 2003 (the WAGPP IPA) uses "Company ⇒ Affiliate of the Company ⇒ Shareholders"

The Host Government Agreement between the Government of the Republic of Turkey and Trans Anatolian Gas Pipeline Company BV, 2012 (the TANAP HGA) uses "TANAP Project Entity" ⇒ "Interest Holder" ⇒ "Project Participants". There is also an additional intermediate Investor Grouping of TANAP Consortium Members, who are all entities "holding a participating interest in the TANAP Project Entity."

4. Information to be assessed

- Decision-makers should aim at gathering all documents necessary to determine the legal, financial and technical capacity of the potential parties to the contract. Examples of such documents include, but are not limited to, the entities':
 - certificates of good standing
 - bylaws or statutes
 - prior experience (i.e., credentials)
 - financial statements
 - shareholders' registry bookSuch documents may help prevent potential challenges to the contract's validity, as well as fraud cases. They can also help ensure that the selected entity has sufficient funds (or access to such funds) to cover any liability resulting from a breach of the contract.

Box 2

Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)

In this case, the tribunal found that even though the relevant agreement had been negotiated, signed and performed by a state-owned oil company, the party to the agreement was the Republic of Ecuador. Clauses 3.3.22 and 3.3.25 of the Participation Contracts (PC) defined the “Parties” as:

“the Ecuadorian State, through Petroecuador, and the Contractor.”

The wording made clear that three entities were involved in the performance of the PC. However, the issue was whether these three entities were all independent parties to the PC. The Tribunal noted that the use of the commas combined with the conjunctive “and” suggested that the PC were entered into only by two parties. Furthermore, the use of the word “through”, which is the English translation of the original Spanish wording *“por intermedio de”* used in the PC, also suggested that one of the entities, i.e., the Ecuadorian State, was represented by another entity, i.e. Petroecuador. The Tribunal was confident that Perenco, Ecuador and Petroecuador all understood that the sentence “through Petroecuador” was intended to create an agency or representative relationship between Ecuador and Petroecuador.

This explanation was supported by Clause 3.3.32 of the PC for Block 21 which specified that “PETROECUADOR” represents the Ecuadorian State. Absent express or unequivocal reference to the contrary, an agent or representative cannot be regarded as an independent party to a contract. Therefore, unless it could be proved that Petroecuador could act independently from Ecuador’s instruction, on its own initiative and for its own benefit, Petroecuador could not be considered a party to the PC.

- Negotiators may want to include clauses in the investment contract prohibiting the assignment of the agreement, absent express approval of the other party. Further, they may consider including clauses eliminating any rights to third party beneficiaries.
- Generally, the “counter-party” of the public entity in an energy investment contract will be a private entity. Often, contracts are entered into by a special purpose vehicle created or designated by the investor for the specific project. At times, it is the law of the Host State that requires the creation of such entities.
- Whether the contract is entered into with the special purpose vehicle or with the parent company, can have a direct effect on the application of an umbrella clause. In some investment arbitration cases. It has been considered that investors may not invoke umbrella clauses for breaches by its subsidiaries.² On the other hand, some tribunals have found that foreign investors owning stock in a national company might have a right to claim for the breach of obligations owed to the company, when such breach affects the value of the shares.³
- Special attention should be paid to the wording concerning the exact role of a state-owned enterprise in the contract. This is because when a state-owned enterprise enters into a contract on its own behalf (as opposed to the Host State) there may be a presumption that its acts are commercial and that its assets serve non-sovereign purposes. Such presumptions, in turn, can be taken into account by a court when faced with matters concerning state immunity of jurisdiction or execution.

² *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, § 384; *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004, § 204; *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, § 208.

³ *CMS v. Argentina* (ICSID Case No. ARB/01/08), Award, 12 May 2005, § 20 – later annulled for failure to state reasons; *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, § 938 – 942; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004, § 54.

- Where the Host State has immunity from jurisdiction, its property is protected from being sued in the courts of another state. Similarly, in the case of immunity from execution, the Host State and its property may not be subject to the enforcement powers of another state's courts. This means, for example, that the Host State's assets cannot be seized by a foreign court.
- As a general rule, states can waive their immunity. Immunity from jurisdiction will be deemed implicitly waived whenever there is an arbitration agreement. However, an arbitration agreement is generally not considered an implicit waiver to the Host State's immunity from execution. Therefore, an investor entering into a contract with any public entity, which may potentially enjoy state immunity, should obtain an express immunity waiver from such a public entity. Moreover, nowadays states have assets in the territory of other states, for which courts may not be allowed to issue orders, e.g., attaching the entity's assets in that territory.
- On the other hand, under an umbrella clause, like the one contained in article 10(1) of the ECT, a breach of a contract by the Host State may become a violation of the ECT. To ensure that the parties have the required privity, in several investment arbitration cases tribunals have first examined whether the investor and the Host State (in its own name) are actually parties to the contract and only then proceeded to make a determination on the purported breach of the umbrella clause. In such a case it is probable that, where a public entity is the party to the investment contract, there is a smaller chance of success when elevating *strictu sensu* contractual claims to treaty claims under the umbrella clause. However, it must be noted that some tribunals have extended the effects of the umbrella clause to the Host State, even if the investment contract was entered into by an entity different from the state.
- Where the Host State has waived its immunity of jurisdiction and/or execution, it can reasonably request its counter-party to waive any right to diplomatic protection, *i.e.*, the right to request his State of nationality to take action against the Host State on his behalf.

Box 3

Eureko v. Poland

The claimant had entered into a contract with the State Treasury, which failed to honor its agreement. The tribunal treated the State Treasury, at all times, as a governmental arm of Poland, and held that all:

"the actions and inactions of the Government of Poland that [were] in breach of Poland's obligations under the Treaty [i.e. fair and equitable treatment, full protection and security, and indirect expropriation] also are in breach of its commitment under Article 3.5 of the Treaty [umbrella clause]."

SGS v. Pakistan

The tribunal held under the international law rules on state responsibility that:

"the 'commitments' subject matter of Article 11 [umbrella clause] may (...) be commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are (...) attributable to the State itself".

5. Inputs of additional specialists

- When studying the documents listed in section 4 of this chapter, input by certain specialists may be useful. For instance, accountants and technical experts can help determine the entity's real and effective financial and technical capacity. Moreover, a corporate lawyer can help identify the entity's ultimate controller, as well as any irregularities in its organization.

- An expert in international law can define the investment treaty protections that could be applicable to the investment, for instance, those of the ECT. In fact, whenever there is a project related to the “Economic Activities in the Energy Sector”⁴, carried out in the territory of an ECT Contracting State by nationals of any other Contracting State, even if no reference whatsoever is made in the contract to the ECT, it is likely that some provisions of the ECT will apply to the contract.

Box 4

The ECT does not define “Investment Agreements” or the parties to such agreements as opposed other investment protection agreements (e.g., the 2012 US Model BIT). However, it does contain two provisions concerning this subject matter.

First, pursuant to Article 1(6)(f) “any right conferred by law or by contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector”, which is owned or controlled by an investor, is defined as a protected investment. As such, the investment contract is protected against, inter alia, (i) unlawful expropriation and (iii) unfair and inequitable treatment.

Second, the last sentence of Article 10(1) embodies a so-called “umbrella clause”, pursuant to which “each Contracting Party shall observe any obligations it has entered into [e.g., by means of an IA] with an Investor or an Investment of an Investor of any other Contracting Party.” As mentioned in the *Energy Charter Treaty: A Reader’s Guide (2002)* “Article 10(1) has the important effect that a breach of an individual investment contract by the Host State country becomes a violation of the ECT. As a result, a foreign investor and its home country may invoke the dispute settlement mechanism of the Treaty.”

6. Negotiation goals

- While negotiating this clause, the Host State and the investor usually have the same goals. Both intend to limit the extent of their liability as much as possible (for example, through intermediate legal entities) and at the same time ensure that their contractual counter-party will be the one facing any potential liabilities.

7. Model clause options

Clause option for the Preamble of the contract

Box 5

Model Mine Development Agreement of the International Bar Association:

“The parties to this Agreement are:

First, _____ [the nation of _____, province of _____state of _____ territory of _____ (the “state”)] or [insert name of the State owned entity] or [insert name of the State owned entity, on behalf of the State].

Second, (the “Company”) which is a duly authorized and constituted corporation existing under the laws of _____ and qualified to do business in the State.

⁴ ECT, Article 1(5): “Economic Activity in the Energy Sector means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises”. ECT, Understandings: “2. With respect to Article 1(5) (a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector. (b) The following activities are illustrative of Economic Activity in the Energy Sector: (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium; (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources; (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines; 26 (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations; (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants; (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency”.

*Whereas, the State owns all subsurface minerals in the State, and
Whereas, the Company desires to conduct [energy operations] in [the designated Area],
And [...];
now, therefore, in consideration of the mutual rights and obligations contained in this Agreement and other good and
valuable consideration, the parties agree as follows:"*

Option for the Definitions clause

Box 6

Model Mine Development Agreement of the International Bar Association:

"Affiliate" means an entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the Company. For purposes of this definition, "control" means ownership of greater than 50% of the share capital of a company and/or the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise.

"Company" has the meaning set forth in the preamble.

"State" has the meaning set forth in the preamble

"Parties" means the Company and the State.

"Parent Company" means _____ "

Option for waiver of immunity of jurisdiction and/or execution clause

Clause option 1

Box 7

ICSID Model Clause for waiver of immunity of execution:

"The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement."

Clause option 2

Box 8

Agip/BP/Etal Production Sharing Agreement Dated 18 November 1997 in respect of the North Caspian Sea (Kashagan) Among Agip Caspian Sea V.B., et al., 39 Basic Oil Laws & Concession Contracts: Russia & NIS 1, 109 (2003):

"Sovereign Immunity: To the extent the [Insert name of the State] or [Insert name of the SOE] has or hereafter may acquire any immunity from jurisdiction, with respect to themselves or their property which is used in a commercial capacity, in any arbitration under Section [insert cross reference], or in any proceeding to confirm or enforce such an arbitration award, each hereby irrevocably waives such immunity in respect of its obligations under this Agreement and agrees that it shall not raise the defense of sovereign immunity in respect of (i) any arbitration or arbitration award under [insert cross reference], (ii) any proceeding to confirm or enforce such an arbitration award or (iii) any execution of such an arbitration award with respect to assets used in a commercial capacity. The foregoing waiver and agreement are intended to be effective in any jurisdiction in which any such arbitration or any such proceeding with respect to an arbitration under this Agreement may be commenced. This waiver and agreement shall not be effective in respect of any person other than Contractor and the Contracting Companies and their permitted assignees acting under the specific circumstances contemplated hereby."

Clause option 3

Box 9

Oman Model Exploration & Production Sharing Agreement of 2002, Basic Oil Laws & Concession Contracts: Middle East, 45 (2003):

“Government hereby represents that no law of [Insert name of the State] would prevent a valid and effective waiver by Government of any such immunity were it to exist.”

Clause option 4

Box 10

Based on the Model Mine Development Agreement of the International Bar Association

Option 1

“The State irrevocably waives any claim to state or sovereign immunity: (i) in respect to proceedings on the merits of any claim which is the subject matter of the arbitration [insert cross reference to the arbitration clause]; (ii) in respect of proceedings to recognize or to enforce or to execute any arbitration award including, without limitation, immunity from service of process and from the jurisdiction of any court; and (iii) in respect of the execution of any such award against the assets or property of the State assets held by the State for commercial purposes or otherwise.”

Option 2

“The STATE waives any right to assert any defense of sovereign immunity as to it and its property in respect of: (i) the institution of any arbitration proceeding pursuant to this Agreement, or the grant of interim relief or provisional measures in connection with such a proceeding; and (ii) the enforcement and execution of any award rendered by an arbitral tribunal pursuant to this Agreement.”

Option 3

“The Parties hereby commit to fulfill the execution and enforcement of the arbitral award and shall not raise any defense to its execution and enforcement.”

Box 11

Agreement with a State Owned Entity of a Sovereign State

“[The SOE] agrees that the signature, performance and execution of this Agreement is a private and commercial act. Moreover, [the SOE] agrees unconditionally and irrevocably that (i) if any proceedings (including arbitration proceedings) are commenced against it or its property, regarding this Agreement or any transaction contained herein, it will not claim immunity in the said proceedings; (ii) waives any right to immunity which it possessed now or may acquire in the future in any jurisdiction with respect to any such proceedings; (iii) gives its general consent to any execution against it in any proceedings (including arbitration proceedings) in any jurisdiction, in granting any reparation in connection with the said proceedings.”

Option for the clause on Notifications

Box 12

Based on the Model Mine Development Agreement of the International Bar Association

*“All notices to be made or given by a party hereunder (each, a “notice”) shall be in writing and delivered:
to [STATE or State owned entity]:
to [COMPANY]:
to [State entity in charge of the State’s defense in investment related disputes]
to [Guarantor, if applicable]:”*

Main options for the clauses on assignment, succession and change of control

Clause option 1

Box 13

The Model Mine Development Agreement of the International Bar Association

“29.0 Assignment

29.1 Affiliated Company Assignment

The Company shall have the right to assign all (but not less than all) its rights and interest under this Agreement to an Affiliate subject to notification to the State, provided that the Affiliate acknowledges and agrees to assume all of the obligations of the Company under this Agreement, has the capacity to perform those obligations, and that the parent Company guarantee the obligations of the Affiliate to the same extent of the guarantee provided by the parent Company on behalf of the Company.

29.2 Third Party Assignment

The Company shall have the right, with the prior written approval by the State, which approval shall not be unreasonably withheld or delayed, to freely assign all its rights and interest under this Agreement to a third party, provided that third party acknowledges and agrees to assume all of the obligations of the Company under this Agreement, and has the capacity to perform those obligations. Nothing in this Section shall grant the State any right to approve any arrangement by the Company for the financing of the project, the creation of security interests or the transfer or assignment of interests in this Agreement or in respect of the project in connection with such financing.

29.3 Capacity of successors and Assigns

No assignment of any or all of the Company's rights hereunder shall be made, and none shall be effective, if the assignee lacks the technical, financial and managerial capacity to honor the obligations in this Agreement.

29.4 Release

On any effective assignment of this Agreement to a third party approved by the State, the Company and the parent Company shall be released from liabilities under this Agreement to the extent assumed by the third party.

29.5 No Assignment by state

The State shall not transfer or assign its rights or obligations in this Agreement or create or permit to be created any encumbrance or claim on its rights in this Agreement”

Clause option 2

Box 14

The Model Mine Development Agreement of the International Bar Association

14.2 Assignment by COMPANY.

(a) The rights and interests of COMPANY under this Agreement may be transferred or assigned and the duties and obligations of COMPANY under this Agreement may be delegated, in whole or in part, at any time only (i) as provided in this Article 14, or (ii) to an Affiliate of COMPANY (for the duration of the time such Affiliate remains an Affiliate of COMPANY), provided, however, that COMPANY shall remain liable for the performance of all such obligations.

(b) COMPANY may transfer or assign fifty-one percent (51%) or less of its rights, interests, and/or obligations or both under this Agreement to a Qualified Successor at any time without the prior written consent of THE STATE.

(c) Except as provided in Section 14.2(a), COMPANY may not transfer or assign more than fifty-one percent (51%) of its rights, interests and/or obligations under this Agreement without the prior written consent of the STATE, which consent shall not be unreasonably withheld, conditioned or delayed.

(d) For purposes of this Section 14.2, a Change of Control of COMPANY (to any Person that is not an Affiliate of COMPANY) or a Change in Management shall be deemed a transfer by COMPANY of its rights, interests and/or obligations under this Agreement.

(e) COMPANY shall give the STATE Notice at least thirty (30) Days prior to any proposed transfer of its rights, interests and/or obligations under this Agreement, other than a transfer subject to Section 14.2(a) or Section 14.2(b). Such Notice shall specify (i) the name and address of the proposed transferee or assignee, (ii) a description of the technical capabilities and mining experience of the proposed transferee or assignee, and (iii) reasonable information on the financial stability of the proposed transferee or assignee. The STATE shall give expedited attention to such Notice, and in any event shall be deemed to have approved the proposed transferee or assignee if it fails to approve or disapprove the proposed transferee or assignee within ninety (90) Days after receipt of the Notice of the proposed transfer or assignment.

(f) Nothing in this Section 14.2 shall grant THE STATE any right to approve any arrangements by COMPANY for the financing of the construction, development or expansion of the Mine, the creation of security interests or the transfer or assignment of interests in this Agreement or in respect of the Mine in connection with such financing.

(g) Any transferee or assignee of the rights and obligations of COMPANY under this Agreement (other than in the case of transfer or assignment of equity in COMPANY) shall agree to assume the obligations of COMPANY under this Agreement, and such provision shall be incorporated in and made part of the instrument of assignment or transfer, a copy of which shall be furnished to the STATE.[...]

17.4 Successors and Assigns.

Subject to the limitations on transfer contained in Article 14, this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties.

Clause option 3

Box 15

The Model Mine Development Agreement of the International Bar Association

“22 Assignments:

22.1 To Affiliates

The Parties acknowledge that Licensee contemplates transferring this Agreement and the License, and its rights and interests thereunder, To an Affiliate. The Licensee shall have the right to transfer its rights and interest under the License and this Agreement to an Affiliate subject to notification to the Licensing Authority.

22.2 To Third Parties

Licensee shall have the right to freely transfer its rights and interest under the License and this Agreement to a third party, but subject to prior approval by the Licensing Authority, which approval shall not be unreasonably withheld or Delayed”

Clause option 4

Box 16

The Model Mine Development Agreement of the International Bar Association

“33.5 Assignment and Succession

The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the permitted successors by operation of law and permitted assignees of the parties including without limitation in the case of the (Government), all future manifestations or forms of public power exercising sovereign authority over all or part of the present territory of (Country).”

Main option for clause on third party beneficiary

Clause option 1

Box 17

[Except as provided in _____] nothing in this Agreement, express or implied, is intended to or shall confer upon any other person any right, benefit, or remedy of any nature whatsoever or by reason of this Agreement.

8. Contract management

- The Host State could require its counter-party to inform the details of its control chain up to its ultimate beneficiary and any changes thereof, as well as of any transfer of rights under the contract. Such a measure could serve two purposes. First, it could aid corruption prevention. Second, it could aid in determining the application of the ECT’s denial of benefits clause (“DOB Clause”). Under the DOB Clause:

“Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the

Area of the Contracting Party in which it is organized; or (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party: (a) does not maintain a diplomatic relationship; or (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.”

- Certain investment tribunals have found that, for operation of a DOB Clause, it is necessary not only that the circumstances provided therein occur (*e.g.* the investor claiming protection is a legal entity controlled by citizens or nationals of a third state), but also that the Host State notifies the exercise of the rights granted by virtue of the DOB Clause. In turn, said notification would operate only prospectively from the date of invocation.⁵
- States should be careful when penalizing investors for unauthorized transfer of rights, because such penalties could potentially constitute a breach of the Host State’s treaty obligations⁶.

⁵ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, §§ 155, 157, 161. It must be noted that in a recently published case, *Khan Resources v. Mongolia*, the respondent criticized the approach taken in earlier cases (*Yukos* and *Plama*), but the tribunal considered that it had “a duty to take account of these decisions, in the hope of contributing to the formation of a consistent interpretation of the ECT capable of enhancing the ability of investors to predict the investment protection which they can expect to benefit from under the Treaty”. *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia* (UNCITRAL, PCA Case No. 2011-09), Decision on Jurisdiction, 25 July 2012, released in 2015.

⁶ In *Occidental v. Ecuador*, the investor transferred to a third party 40% of the economic interest held under a participation contract for the exploration and exploitation of oil, without governmental authorization, which was legally and contractually required. The tribunal found that the unauthorized transfer constituted a breach of the contract and Ecuador’s Hydrocarbons Law. Still, the tribunal concluded that the government’s response to forfeit the contract – “caducidad”, a sanction also provided under the Contract and Ecuadorian law - was disproportionate and amounted to a breach of the FET standard provided in the US-Ecuador BIT: “It follows that even if OEPC, as the Tribunal found earlier, breached Clause 16.1 of the Participation Contract and was guilty of an actionable violation of Article 74.11 (or Articles 74.12 or 74.13), the Caducidad Decree was not a proportionate response in the particular circumstances, and the Tribunal so finds. The Caducidad Decree was accordingly issued in breach of Ecuadorian law, in breach of customary international law, and in violation of the Treaty. As to the latter, the Tribunal expressly finds that the Caducidad Decree constituted a failure by the Respondent to honour its Article II.3(a) obligation to accord fair and equitable treatment to the Claimants’ investment, and to accord them treatment no less than that required by international law”.

I. Legal Nature

1. Overview

- The legal framework of an energy investment contract is a difficult subject that requires careful and sound drafting. This is because these contracts operate in the complex interrelation of different legal spheres – both national and international. The understanding of what the legal framework of investment contracts is, how it functions, and how it can be created by the contracting parties has therefore been and still is changing and evolving. Some domestic legal orders provide requirements for this interrelation while others do not. It is a crucial task for the negotiators to set out clear provisions in this regard.

2. Terminology

- Investment contracts rarely explicitly clarify their own legal nature. As a result, there is no established terminology for this type of clause. It can best be described as “the legal nature” of the contract.
- The legal nature of the contract can be construed from provisions such as “change of law”, “certain covenants and consents of the government”, “legislative process” or “government agreements and undertakings”. Further, recent investment contracts may contain specific clauses on the “nature of this agreement”.

Box 1

Greek Host Government Agreement of the Trans Adriatic Pipeline, paragraph 26:

“Nature of this Agreement: This Agreement shall at all times have a dual nature, being both part of Greek Law (including as the implementing law of the Intergovernmental Agreement) and a private contract between the Project Investor and the State.”

3. Purpose and objective

- The legal nature of an investment contract is a crucial element of its overall legal framework. It is therefore advisable to clarify the legal nature in the contract itself in order to avoid uncertainty. There are multiple approaches to determine the nature of an energy investment contract concluded between a Host State and an investor. Different legal systems ascribe different legal natures to investment contracts. From this classification follows the position of an investment contract within the hierarchy of a legal order as well as the application of certain rules.
- Most legal systems distinguish between civil or private contracts on one hand (with commercial or economic contracts usually being a sub-category thereof) and public law contracts (also known as administrative or government contracts) on the other. The treatment of these contracts differs from system to system. For instance, in civil law systems public and private law contracts are governed by different sets of rules and are brought before different courts. However, in common law systems public law contracts are usually considered ordinary contracts to which the general extensive freedom of contract applies. The clarification of the legal nature of an investment contract is therefore mainly relevant for civil law systems.
- Energy investment contracts comprise both private as well as public law elements. The presence and extent of these elements, however, depends on the characteristics of the specific investment project at hand. Private (or even commercial) law elements can be seen in the profitability of the project or in certain provisions on the sale and purchase of oil or gas, on insurance or on liability of the parties.

There are usually more private law elements in a commercial transaction than, for example, in an infrastructure investment project.

- Public law elements emerge from the strong public policy considerations that may generally underpin governmental contracting, for example, the negotiation, conclusion, operation and termination of such contracts. In addition, public law elements may also stem from the public interest that a specific project may serve. If a project is in the public interest, it can be excluded from certain obligations or restrictions that would apply to “private projects”. In most states for example, compulsory acquisition, that is necessary for the realisation of many projects, requires the project to serve a public interest. It is for this reason that certain contracts expressly state their public interest character. In other cases, however, the very same character is explicitly denied.

Box 2

The protection of public interest in the Trans Adriatic Pipeline Host Government Agreement of Greece, paragraph 14.1:

“The State acknowledges and agrees that the Project is a project of national importance and in the national and public interest of the Hellenic Republic.”

Box 3

Exclusion of public interest under the Trans-Balkan Intergovernmental Agreement, paragraph 18:

“The States agree that (...) the Project is not intended or required to operate in the service of any public benefit or interest in the Territories of any of them (...).”

- Generally, if a legal system distinguishes between private law and public law contracts, this distinction manifests itself through three aspects:
 - **Privity of contract:** parties to a private law contract are generally considered equal players, while the investor in an administrative contract has a subordinate role vis-à-vis the state party.
 - **Freedom of contract:** private law contracts generally enjoy contractual freedom, while administrative contracts are subject to regulatory rules.
 - **Validity of contract:** private law contracts are generally valid only between the contracting parties, while administrative contracts might also have validity for third parties.
- In the case of an agreement between the Host State/state owned enterprise and a foreign investor, many domestic laws may require the conclusion of an administrative contract or directly classify such agreements as administrative contracts. In practice, many investment contracts are in fact administrative contracts.

4. Information to be assessed

- The legal nature of an investment contract mainly depends on the system and the requirements of the Host State’s law. It is therefore crucial to gather all information on the applicable legislation.
- The source of the applicable legislation can be found in a variety of legal texts. Some states have dedicated legislation governing the conclusion of state contracts. The domestic law may, for example, provide for rules on general or on energy specific investment contracts (e.g. national foreign investment law, law supporting direct investment, etc.). Very often, rules on state contracts can also be found in statutes and regulations on the actual subject matter (e.g. energy law). Further, rules regarding the capacity of a state entity to conclude investment contracts can be found in the legislative

act creating that entity. Therefore, a thorough assessment of the respective domestic law is always necessary.

- Where the formation of the contract is governed by the laws of the Host State, generally two procedures can be distinguished: the free negotiation of a contract and the tender procurement procedure. In both cases, the investor is interested in avoiding cost and effort unless the negotiation concurs with the prescribed procedures and in good faith. However, the Host State or its representative may withdraw the call for tender or cancel the tender procedure or may withdraw from further negotiation. Such behaviour may trigger a claim for damages, but rarely a claim to continue negotiations or even to conclude the contract under *culpa in contrahendo* in civil law systems⁷ or under special aspects in common law systems⁸. Especially state-owned enterprises may be under an obligation to contract due to their monopoly in the Host State. Such claims can be fostered by a letter of intent, an agreement of intent, or a similar pre-contractual agreement (normally setting out the time frame for contract conclusion and the routes and remedies in case of failure to agree).
- This situation of pre-contractual uncertainties will usually not repeat itself in case of a multi-stage contract. Here you have a complete contract or a at least a basic contract with follow-up agreements on the various stages of development (for example, exploration, production, down-stream activities and decommissioning). Having a complete contract for all stages⁹ may be burdensome for investors submitting tender offers as well as to the procurement officers who have to evaluate the proposals; and it may difficult or even illusionary, as there a numerous specifics which are difficult to foresee, e.g. market and price situations, new standards and industrial techniques, new environmental and other public law obligations; the adjustment of price formulas and income splitting formulas is especially prone to dispute. In view of such problems, the basic agreement should include an obligation to contract for the next stages and determine a route or a mechanism to achieve a balanced contents for the next contract, e.g. an obligation to negotiate and an obligation to submit to mediation or an expertise, an alternative dispute resolution as well as a guideline for keeping the balance of the contract, e.g. by a stabilization clause.

5. Negotiation goals

- The negotiation positions of the parties are largely determined by the general applicable legal system. While in a common law system the parties might be able to fully exercise their extensive contractual freedom, there may be limitations on negotiation in a civil law system.
- Negotiation on the legal nature can only take place in the absence of national requirements that determine a certain legal nature. In this case, the contracting parties can decide:
 - to ascribe a certain legal nature to the investment contract that may or may not be stipulated in domestic law for other kinds of contracts; or
 - not to explicitly regulate or indicate the legal nature altogether; and

⁷ T. Inden/K.N. Oleson, The Public Sector and the Obligation to Contract, European Review of Contract Law 12(2016) 77-95, <https://doi.org/10.1515/ercl-2016-0006>

⁸ V. Klappstein, The obligation to contract in British law, Journal of Governance and Regulation 3 (2014) 50-64, http://doi.org/10.22495/jgr_v3_i2_cl_p5; see also Quebec Court of Appeal, Sing v. Kholi, 2015 QCCA 1135, with discussion in: D. Mitchell, Contracts: The consequences of failed negotiations, <http://imk.ca/en/blog/contracts-consequences-failed-negotiations>

⁹ E.g. FAO Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmenistan, extwprlegs1.fao.org/docs/texts/tuk81989E.doc

- (in either of the two aforementioned options) to make the contract part of the domestic law and give it the legal nature of a parliamentary act or decree (thereby determining its status in the domestic law hierarchy).
- Investors will generally appreciate a greater freedom of contract and may not want to ascribe a definite legal nature to the contract that entails any requirements. At the same time, the incorporation of an investment contract into domestic law via means of ratification strengthens the investors' position as it gives the provisions of the contract a certain rank and status that an ordinary contract – whether private or administrative – would not hold. The Host State, on the other hand, may prefer the classification of an administrative contract since the contract will be subject to the domestic law and will give the Host State certain regulatory powers.

6. Current trends

- In the past decades, the negotiation climate has been rather investor-friendly. In two known cases (the HGAs of the BTC Pipeline Project and the South Caucasus Pipeline Project), the investment contracts were not only ratified into the domestic legal system, but were made the “prevailing legal regime” under the relevant domestic law with respect to the specific project. This approach was meant to overrule any domestic legal act, even constitutional law, in favour of the specific project. In both the cases, this practice was widely opposed and even subsequently modified. Such handling is nowadays therefore hardly implemented, which is partially due to increasing public opposition and partially due to an increased awareness and a better consultation on the state side. The general trend leans towards a more nuanced balance of both investor and public policy interests. Making an investment contract the “prevailing legal regime” is therefore not a suggested policy option anymore.

7. Interaction with other relevant provisions

- This section should be aligned with the clauses on
 - Applicable law
 - Stabilisation clauses
 - Change of law
 - Relationship with international law

8. Model clause options

Clause option 1

- In case of an obligatory provision of domestic law stipulating or determining a certain type of contract, the legal nature is determined by the applicable law.

Box 4

“This [name of contract] is an [administrative/public law/private law] contract according to [Article ... of applicable domestic law].”

Clause option 2

- In the absence of domestic law requirements, it is for the parties to decide on the legal nature of their investment contract, which may as well include the decision not to explicitly classify the contract in this regard.

Box 5

“This [name of contract] shall at all times have the nature of an [administrative/public law/private law] contract.”

Clause option 3

- In case of a hybrid, very complex or even undefinable legal nature of the contract or in case the contracting parties choose not to ascribe a certain legal nature to their investment contract, it might be reasonable to clarify what the contract is not.

Box 6

"This [name of contract] shall not be deemed an [administrative/public law/private law] contract (according to [Article ... of domestic law])."

Clause option 4

Box 7

In case where the legal nature of the contract is characterized as "administrative" or "public law", it is advisable that the dispute settlement clause of the contract includes the following paragraph to avoid problems regarding recognition and enforcement of the award:

"Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of the New York Convention."

Additional clause option 5

- The investment contract can also form part of the respective Host State's law. In the Trans Adriatic Pipeline, for example, the host government agreements were both private law contracts between the project investor and the Host State, and at the same time part of (public) Greek or Albanian law respectively. In fact, in a few cases, investment contracts have been ratified by an approval law and were thereby made part of the domestic law itself. This is, however, not to be confused with the ratification that might be necessary to implement certain provisions of an investment contract.
- It is important to note that although some legal systems grant energy investment contracts the force of parliamentary law or of decrees, and although there are rare historical examples of it, it is not advisable to give these contracts the rank of constitutional law. Such an elevation in hierarchy of norms raises very fundamental systematic concerns of legal theory. **It is therefore not a policy option.**

Box 8

"This [name of contract] shall be given the force of [e.g. Parliamentary law] [and shall take precedence over any decree or administrative order]."

Or

Box 9

"This [name of contract] shall form part of [name of Host State]'s Law."

- Due to the existing range of options, this Handbook can neither set out all options nor can it recommend a certain approach. The specific characteristics of each project and of each legal system will have to be assessed carefully in any case. But where a legal nature can be ascribed to the investment contract, a clear indication will serve the purpose of legal certainty.

II. Applicable Law

1. Overview

- A contract's applicable law is usually either regulated in a distinct provision or in the provision on "arbitration" or "dispute resolution".

2. Terminology

- Where parties are free to choose the applicable law the provision is usually named "choice of law". Where the Host State's law provides obligatory rules, the clause is often named "governing law". A generic and therefore suggested term is "applicable law".

3. Purpose and objectives

- Whether contracting parties can choose the applicable body of law depends on the contractual freedom granted by the Host State's domestic law.
- In civil law systems with an established administrative contract doctrine, and in common law systems that are silent on the applicable law, the Host State's domestic law will typically apply. This is because the contractual obligations will generally be performed in the Host State. In other cases, parties to an investment contract may choose the body of law that is applicable to their contract. This contractual freedom is realised by most investment contracts in practice.
- Besides the domestic law of the Host State, the chosen law can also be a third state's domestic law, international rules and principles or a combination of the different available options.
- Contracting parties may decide not to opt for an express choice of law. In such a situation, the arbitral tribunal will look for an implied choice and, in the absence of both an express and implied choice, will apply general rules to determine the applicable law (e.g. the law governing the seat of arbitration). To avoid such uncertainty an express choice is highly recommended.

4. Negotiation goals

- The Host State and the investors are interested in a body of law that provides for a predictable and stable legal framework.
- The Host State generally prefers to subject the investment contract to its own domestic law. This is because the domestic law is naturally more familiar to the state party and its negotiators. In addition, the domestic law may be considered the most suitable choice in certain cases where the place of performance is the Host State.
- Investors, on the other hand, may try to avoid applying the Host State's law as the sole applicable law. This is because it gives the Host State power to unilaterally modify the applicable law and tends to create an imbalance between the contracting parties. It is for this reason that in many instances, the application of the Host State's law is limited to a certain time of validity (e.g. to the signing date -> *stabilisation clauses*).

5. Interaction with other relevant provisions

- This section should be aligned with the clauses on
 - Arbitration/dispute resolution
 - Legal nature;

- Stabilisation clauses; and
- Change of law

6. Model clause options

Clause option 1

- A common option is to subject the investment contract to one national legal order as a whole. In fact, within investment contracts on cross-border pipeline projects, it is the most frequently used option.
- The choice of the Host State’s law is preferable since the performance of the contract will take place in its territory. The domestic law will best fit the political, cultural and other characteristics of the Host State and will, therefore, generally facilitate smooth operation and enforcement. Concerns of the investors regarding the power of the Host State to unilaterally change the applicable law can be met through stabilisation clauses.
- The advantage of subjecting the contract to one national legal order as a whole is to avoid uncovered areas. National laws either provide for substantial provisions themselves or refer a certain topic to another set of rules by means of its provisions on conflict of laws. The contract is thereby implemented and enforced in a coherent manner.
- Reference can be made to international law for issues that go beyond domestic law (e.g., cross-border issues, customs and duties, tax, dispute resolution).

Box 10

Applicable law clause in the International Centre for the Settlement of Investment Disputes (ICSID) Convention, article 42:

“(1) the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. in the absence of such agreement, the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) the tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) the provisions of paragraphs (1) and (2) shall not prejudice the power of the tribunal to decide a dispute ex aequo et bono if the parties so agree.”

- The reference to one national legal order as a whole can be phrased in the following manner:

Box 11

“This [name of contract] shall be governed by and interpreted in accordance with the law of [name of the state].”

- If a body of law other than that of the Host State is chosen, but the contract still makes sporadic reference to provisions of the Host State’s law, it is advisable to additionally include the following provision in order to avoid inconsistency.

Box 12

“Provisions of the laws of [name of Host State] which are referred to in this contract shall be interpreted in accordance with the laws of [name of Host State].”

Clause option 2

- A second option is to ascribe different bodies of law to particular contractual issues or to exclude particular contractual issues from the application of certain bodies of law. Through this model, different national legal orders can be combined to apply simultaneously to one investment contract.
- This approach may be necessary in case mandatory domestic law apply only to specific topics (e.g. environment, foreign exchange, taxation, etc.) and the contracting parties are otherwise free to choose a third state's law. This leads to customised application of laws that are best suited to the project at hand. It does, however, increase the risk of uncertainty and legal gaps.
- An exclusion of certain rules is often done for rules of conflict of laws that “require the application of the laws of any other jurisdiction to govern this article”. A customised provision on applicable law, excluding certain application areas, can be phrased in the following manner:

Box 13

“This [name of contract] shall be governed by and interpreted in accordance with the substantive laws of [name of the state] except for rules of [...]”

- Exclusion can also be made for principles that “would prevent adjudication upon or accord presumptive validity to, the transactions of sovereign states”. A customised provision on applicable law excluding provisions with a certain legal effect can be phrased in the following manner.

Box 14

“This [name of contract] shall be governed by and interpreted in accordance with the substantive law of [name of the state], but excluding any rules or principles that would [...]”

- Yet another option is to choose principles common to both the law of the Host State and the law of the investor's home state with a third option in case no common principles exist:

Box 15

“This [name of contract] shall be governed by and interpreted in accordance with principles of the law common to the law of [name of the Host State] and [name of the home state], and to the extent that no common principles exist in relation to any matter then in accordance with the principles of the law of [name of third state].”

Clause option 3

- In addition to clause option 1 or 2, the investment contract can be subject to principles of (customary) international law. However, the application of international law only is not an option since public international law governs the relationship among sovereign states and not between a state and a private investor.
- Many international rules and principles do not fit the characteristics of investment contracts and should be used with caution, if at all. Common principles of international law that investment contracts sometimes refer to include: *pacta sunt servanda* (“agreements must be observed in good faith”), *clausula rebus sic stantibus* (“things thus standing”, allowing for agreements to become inapplicable because of a fundamental change of circumstances), and *venire contra factum proprium* (“No one may set himself in contradiction to his own previous conduct.” This holds contracting parties accountable for the promises they make).

- Principles of international law can either be applied to the whole investment contract or to specific topics only (e.g. for expropriation).
- A general application of international law principles can be added to policy option 1 or 2 in the following manner:

Box 16

“This [name of contract] shall also be subject to the international legal principle of [...].”

Or

Box 17

“This [name of contract] shall also be subject to such rules of international law as may be applicable.”

7. Contract management

- It is necessary for the contracting parties to keep track of changes and recent developments in the applicable body or bodies of law.

III. Relationship with Public International Law

1. Overview

- Public international law is a body of rules that comprises rights and obligations of the states and thereby mainly governs the interaction among states themselves. Some of these rights and obligations concern the sphere of energy investment projects, such as obligations towards the environment or towards the investors themselves.
- It is important for an investment contract to set out its relationship to public international law or to certain agreements in particular, as the contract itself operates in a different body of law, namely the domestic law(s) chosen as the applicable law (-> *legal nature*, -> *applicable law*).

2. Terminology

- There is no consistent practice in investment contracts regarding their relationship with public international law. Hence, there is also no established contractual terminology.
- Some investment contracts cover the topic, among many others, under the titles of “representations and warranties” of the state or “government agreements and undertakings”, while others contain distinct provisions on the “relationship to other agreements” or the “relationship to treaties”.
- For the sake of convenience and certainty, this Handbook suggests a dedicated clause on the “relationship with public international law”.

3. Purpose and objective

- Public international law as such does not give an investment contract enforceable effect. However, rights and obligations stipulated under public international law can still apply to and affect any given investment contract.

- When drafting investment contracts, public international law can come into play in two different ways. Investment contracts may be relevant to (1) project unspecific public international law and (2) project specific public international law.
- Project unspecific public international law includes applicable bilateral investment treaties (BITs), multilateral investment treaties such as the ECT or any other treaty signed by the Host State, which may apply to any of the subjects concerned. Primary and secondary EU law is also public international law within this sense. The Host State is obliged to abide by these rules if and to the extent they are legally binding. Internal rules or provisions of investment contracts cannot be invoked to justify an infringement of international law.
- Investment contracts relevant to project specific public international law, namely intergovernmental agreements (bilateral or multilateral intergovernmental agreements), are specifically designed and concluded for the very project at hand. Intergovernmental agreements (IGAs) are mostly signed where an investment project has a cross-border nature and is implemented in two or more state territories, such as cross-border pipeline projects. Such IGAs usually form the international legal framework of a legal regime applicable to a specific investment project. In some cases, investment contracts are even made an integral part of the corresponding IGA(s).
- In case of project unspecific public international law, it is important to ascertain whether or not a treaty is applicable. For instance, if the scope requires an assessment of a legal term (such as “investment” in Article 1(6) of the ECT), the contract can clarify the applicability of such a term and subject itself to the scope of the given treaty. However, it is important to remember that this can only be treated an indication of the treaty’s applicability (as the interpretation of the relevant international law does not fall within the competence of the parties to the investment contract).
- In case of changes to international law after the entry into force of the investment contract (e.g., more restrictive environmental law standards), the Host State may be obliged to take actions that could be in conflict with the investment contract. The obligation of the Host State under the international treaty cannot be averted through an investment contract. Potentially, the investor may have an entitlement to damages due to subsequent amendments (see the section “Stabilisation Clause”).
- When public international law is applicable to a contract, the question arises whether the investment contract can deviate from it. A withdrawal from obligations under public international law to the disadvantage of the investor, by means of an investment contract, constitutes a unilateral change which would generally result in a breach of public international law. A deviation to the advantage of the investor (and thereby to the disadvantage of the Host State), however, will usually not be considered a breach of public international law.
- Project specific public international law does not raise questions of applicability, as IGAs are especially designed to apply to the project in question only. IGAs are the overarching legal framework, i.e. the horizontal level, of a project specific legal regime to which investment contracts form the vertical dimension.
- The relationships between investment contracts and their IGAs vary to a large extent. In some cases, investment contracts and IGAs have a reciprocal relationship in which either specifies or alters the other and in which neither can be read without the other. The degree of such interrelation and interdependency depends on the will of the parties and the need to harmonise a project specific regime throughout the territory in which the project takes place. However, a strong interrelation is not realised by a respective provision on the “relationship to project specific agreements”, but rather by respective references in the provisions of the topics to be harmonised. Hence, this handbook cannot suggest options for varying degrees of interrelation. Rather, it suggests provisions to make clear that the investment contract is concluded in furtherance of the IGA and thereby forms part of

the project specific regime. It aids in avoiding contradictions and promoting consistency of the contract with the IGA.

4. Negotiation goals

- The negotiation range is very limited when it comes to the relationship of an investment contract with public international law. It is usually not possible to set aside binding public international law through an investment contract. However, the investor may envisage the applicability of certain treaties that oblige the Host State to protect investor rights (such as the ECT) and may want to make sure its applicability is not hindered by a tribunal's assessment of the treaty's scope. In this case, an investment contract can clarify that it falls within the scope of a certain treaty (see policy option 3). However, this determination is only indicative and cannot expand the scope of the relevant treaty.

5. Current trends, strange practices and relevant arbitral decisions

- Some investment contracts that evolved in a very investor-friendly environment have been made part of the public international law and have also been given priority over treaties that are inconsistent with their provisions. Such a practice seems largely inconsistent with general considerations of legal hierarchy and the different scope of public international law on one hand and domestic legal orders, in which investment contracts operate, on the other.
- A special situation arises where during performance under the contract new public law requires stricter standards, e.g. reduced emissions. This may reflect a necessity of the Host State or may be imposed on the Host State, e.g. by accession to an economic area like the EU or by public international law like the Paris Accord. Observance of public law obligations becomes mandatory for the investor, and the only solution lies in a financial readjustment of the contract under the stabilization clause or in an expropriation with full and effective compensation (for example where production in a power station cannot be continued in full compliance with the new standards).

6. Interaction with other relevant provisions

- This section should be aligned with the clauses on
 - Applicable law
 - Stabilisation clauses
 - Change of law

7. Model clause options

Clause Option 1

- Investment contracts may contain a provision stating that they are in conformity with the relevant applicable treaties. Such a declaratory statement can help an arbitral tribunal to understand that the contracting parties concluded the investment contract in light of certain provisions of public international law and with the will to conform to them. However, in case the investment contract turns out to be in nonconformity with the mentioned treaties, such a statement will have no legal effect.

Box 18

"This [name of contract] is in conformity with the Energy Charter Treaty, [the Community Treaties] and any other international treaty or any other agreement [name of Host State] is a party of."

Clause option 2

- For the avoidance of doubt, a provision can be inserted that the investment contract does not aim at altering rights and obligations stipulated under public international law:

Box 19

"Nothing in this [name of contract] shall deprive any party [and project participants, state component or independent authority] of its rights or any remedy to which it may be entitled, or affect any obligations such Persons [or project participant, state component or independent authority] may have from time to time under the [the Energy Charter Treaty, the Community Treaties or] any other international treaty from time to time in force."

Clause option 3

- A more differentiated approach is to dedicate each applicable area of public international law (project specific treaties, Community Treaties, ECT, et al.) in a single provision. This approach is especially suitable in case the investment contract is embedded in a project specific regime of one or more intergovernmental organisations.
- All the following draft proposals can be combined into one clause (depending on their applicability) and should in any case be combined with a general clause on the relationship with public international law as suggested by policy option 1 or 2 of this section.

Relationship with project specific public international law

Box 20

*"1. The Parties acknowledge that this investment contract is the "[name of contract]" between [name of Host State] and the Project Investor referred to in the [name of intergovernmental agreement].
2. This [name of contract] is entered into
(a) in execution and implementation and furtherance of, and conjunction with, the obligations of [name of Host State] under the [name of intergovernmental agreement]; and
(b) in elaboration of the principles and undertakings set out in the [name of intergovernmental agreement]."*

Relationship with community treaties

Box 21

"No provision of this [name of contract] derogates, or shall require the State, any other State Component or any Independent Authority to derogate, from any requirement under the Community Treaties, including, for the avoidance of doubt, any requirement of any European Union law made under the Community Treaties."

Relationship with the ECT

Box 22

"The Parties agree that the Project shall be regarded as an "Investment" in [name of Host State] in the sense of article 1(6) of the Energy Charter Treaty and that, without limitation, the Persons listed below, in the capacities indicated below, shall be regarded as "Investors" in the sense of article 1(7) of the Energy Charter Treaty with respect to the same: [insert list of Persons, such as: project investor as owner and developer of the project; shareholders; shippers]"

Or if there is not a heterogeneous list of persons to whom investor rights shall be granted:

Box 23

“The Parties agree that the Project shall be regarded as an “Investment” in [name of Host State] in the sense of Article 1(6) of the Energy Charter Treaty and that each Company shall be regarded as an “Investor” in the sense of Article 1(7) of the Energy Charter Treaty.”

8. Contract Management

- No contract management is necessary after the conclusion of an investment contract including a provision on its relationship with public international law as such a provision needs no implementation.

IV. Stabilisation Clauses

1. Overview

- Stabilisation or stability clauses are a common device in large scale energy investment contracts. They seek to address the economic effects of changes in the law of the Host State that occur during the life of an investment project.
- These clauses are a critical means of obviating, or at least mitigating, the increased financial burden of having to conform to new legislation and regulations arising at some point after the initial bargain between the Host State and the investor has been struck.
- The legitimacy of stabilisation clauses has been discussed controversially for decades. It is generally held that a sovereign state cannot give up its right to legislate vis-à-vis any private company but has an “inalienable right” to amend and reform its legislation.

2. Types of Stabilization clauses

- In practice, the names assigned to the clause may vary from one contract to another, underlining that any classification is for guidance only. However, the essential idea is the same: the parties to the agreement seek contractual assurance that the investment terms at its core will remain the same over the life of the contract.
- Typically, stabilization instruments take a contractual form. Among the main types of stabilisation clause are “freezing clauses”, “intangibility”, “renegotiation” and “allocation of burden clauses”. Some of these clauses, though considered controversial, still find application in some countries. For instance, though freezing clauses are generally believed to be outdated, they are still common in investment contracts from Sub-Saharan Africa, Eastern and Southern Europe, Central Asia and the Middle East.
- It is important to note that hybrids are common and more than one form of stabilisation may exist in a single contract. This may be due to a “belt-and-braces” approach on the part of the investor.
- Economic equilibrium clauses do not impinge upon the Host State’s right to legislate but only foresee economic compensation in case of subsequent amendments negatively affecting the contractual equilibrium.

3. Purpose and objective

- Stabilisation clauses are popular with investors since many investment contracts in the energy industry may well have a term far beyond that of one or two governments. They act as contractual risk-mitigation tools to protect investments against policy swings over a decade-long period. In fact they may well prove to be crucial to the investor's decision to make the investment.
- Though the principal beneficiary of stabilisation is usually the investor, the Host State too can benefit from it by acquiring a competitive advantage over neighbouring states. Inclusion of this clause could act as an incentive for investors that typically will have a number of options in their portfolios. For example, many capital-importing states have accepted stabilisation clauses as a means of encouraging a favourable investment climate.
- For large-scale projects in the energy sector, such as gas projects, lenders often treat stabilisation clauses as critical to the financing of a project, and will look for reassurance that the economic and legal *status quo* is maintained in some way.
- While such provisions may not stop the Host State from exercising its legislative powers, stabilisation clauses can, nonetheless, mandate that a court or arbitration tribunal compensate the investor for any damage suffered. Aside from a strictly legal assessment of their value in formal proceedings, stabilisation clauses may enhance the ability of investors to negotiate a more favourable settlement in a dispute where the Host State seeks to revise the terms of the original contract.
- Treaty-level protections, such as the application of the Fair and Equitable Treatment (FET) standard and umbrella clauses are capable of providing protection to investors. Therefore, contractual stabilisation clauses backed by international arbitration are a preferable means of ensuring that an investment is left unaffected, or not dramatically affected, by subsequent legal and regulatory changes.

4. Issues to be assessed

- When contracting with a state-owned enterprise, the investor must ensure that the contracting party has the capacity and authority to bind the Host State.
- The investor must stipulate that the Host State's guarantees should comply with and remain within the constitutional and legal framework of its regime. This will help facilitate the enforcement and execution of any arbitral award if a future dispute concerning the stabilisation clause were to arise.
- It is essential to ensure that the wording of the clause covers future legal changes rather than simply permitting inconsistencies between the terms of the energy investment contract and the laws of the Host State as at the date of execution.

Box 24

The Amoco International Finance Corp v Iran case:

Amoco contracted with the National Petrochemical Co ("NPC"), a company controlled by the state of Iran but nevertheless a private entity. Article 21(2) of the agreement provided that:

"Measures of any nature to annul, amend or modify the provisions of this Agreement shall only be made possible by the mutual consent of NPC and AMOCO."

Since the only parties to the investment agreement were NPC and Amoco, no measures in the Agreement were binding on Iran. As a result, all of the purported protection offered by the "stabilisation clause" was lost.

Furthermore, it was held that the clause did not have the *effect* pleaded by the investor, either. The relevant clause stated:

"The provision of any current laws and regulations which may be wholly or partly inconsistent with this Agreement"

shall, to the extent of any such inconsistency, be of no effect in respect of this Agreement.”¹

The Tribunal noted that this clause was not a stabilisation clause as it “provided no guarantee for the future”. The clause was found to have the effect of affirming the validity of contractual clauses inconsistent with Iranian laws and regulations as at the date of execution of the agreement, but had no effect as a stabilisation clause beyond this date. *Future* alterations to the legal and regulatory framework were therefore applicable to the Agreement.

- The contractual rights between the parties should be maintained so that no party can unilaterally change the terms of the contract without the consent of the other. It is thus important to consider including a specific procedure for determining mutual consent regarding the effects of changes to the legislative and regulatory framework of the Host State. This may protect parties against the principle of implied consent.
- As for the Host State, there are two overriding concerns. First, whether it is necessary to offer a stabilisation clause to obtain a particular investment in the market for international investment. Second, whether in the long-term the scope of such a clause should be limited and should exclude certain areas where state prerogatives need to be retained. This includes areas affecting the Host State’s ability to protect the health and well-being of its citizens.
- The Host State may also want to consider carefully any asymmetry in fiscal stabilisation clauses that could result in protecting the investor from adverse changes to the fiscal terms while passing on benefits of reductions in tax rates or other changes beneficial to the investor.

5. Negotiation goals

- From the perspective of the Host State, it is important that the investor is not allowed to avoid compliance with laws aimed at promoting environmental, social, or human rights goals. To ensure this, the Host State may reserve the unilateral right to revise the legislative framework applicable to the energy investment contract in these fields. Alternatively, the Host State may negotiate a stabilisation clause that is narrowly drafted and is not applicable to social and environmental laws, which are likely to evolve over time.
- Much of this can be ironed out in negotiations, where a mutually advantageous compromise can be reached. Absent the negotiating capacity on the part of the Host State, it is advisable to take a general approach, setting out the policy in advance and introducing some guidance for potential investors as to the view of the Host State in this matter.

6. Current trends, strange practices, relevant arbitral decision(s)

- Some states offer distinct stability agreements, like a contract clause written out as a full agreement. In the hydrocarbons sector, both Timor-Leste and Nigeria have provided dedicated instruments for stabilisation prior to investments being made, mostly in the natural gas sector. Some Latin American countries have provided for stabilisation agreements that cover various kinds of investment including mining, oil and gas investments.
- The legitimacy of stabilisation clauses still remains debatable. As Host States are less willing to enter into this kind of agreement, investors increasingly ask for the inclusion of economic equilibrium clauses or similar types of clauses that address the economic and financial compromise found in the contract rather than trying to prevent the Host State from introducing new legislation.
- Only in 2016, for example, the Israeli High Court of Justice held that a contract to develop natural gas would have to be cancelled if it contained a stabilisation clause, which was deemed to be

unconstitutional. This shows that there is an inherent risk of unconstitutionality associated with stabilisation clauses.

7. Interaction with other provisions

- Other mechanisms similar to stabilization clauses are “hardship” and “force majeure” clauses.
- Hardship clauses provide remedies such as renegotiation or recourse to arbitration, for investors faced with “exorbitant loss” or obligations which have “become excessively onerous due to extraordinary and unpredictable events”.
- *Force majeure* clauses excuse a party from liability due to the impossibility of it performing in certain agreed circumstances.
- Substantive treaty protections such as FET provisions could apply to a contract dispute even if they are not the subject of specific agreement.
- The standard according to which any breach of the FET principle is assessed can be quite strict, irrespective of the underlying motives for a state’s act or omission.
- A number of recent arbitral awards however have demonstrated a tendency towards recognising the “inherent right” of states to regulate¹⁰ their economies, consistent with long term goals. In these cases, tribunals often consider investors’ expectations at the time of entering into an investment in more critical or nuanced fashion, in consideration of the need that those expectations be reasonable. This trend can find its root in cases as early as *Saluka v Czech Republic*, where the tribunal held the Host State not liable for compensation because it was exercising its normal regulatory power by adopting, in a non-discriminatory manner a *bona fide* regulation aimed at the general welfare.¹¹
- A more recent example illustrating this trend is the *Charanne* decision (a case under the ECT). In this case the tribunal found that no legitimate expectation was violated since the Host State did not make specific commitments to investors, thus dismissing the investor’s FET claim. Hence, a stabilisation clause would have the effect of preventing a Host State from making radical and unforeseen changes of the regulatory framework. More convincingly, other tribunals, e.g. in *Eiser vs. Spain*, argued that even in the absence of stabilisation clauses Host States are not allowed to change the regulatory framework in an abrupt and radical manner when the framework was specifically established to attract foreign investment.
- Arbitral tribunals constituted under the ECT have confirmed the right of the Host State to maintain a reasonable degree of regulatory flexibility in response to changing circumstances in the public interest though subsequent changes should be made fairly, non-retroactively, consistently and predictably, taking into account the circumstances of the investment. A good reference of how Host States can introduce non-discriminatory regulatory reforms while minimising potential conflicts with foreign investors is presented in the document “Best Practices in Regulatory Reform” recently prepared by the Energy Charter Secretariat.

¹⁰ See, for example, *ADC v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para 423; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, para 139; and *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 para 100.

¹¹ *Saluka v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 253-265.

- Some treaties may also contain umbrella clauses,¹² the main purpose of which is to ensure that contractual obligations between a signatory State and investors from another signatory are upheld.
- The clause may provide overarching, “umbrella” protection to foreign investors by giving them the force of an international treaty and, consequently, a second form of enforcement. Yet, even umbrella clauses are subject to a variety of interpretations. While certain tribunals adopt a very restrictive view of what in fact an umbrella clause achieves, other tribunals have given greater effect to these clauses, notably where the contract between investor and Host State contains a stabilisation clause.
- To rely exclusively on FET provisions or umbrella clauses for protecting one’s investment would be a strategy fraught with uncertainty. This is due to the risk of their possibly restrictive interpretation, and more fundamentally because investment treaty protection may not be open or even possible in some cases. For instance, there are some Bilateral Investment Treaties (BITs) that do not grant such protection to investment.
- In addition, some Host States try to reserve their rights on environmental regulation and enforcement when revising their investment treaties. For example, under as seen in the ECT, four contracting parties, including Australia, Canada, Hungary and Norway, opted out the final sentence of Article 10(1) (the umbrella clause), thereby not permitting investors to submit a dispute concerning this provision to international arbitration.
- Investment treaties may thus well contain provisions aiming to ensure or promote stability for foreign investment, but these do not always yield the results investors would desire. In consequence, the need for stabilisation clauses at the contractual level (in investment contracts) has continued to develop.

8. Model clause options

Clause option 1

- The goal of freezing clauses is to “freeze” the laws of the Host State for the duration of the project. This ensures that the legal landscape is the same and gives the parties certainty as to their respective rights and obligations.
- In its strictest form, a freezing clause purports to freeze all relevant laws of the Host State for the entirety of the project under the investment contract. It may even “incorporate” the Host State’s laws in their entirety at the time the contract was signed into the particular contract creating a special governing law. As mentioned above, the legitimacy of these clauses is very controversial.
- Another type of freezing clause is one which freezes only the laws referenced in the clause itself. This imposes a lesser constraint on the sovereignty of the Host State and is dubbed a “limited freezing clause”.

Box 25

Comprehensive freezing in the Latin American Infrastructure Model Agreement from 2000s:

“Specific Juridical Stability: The State guarantees the Investors and the Recipient Company that this Investment Contract, the Project Agreements and the State Institution Authorizations, in each case in relation to the Investments and the Project, shall enjoy absolute legal stability in accordance with the Legal Framework in Effect. Accordingly, neither the Investment Contract,

¹² It shall be noted that not all treaties contain an umbrella clause. For instance, the North American Free Trade Agreement (NAFTA) does not include an umbrella clause in its provisions.

nor the Project Agreements nor the State Institution Authorizations may be modified unilaterally by laws or other dispositions from the State of any type that affect them or changes in the interpretation or application thereof and each thereof in which the State is a party may only be modified by the mutual written agreement of the Parties that expressly evidences such modifications.”

Limited freezing clause in the Bolivia Model Production Sharing Contract (1997), article 12:

“In Article 52 of the Hydrocarbons Law, the system of royalties and permits to apply to this Contract shall remain fixed throughout its term.”

Clause option 2:

- The intangibility clause attempts to freeze the contract rather than the law. It prohibits unilateral changes to the investment contract and requires the consent of both parties before any changes may be made.

Box 26

Intangibility clause in the Model Production Sharing Contract of Mozambique (2001), article 30.7(d) and (e):

“The government will not without the agreement of the contractor exercise its legislative authority to amend or modify the provisions of this Agreement and will not take or permit any of its political subdivisions, agencies and instrumentalities to take any administrative or other action to prevent or hinder the Contractor from enjoying the rights accorded to it hereunder.”

Clause option 3

- The renegotiation form of stabilization goes by many names, such as rebalancing, or readjustment. These clauses do not seek to prevent a change in the law or the contract. Instead, they seek to address the economic impact of such a change to the original bargain and establish a framework to renegotiate or rebalance that bargain.
- A subset within this variety of stabilisation clause is the **economic equilibrium clause**, which stipulates that the parties work to restore the economic equilibrium originally envisaged in the contract, to the extent “reasonably possible”. There is usually a materiality threshold stipulated in this clause.¹³

Box 27

The materiality threshold set out in the International Project Agreement between Benin, Ghana, Nigeria and Togo and the West African Gas Pipeline Company (WAPCO), clause 36.2:

“[I]f without the prior written consent of the Company there occurs a Regime Failure which has a material adverse effect on the Company, or which causes the benefits derived by the Company from the Project (as described in Clause 15.2) or the value of the Company to the Shareholders to materially decrease, then (unless it is disputed by the States that a Regime Failure has occurred, and the States have, within 28 days of being notified by the Company that the Company asserts that a Regime Failure has occurred, commenced a Dispute Resolution Procedure to determine whether a Regime Failure has occurred): (a) at the request of the Company, the States (represented by the Relevant Ministers) shall meet with the Company and endeavour in

¹³ Indemnification or negotiation surrounding the cost of compliance with new laws by the investor will generally be focused on only material or significant new costs which demonstrably affect the economic balance struck by the parties at the outset of the investment and so these clauses rarely allow for full indemnification covering negligible, minor new costs to the investor. It is important, therefore, that the parties negotiate and accurately define what is typically called “Material Adverse Effect” (our emphasis) in the contract.

good faith to negotiate a solution which restores the Company and/or the Shareholders to the same or an economically equivalent position it was or they were in prior to such change, and the State or States in respect of which the Regime Failure has occurred shall use its or their best endeavours to procure that the solution is implemented.”

- Economic equilibrium clauses come in “full” and “limited” varieties. The “full” clauses protect against the financial implications of all changes in the law, whereas the “limited” ones protect against the same but only in relation to the particular laws referenced in the clause itself. The “limited” clauses are usually more focused on reaching a negotiated commercial solution as opposed to direct indemnification of the investor.

Box 28

Full equilibrium clause in the Energy Charter Treaty Secretariat’s Model Host Government Agreement, Option B of article 37.2:

“The Host Government shall take all actions available to it to restore the Economic Equilibrium established under this Agreement and any other Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in [insert name of the State] law (including any laws regarding Taxes, health, safety and the environment) occurring after the Effective Date ...”

Limited equilibrium clause on tax regime stability in the 2010 Indian Model Production Sharing Contract, article 17.10:

“If any change in or to any Indian law, rule or regulation dealing with income tax or other corporate tax, export/import tax, excise, customs duty or any other levies, duties or taxes imposed on Petroleum or dependent upon the value of Petroleum results in a material change to the expected economic benefits accruing to any of the Parties after the date of execution of the Contract, the Parties shall consult promptly in good faith to make necessary revisions and adjustments to the Contract in order to maintain such expected economic benefits to each of the Parties, provided, however, that the expected economic benefits to the Parties shall not be reduced as a result of the operation of this Article.”

Clause option 4

- A further kind of stabilisation, common in North Africa and parts of the Middle East, is “the allocation of burden” variety. The burden arising from a change in laws applicable to the contract is shifted by means of this clause from the investor to the Host State. No balancing is implied and no amendment of the contract is required. It is the national company of the Host State that is required to take remedial action under the contract, such as paying an additional tax or royalty.

Box 29

Model Production Sharing Contract of Kurdistan (2007, Article 31.1:

“The GOVERNMENT shall indemnify each CONTRACTOR entity upon demand against any liability to pay any taxes, duties, levies, charges, impositions or withholdings assessed or imposed upon such entity which relate to any of the exemptions granted by the GOVERNMENT under this Article 31.1.”

Clause option 5

- Among the thousands of existing contracts between states and energy investors, it is to be expected that there are many hybrid arrangements. It is entirely possible, for example, to find clauses with characteristics of both freezing and economic equilibrium clauses. These clauses do not render investors automatically exempt from new laws but, more like freezing clauses, they do explicitly include wording allowing the investor to be granted an exemption from the new laws. Like freezing clauses and the economic equilibrium clauses, hybrid clauses can also provide either full protection against all changes of law or only some limited set of changes.

Box 30

“Based upon Article... above, if any existing Laws of... or any other applicable or existing law of any other Government, is changed or repealed, or if new laws are introduced, or if there occurs a rise in the tax rate or the introduction of a new tax, which bears unfavourably on the financial status of the Joint Venture or the Parties, then the Parties will apply all efforts necessary to completely or partially release the Joint Venture or the Parties from the above-mentioned changes, or the Parties will undertake all other necessary steps to alleviate the unfavourable impact of these changes.”

Contract for Additional Exploration for and Production and Production-Sharing of Crude Hydrocarbons in the Chinarevskoye Oil and Gas-Condensate Field in West Kazakhstan Oblast Pursuant to Licence Series MG Nno. 253d (Petroleum) between the Republic of Kazakhstan State Committee for Investments (the Competent Body) and the Zhaikmunai Limited Liability Partnership (the Contractor), Kazakhstan, 1997:

“The Tax Regime set forth in the Contract shall be permanently in effect until the expiration of the Term of the Contract... If changes are made in the law after the Contract signing date that make further observance of the original terms and conditions of the Contract impossible or that lead to a significant change in its general economic terms and conditions, the Contractor and representatives of the Competent Body and Tax Agencies may make changes in or correction to the Contract that are needed to restore the economic interests of the Parties as of the Contract signing date. These changes in or correction to Contract terms and conditions shall be made within sixty days of the time of written notification of a Tax Agency or the Contractor.”

STANDARDS

1. Overview

- In developing a regime for energy contracts that fits with the interests of the parties and the international community's goal of sustainable development, the questions of which standards to use and who is to be the standard-setter are of utmost importance. The answer to these two questions may need to be balanced with each other, but often will be mutually reinforcing.
- The drafting of standards provisions begins with considering which dimensions of the project should be subject to standards and then determining what standards should be applied to each of those dimensions. The following chapter will address these basic issues presented to drafters of standards provisions in energy investment contracts.

2. Types of standards

- The specific standards contained in energy investment contracts vary considerably from project to project. While environmental, technical/design, safety, and accounting standards are the most frequent standards provisions, health, labour, and social standards are not infrequent. Some contracts may also contain quality, valuation, and insurance standards.
- Broadly, there are three categories of standards that may be applicable to different aspects of energy projects:
 - Operational standards which include technological, quality and, labour standards.
 - Governance standards, such as accounting standards and security standards applicable to the governance aspects of the project.
 - Human rights standards including health, environmental standards that impact the sustainable development aspects of the project.

3. Purpose and objective

- Grouping the standards provision can provide the investor and the Host State with a clear overview of their respective obligations. It can afford the parties an opportunity to differentiate between the specific standards within each category and carefully consider how they are to be applied. The categorization of standards is thus a means of ensuring consistency in the contract and guaranteeing foreseeability for both parties as regards the extent of their respective obligations.

4. Information assessment checklist

- It is important to ascertain the status of drafted standards against international standards. Where a contract provides for specific standards (for instance, requiring a particular scale of measurement or a particular set of rules from a standard-setting organization), the parties may want to insert language on how an increasing (or decreasing) severity of standards worldwide will affect the contractual obligations of the parties.
- For social or labour standards, incremental strengthening of standards should not cause significant obstacles to the project as a whole. This is because practices in those areas can change quickly and the conformity of past behaviour will not be affected. Where, for instance, the contract lists adherence to the International Labour Organization (ILO) Core Labour standards provisions as the measure of the investor's obligations toward employees, the Host State can expect that a decision by the ILO to add to this Core can be implemented as of the date it goes into effect. Parties may also consider inserting contractual language on how to divide the costs of increased standards. Explicit language on standards "progression" can assist in avoiding legal confrontations posed by an altered regulatory environment.

- For technical standards, accounting standards, or measurement standards, an evolutionary approach may be cumbersome. This is because changes to standards during the life of a project may require past actions to be adjusted and the expectations of both the parties to be continually reassessed. To avoid such complications, the parties can consider inserting a standards-freezing provision in the contract. This should define the precise set of standards (by date or version number) intended for application and explicitly provide that further changes on the international level will not alter the parties' obligations under the contract.
- Eventually, the proper scope of standards provisions will be determined by the specific nature of the contract and its operational context. A contract for exploration, for example, may not need an elaborate provision on design standards or measurement standards. On the other hand, these same standards will be essential in an energy transit contract.
- For the Host State, the general international legal framework makes reference to minimal standards relating to human, health, and labour rights or environmental protection. Private actors have no such legal duties. Thus, if the Host State agrees that the contractual obligations can be non-reciprocal then drafters may devote their time to the technical, accounting, or valuation standards rather than human or environmental rights. Clearly this would be against the aims of the different legal regimes, but it would breach no firm international legal obligations.

5. Negotiation goals

- A crucial aspect of standards usage is the issue of whose standards are to be applied as the measure of the parties' behaviour. Reliance on international standards would seem an obvious choice in terms of efficiency. However, sovereignty considerations as well as commercial interests may encourage parties to agree on territory or project-specific standards. Whether the one or the other is to be preferred depends on the reasons for incorporating the standard, what is the cost of harmonisation/specialisation, and who are the intended beneficiaries of the standard.
- The basic consideration for deciding whose standards should be applied is for whose benefit the particular standard is included in the contract. For standards that are mainly intended to safeguard the general interests of the parties, for example quality and insurance, it is advisable that the parties establish the standards by themselves or agree to accepted industry norms. Due to the strong interest of the Host State in some issues, such as public security standards, a more unilateral approach to standard setting may be taken by the Host State.
- For standards that safeguard the interests of third persons or the broader public (for instance labour, human rights, and environmental standards) recognized international standards should form the minimum basic level of performance.
- The scope and manner of standard setting will vary depending, at least to some extent, on the relationship of the parties involved. If the Host State is familiar with the investor and has engaged with it in the past, it is possible that the particular contract can build on past experiences or implied agreements. A more extensive and explicit consideration of standards may be prudent for first-time relationships or for contracts with multiple parties.
- A significant number of energy investment contracts designate the investor as the standard-setter. As a result, transferring this authority to the Host State (alone or in cooperation with the investor) may require difficult negotiations and creative approaches to ensure the standards are mutually agreeable.

6. Current trends

Labour standards

- Provisions on labour standards are infrequent in available energy investment contracts. Agreements which contain this provision typically require the investor to adhere to local employment law. The scope of the standard includes hours and salaries as well as working conditions. An example is the Nabucco Agreement with Romania which includes a specific labour standards provision.
- Using the labour standards provision to limit the duties of the investor approaches the topic of labour rights clearly from a project-based perspective. As a result, the involvement of both parties in the consideration of this standard is reasonable.
- A new trend in labour standards is to view them as a part of human rights law. The aim is to protect the worker as an individual. Countries are taking an approach more in keeping with contemporary international law on labour rights. Agreements mandate that the parties agree to apply international core labour standards as a minimum – clarifying that national labour law will only supersede where it provides higher standards of treatment.
- Another important development is extending the scope of the investor’s responsibility by including the contractor’s behaviour within the scope of the investor’s obligation. This attention to the supply chain labour conditions reflects a relatively new but growing attention to supply chain management.

Box 1

Labour standards provision under the Host Government Agreement between Albania and Trans Adriatic Pipeline AG, article 19:

“The Parties acknowledge that in undertaking the Project Activities, the Project Participants shall observe and comply with (in each case as may be amended or replaced from time to time: the "Core Labour Standards" as defined by the International Labor Organisation; those standards detailed in performance requirement 2 (Labour and Working Conditions) of the Environmental and Social Policy; and except to the extent inconsistent with the standards referred to in paragraphs (a) and (b) above (unless such inconsistency requires the application of an objective higher standard), Albanian Law relating to labour standards. To the extent any Project activity is governed by any Albanian Law covering materially the same subject matter as that referred to in clause 19.1, the State, each of the other State Parties and each Independent Authority agrees and consents to that Project Activity taken by or on behalf of the Project Participants to the extent that such activity shall be deemed to be in compliance with any Albanian Law covering the same subject matter.”

Box 2

The 2013 Liberia Offshore Agreement also sets out a standard of compliance only equal to that required by national employment law, but it extends the scope of the responsibility by including the investor’s contractors’ behavior within the scope of the obligation.

Security standards

- To the extent that energy resources are strategically important to countries, parties to host government contracts may want to consider including a provision on the security of the project. International law approaches to security questions traditionally favour states in both the assessment of risk and the determination on how to protect the population from the risk. As a result, the Host State will usually have the standard-setting prerogative when it comes to national security.

- Research reveals no national security standards in host government contracts at this time. Given the possibility of armed attacks on energy facilities and/or electronic systems operating these facilities, parties are encouraged to discuss whether security standards should be provided.

Human rights standards

- International law places the duty on the Host State to respect, protect, and promote human rights. Private parties, on the other hand, do not have binding human rights obligations, unless such obligations arise under national law or as contractual duties. This non-binding nature of human rights norms for companies, however, has been modified to some extent by a number of international instruments which place duties on companies to at least not actively violate human rights. The Global Compact and the Business and Human Rights Principles are the most prominent examples.

Box 3

The Office of the High Commissioner on Human Rights lists 9 conventions (and 9 optional protocols) as “core international human rights instruments”. While they overlap somewhat with the labour conventions, the standards apply to all individuals and are therefore of individual importance to Host States:

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- International Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Rights of Persons with Disabilities

Box 4

The Ruggie Principles on Business and Human Rights are a well-accepted (but non-binding) statement of current thinking on private party obligations in international law existing today. Principle 11 states: *“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”*

Other instruments which may be applicable to investors include:

- The Guiding Principles for Business and Human Rights
- The Ten Principles of the UN Global Compact on Human Rights
- The Voluntary Principles of Security and Human Rights
- The International Finance Corporation’s Performance Standards on Environmental and Social Sustainability

The principles stated in these four global instruments may also be found in individual company codes of conduct. A lack of strict adherence to them may therefore place an investor at risk of public condemnation.

- The primacy of state responsibility in securing human rights makes the Host State the preferred standard-setter for any human rights standard in a host government contract. However, this does not change the need for both parties to be bound by their respective obligations. While the investor is not directly bound by human rights obligations, a host government contract omitting mention of these would not necessarily mean that the individuals affected by the parties’ activities would be without a

claim. The victims' claim would, however, have to be brought against the Host State for its failure to protect them rather than directly against the perpetrator of the original harm.

- The scope of the human rights standards generally extends from protecting the rights of the project participants (such as the workers) to the rights of individuals impacted by the project. This can include indigenous populations whose land rights will be affected, residents whose health or safety might be affected, and to the citizenry as a whole whose rights to free political expression, religion, and belief must be protected.
- Typically, human rights standards are incorporated in energy investment contracts as standards on labour conditions, health standards, safety standards, or references to "social" standards. One exceptional contract is the Mozambican Gas Pipeline Agreement with South Africa, which contains a stand-alone provision specifying that the investor "*will also endeavor to promote the empowerment of historically disadvantaged South Africans in the gas business*".
- The health and safety standards are generally contained in a single provision, while social standards are often combined with environmental standards. The combination makes sense if the targets of protection are the same, but is less convincing if the beneficiaries include both workers (project participants) and the local community.

7. Model clause options for different standards

Operational standards

- To ensure a successful project, most energy investment contracts include a reference to at least some operational standards by which to judge the project's physical and operational aspects. Depending on the project, these can include standards that emphasize the technical capacities or design of the project's constructions and the quality that the project achieves. Each of these will be regarded in turn.
- Some parties may consider labour standards part of the operational aspects of a project. This certainly could be true for the regulation of a project's labour force in terms of whose nationals may be hired, and what skills they should have. The labour conditions relating to a project, however, are the subject of substantial international law. For this reason, they are discussed below with the standards relating to sustainable development.

Design standards

- Where projects involve physical infrastructure and technologies available are variable, technical or design standards will provide the parties with greater foreseeability in the results. For the Host State, the advantage lies in knowing how the end result will function and interact with existing infrastructures. Similarly, for the investor, the advantage comes with a clearer perspective on costs. It must, however, be remembered that though foreseeability has its advantages, it may also result in reduced flexibility and less innovative solutions.
- Provisions on design standards can be contained in the main contract or in a special annex, or in a combination of the two. The use of an annex is preferable if there is extensive detail, while the combination allows for a general reference to a set of standards in the main text with a project-specific listing of particular standards in an annex.

Box 5

Annex to the Baku-Tbilisi-Ceyhan Host Government Agreement Azerbaijan, on technical standards:

1.1 It is agreed that for purposes of construction or operation of any Facilities or the conduct of any Project Activities, the standards from time to time in effect of the following organizations shall be acceptable for all purposes:

API - American Petroleum Institute

ANSI - American National Standards Institute

ASME - American Society of Mechanical Engineers

ASNT - American Society of Non-destructive Testing

ASTM - American Society for Testing and Materials

AWPA - American Wood Preservers' Association

AWS - American Welding Society

GBE - British Gas Code of Practice

BSI - British Standards Institution

DIN - Deutsche Institut für Normung

IEC - International Electrotechnical Commission

IEEE - Institute of Electrical and Electronics Engineers (USA)

IP - Institute of Petroleum (UK)

ISA - Instrument Society of America

ISO - International Standards Organisation

NACE - National Association of Corrosion Engineers (USA)

NEMA - National Electrical Manufacturers Association (USA)

NFPA - National Fire Prevention Association (USA)

SSPC - Steel Structures Painting Council

UBC - Universal Building Code

- A common approach to technical standards is a reference to international industry standards, often termed as “good international practice” or “acceptable international practice” standards. For clarity, capitalization should be avoided unless the parties intend to refer to the title of a specific set of existing rules. This is because capitalization suggests these to be a set group of standards but there are no such codes in existence.
- The choice of whether to tie technical standards to national law provisions needs to take into account the relative rate of change in standards on the national and international levels and the question of who should promulgate these standards. Where national laws are always to be adhered, national parliaments or administrations maintain baseline control over the project, while the sole superiority of international standards places the most influential actors of the international industry in control.
- Some provisions allow the standard to be set as needed rather than at the beginning of the contract’s life. For instance, the BTC Georgia HGA sets out a list of organizations whose standards “shall be acceptable for all purposes”, but then refers more generally to standards “which are appropriate under the circumstances or, to the extent the Specified Technical Standards are silent or are inapplicable under the circumstances, then the then-current technical standards and practices generally used by the international community (within Canada, the United States or Western Europe) with respect to Petroleum pipeline projects comparable to the Project...”. It continues to place on the investor the competence/responsibility for establishing the specific standard to be considered adequate. It notes: “The relevant technical standard or practice shall be determined by the MEP Participants based on the foregoing from time to time, as the needs of the project require, and notified to the Government”. This offers flexibility and adaptation to current standard setting. The danger of such a provision lies in its lack of foreseeability and vagueness in both time and content.
- The BTC Azerbaijan is similarly structured and states, “If this Appendix is silent on specific standards to be applied in future activities, the standards relevant to the international community with respect to Petroleum pipeline projects comparable to the Project shall apply” and “the standards from time to time in effect of the following organisations shall be acceptable for all purposes: ...”. This has the

advantage of clarifying that the contract provisions on technical standards will prevail over general international standards both in the present and in the future, but allowing for evolution of standards for non-specifically mentioned standards. The provision does introduce some ambiguity, however. Greater legal security would require knowing how to define what “relevant to the international community” means and on what basis projects may be considered “comparable”.

Box 6

The BTC Turnkey Agreement avoids much of the ambiguity of other technical standards provisions. It states in relevant part:

“(ii) the Facilities shall be constructed and erected ... (b) using principles, criteria and standards generally accepted for use by turnkey contractors undertaking major international pipeline projects of the same or similar size and type as the Facilities”.

Austria’s Nabucco Project agreement offers a good example of how the contracting parties can cooperate on setting the standards to be applied:

“The Companies shall be entitled to apply a uniform set of technical standards for the Project and the Project Activities. Such technical standards shall be prepared by the Companies according to the Gaswirtschaftsgesetz and shall be submitted to the State.”

Quality standards

- Quality standards ensure that the parties’ reciprocal obligations and benefits are realized. Since these standards benefit both the parties, and because industry knowledge is best assessed by the parties themselves, it is suitable that they are subject to negotiations between the Host State and the investor.
- Quality standards require a particular level of performance. These may not be included unless the level of performance by a party is less than what could reasonably be expected. Indeed, many host government contracts do not include a provision on quality standards. Quality standards provisions are valuable where the government’s interest in the project is developmental. Unless a quality product results from the investment project, the technology transfer effects may be worthless. Local industries need to learn how to produce goods of a certain quality as well as how to test for quality.
- Where they are found, a quality standard is included in a contract mainly to ensure that the end product/service is usable or marketable and thereby revenue-enhancing. Such provisions are of particular importance for production sharing contracts or other projects where the Host State has a share in the profit from sales of the production.
- It should be noted that quality standards may also be valuable for the investor by providing an upper limit on the Host State’s expectations. Where the host government agreement requires, for example, that the investor expend “reasonable efforts” or “best efforts” to achieve a given result, it can rely on such a standard to relieve it of liability where the costs involved in reaching that result would be disproportionate to the benefits.
- There are few “typical” quality standards provisions. The particular level of this standard can be individual to the project and the parties may even consider basing their decision on industry norms. As such, quality standards can be very detailed or very general.

Box 7

Detailed quality standard provision in the Liberian 2009 Mining Development HGA, article 6.2:

“The Concessionaire shall demonstrate the capacity to produce marketable Product of the quality specified in the Modified Bid Materials in an amount equal to (x) for the Phase I Capacity Test, at least 1 mpta of concentrate containing TFe 64.5% and 8 mpta of concentrate containing TFe 65%, and (y) for the Phase II Capacity Test, at least 1 mpta of concentrate containing TFe 64.5% and 16 mpta of concentrate containing TFe 65%, in each case as measured by shipments out of the Port Facility over a 30-day period within the six-month period”.

General quality standard clause in the BTC Turnkey:

“(ii) the Facilities shall be constructed and erected (a) in a good workmanlike manner.”

Insurance standards

- Insurance standards are similar to technical standards in that they are of primary benefit to the parties. Although financiers have an interest in the monetary security of the investment, their interests can be adequately accounted for by the parties themselves.
- In both technical and insurance standard-setting, it is likely that parties will give the investor a lead role in formulating the contract provision(s). Whether the lead role is an exclusive role is a question the Host State must consider carefully. Preserving the Host State’s involvement in standard setting can broaden government official’s understanding of the operations of the project, the placement of the project within the national economy, and provide an opportunity for the contracting parties to develop their relationship. At the same time, active participation by the Host State in setting the standards will require a commitment of resources from the competent ministry. This can be limited by giving the Host State a “veto right” over standards proposed by the investor – but even here, some resources must be invested. Should the Host State have the right to object to investor-proposed standards and then fail to use this right, it will have to forfeit any legal arguments over the adequacy of the standard in future disputes.

Accounting standards

- Accounting standards function to give the investor, the Host State, and third parties oversight of the investment project.
- Because the financial statements produced under accounting rules should be available for comparison as well as for assessment on their own, the same standards should be used in the territory where the project is pursued. As a result, the parties should take a common decision as to which set of international standards to apply.
- In many host government contracts, the general provision on accounting standards is accompanied by an additional annex on the subject. Such annexes usually include details on units of account to be used, on how to round figures, regulating how to adjust for changes in exchange rates, how to allocate for costs shared between the investor and the Host State, and details on how and when the investor is to submit financial records to the Host State.

Box 8

The 2013 Timor production sharing contract refers generally to standards based on industry practice:

“The Contractor shall maintain complete accounts, books and records... in accordance with generally accepted accounting procedures and standards of the international petroleum industry”.

The 1992 Myanmar PSA:

“Books and records of accounts will be kept in accordance with a generally accepted and recognized accounting system consistent with modern petroleum industry practices and procedures”

The 1996 Azerbaijan PSA:

“The Petroleum Operations Account shall be kept in accordance with the standards of international Petroleum industry practice”.

Each of these contracts includes a full annex on accounting procedures in addition to the general statement provided here.

- While the interests of both the parties should be considered while deciding which set of standards should be adopted, the negotiations for accounting standards should be led by the Host State. This is because the Host State is best-placed to ensure that the standards are compatible with the generally applicable national accounting standards.
- Host government contracts may also apply standards based on international industry practice in combination with national law. The reference to national law provides the Host State with more control over the reporting results. It is advised that in such cases the parties should clearly indicate the variance from the international standards and the reason for such variance. It is also recommended that either a specific reference to the national law element is provided or a general hierarchy is set out, such that national rules will prevail in case of conflict with international practice.

Box 9

The 2008 Ghana Oil Production Agreement:

“Contractor shall maintain... books of account and supporting records in the manner required by applicable law and accepted accounting principles generally used in international petroleum industry.”

The Nabucco Project Agreement with Austria:

“All such books or accounts and other records shall be maintained in the currency of account for the relevant transaction and in accordance with generally accepted international accounting standards and the generally accepted accounting principles of the State”.

The 2012 Uganda PSA:

“in accordance with generally accepted and recognized accounting systems and consistent and normal practice of the international petroleum industry”.

The 2013 Liberia Offshore PSA:

“The registers and accounting books of the Contractor shall be in conformity with accounting rules and regulations generally applicable to the petroleum industry in Liberia. However the Contractor may apply Good International Petroleum Industry Practice accounting rules and procedures, insofar as none of these is contrary to the rules and regulations referred to above”.

- A small number of host government contracts also use an approach of solely applying international standards. There are two main sets of international standards from which parties can choose. One of the sets of standards is that issued by the International Accounting Standards Board, the International Financial Reporting Standards (IFRS). These standards are to be preferred, given their wide adoption. The US-Generally Accepted Accounting Principles (US-GAAP) form the other possible standard to

be applied. The US-GAAP is promulgated by the Financial Accounting Standards Board and the strength of these standards is that their rules are required by the United States Security and Exchange Commission.

- The benefits of using international accounting standards rest primarily with the comparability of figures across territories. These are particularly useful for projects that include several Hosts. This is because national differences in accounting practice would otherwise burden the investor as well as prevent other Hosts from analysing their own results on the basis of the investor's activities in neighbouring states. Moreover, third parties interested in the figures will also have easier access to understandable figures. This can be important for competitors as well as potential partners.
- The comparability effects of the generally accepted principles of US-GAAP and IFRS extend beyond the cross-boundary comparisons to those across industries. While international accounting practices in the petroleum industry also capture comparability benefits of multi-jurisdictional projects, it is only the general international accounting standards that will allow the project to be easily evaluated by non-industry analysts. The overall legitimacy of the project is thereby increased by the use of such standards alone (or with specific industry- or host-law exceptions if necessary).

Box 10

The 2009 Liberia Mineral Agreement:

‘Each of the Concessionaire and the Operating Company shall deliver to the Government [...]:

i) a balance sheet [...] and

ii) statements of income, changes in shareholders' equity and cash flows of the Concessionaire or the Operating Company, [...], [...] as having been prepared in accordance with generally accepted accounting principles in the United States (“GAAP”) or International Financial Reporting Standards (“IFRS”), consistently applied except as otherwise noted”.

The Turkey's TANAP Agreement specifies the IFRS as the sole standard for accounting:

“All such books or accounts and other records shall be maintained in the currency of account for the relevant transaction and in accordance with the International Financial Reporting Standards”.

Labour standards

- The 8 Fundamental Conventions of the ILO include the four universally applicable fundamental, or core, labour rights. These include:
 - Prohibition on slavery and slave-like practices
 - Prohibition on the worst forms of child labour
 - Prohibition on discrimination at work
 - Right to unionize and to collective bargaining
- These rights are considered applicable to every state, whether or not it has ratified the corresponding ILO treaty. Thus, including these as a standard is legally redundant for the parties. An explicit reference to the four in a host government contract, however, could add symbolic value by placing the contract firmly within the broader international law system. This is particularly important where a contract has a provision that proclaims the Host State's duty to not enforce any obligation that limits the implementation of the host government contract. For the investor, the standards are ones to which soft law demands conformity as well. The wide recognition of these particular rights is an indication of their importance and parties are not advised to negotiate on standards below these.
- While making a policy choice for labour standards, the difference between a positive and a negative formulation should also be considered carefully by the parties. For instance, the Nabucco Agreement with Romania is formulated in the negative. This means that the contract does not require any standards higher than those guaranteed under national labour laws. While it specifically mentions that

there is to be an equality of conditions for citizens and non-citizens, the negative formulation emphasizes the investor's rights rather than the investor's obligations to offer workers decent working standards. The negative and positive formulation of the labour clause is critical as it can affect the burden of proof should it become a source of dispute.

- Using labour standards provisions to limit the duties of the investor approaches the topic of labour rights clearly from a project-based perspective. As a result, the involvement of both parties in the consideration of the standard is reasonable.

Box 11

The Nabucco Agreement with Romania, article 16:

"1. The employment laws and practices or standards applicable to the Project shall be the normal rules that are established pursuant to the National Laws. No requirements in this regard shall be imposed on the Project Participants in addition to those standards applicable to similar projects.

2. All employment programmes and practices applicable to citizens of the State working on the Project in the Territory, including hours of work, leave, remuneration, fringe benefits and occupational health and safety standards, shall not be less beneficial than is provided by the State's labour legislation generally applicable to its citizenry."

Human Rights standards

- Some host government contracts give the role of the standard-setter to the investor or the industry as a whole. While this option is extremely advantageous to the investor, it leaves the Host State open to charges of violating its international human rights obligations should the investor not set the standards high enough. In some cases, there exist provisions under which the Host State is obliged to review the standards proposed. However, further elaboration on how disagreements will be settled remains absent.
- It must be remembered that since industry practice is also potentially insufficient to fully protect those impacted by the investment, there is room for improvement.

Box 12

The West African Gas Pipeline Agreement requires the investor to set the human rights standards:

"The Company shall procure that all contracts for the operation, maintenance or repair of the Pipeline System are written so as to: ... c) require conformance with the Environmental Management Plan and other health, environmental or safety standards identified by Company".

Box 13

The BTC Georgia agreement looks to the industry's practice and states: *"the [project] Participants shall conform to the health and safety standards and practices generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project".*

- Some host government contracts increase the role of the Host State slightly, by giving it an oversight right in the standards set. Here, the advantages are the annual review of the standards and nevertheless certain foreseeability in the standards to be applied.

Box 14

The 2013 Timor PSA:

*“The Contractor shall carry out Petroleum Operations, and procure that they are carried out, in such a manner as... to: (...)
ii) ensure the safety, health and welfare of persons in or about Petroleum Operations.”*

Further, the PSA specifies that:

“...the Contractor shall submit to the Designated Authority, for its approval, plans in regard to: i) the health, safety and welfare of persons in or affected by Petroleum Operations... in order to reduce the risks to the personnel... so they are as low as reasonably practicable. The plans shall be reviewed annually and amended from time to time as may be necessary to ensure its continuing compliance with Good Oilfield Practice”.

- Host government contracts can also use the general international practice standard, while placing emphasis on applying national law as the minimum. The advantage of this is to maintain the Host State’s pre-eminence as the standard-setter, while allowing for possible improvements by means of including international standards.

Box 15

The TANAP Turkey agreement states:

“community health impact standards relating to the TANAP Project shall be established by the TANAP Project Entity [...]. Such ... Standards shall comply with National Laws and shall also take due account of international standards and practices generally prevailing in the Natural Gas pipeline industry, including relevant Performance Standards of the International Finance Corporation.”

Environmental standards

- The wording for this standard can be general (e.g., the system is to be “operated, maintained and repaired in accordance with internationally acceptable industry standards”) or specific (e.g., requiring the use of IASC accounting standards).
- The 1996 Azerbaijan Exploration Development and Production Sharing Agreement contains two separate examples of extensive environmental standards provisions. The first is Article 26 and this is expanded by Annex 9. The expansiveness of these provisions is noteworthy, but the level of assured protection that would result from the application of either is seriously below that which current views on environmental protection would require of states.

Box 16

Environmental Protection and Safety under the 1996 Azerbaijan Exploration Development and PSA:

"26.1 Environmental Standards

Contractor shall develop jointly with SOCAR and the State Committee of the Azerbaijan Republic on Ecology and Control over the Use of Natural Resources ("SCE") safety and environmental protection standards and practices appropriate for the regulation of Petroleum Operations. The safety and environmental protection standards shall take account of the specific environmental characteristics of the Caspian Sea and draw, as appropriate, on (i) international Petroleum industry standards and experience with their implementation in exploration and production operations in other parts of the world and (ii) existing Azerbaijan safety and environmental legislation. In compilation of such standards and practices account shall be taken of such matters as environmental quality objectives, technical feasibility and economic and commercial viability.

Subject to the first sentence of Article 26.4 the standards, which shall apply to Petroleum Operations from Effective Date shall be the standards and practices set out in part II of Appendix 9 until substituted by new safety and environmental protection standards devised and agreed between Contractor, SOCAR and SCE. Such substitution shall take effect following the written agreement between Contractor, SOCAR and SCE on a date agreed between the Parties and SCE and from such date such agreed standards and practices shall have the force of law as if set out in full in the Agreement. In the event that safety and environmental protection standards and practices are imposed otherwise than with the agreement of Contractor it is agreed that the provisions of Article 23.2 shall apply. The Parties and SCE shall agree a separate protocol for the detailed implementation of the joint development and definition of the new standards and practices for safety and environmental protection. The cost to Contractor of such development and definition shall be Cost Recoverable.

26.2 Conduct of Operations

Contractor shall conduct the Petroleum Operations in a diligent, safe and efficient manner in accordance with the Environmental Standards and shall take all reasonable actions in accordance with the Environmental Standards to minimise any potential disturbance to the general environment, including without limitation the surface, subsurface, sea, air, lakes, rivers, animal life, plant life, crops and other natural resources and property. The order of priority for actions shall be the protection of life, environment and property. Contractor shall implement an integrated management system covering all health, safety and environmental aspects of the activities carried out in relation to the Petroleum Operations as outlined in part I of Appendix 9.

26.3 Emergencies

In the event of emergency and accidents, including but not limited to explosions, blow-outs, leaks and other incidents which damage or might damage the environment, Contractor shall promptly notify SCE (Goskomokbrana) and SOCAR of such circumstances and of its first steps to remedy this situation and the results of said efforts. Contractor shall use all reasonable endeavours to take immediate steps to bring the emergency situation under control and protect against loss of life and loss of or damage to property and prevent harm to natural resources and to the general environment. Contractor shall also report to SOCAR and appropriate Governmental Authorities on the measures taken.

26.4 Compliance

Contractor shall comply with present and future Azerbaijani laws or regulations of general applicability with respect to public health, safety and protection and restoration of the environment, to the extent that such laws and regulations are no more stringent than the Environmental Standards. In the event any regional or multi-governmental authority having jurisdiction enacts or promulgates environmental standards relating to the Contract Area, the Parties will discuss the possible impact thereof on the project. The provisions of Article 23.2 shall apply to any compliance or attempted compliance by Contractor with any such standards which adversely affect the rights or interests of Contractor hereunder.

26.5 Environmental Protection Strategy

An environmental protection strategy shall be developed which shall include:

- (a) the establishment of an environmental management system as an integral part of Petroleum Operations and the formation of an environmental sub-committee as described in the Environmental Standards;*
- (b) an environmental work programme carried out in sequences appropriate to the normal phases of Petroleum Operations as described in the Environmental Standards (seismic survey, exploration drilling, field development and production).*

26.6 Environmental Damage

(a) Contractor shall be liable for those direct losses or damages incurred by a Third Party (other than Governmental Authority) arising out of any environmental pollution determined by the appropriate court of the Azerbaijan Republic to have been caused by the fault of Contractor. In the event of any environmental pollution or environmental damage caused by the fault of Contractor, Contractor shall reasonably endeavour, in accordance with generally acceptable international Petroleum industry practices, to mitigate the effect of any such pollution or damage on the environment.

(b) Contractor shall not be responsible and shall bear no cost, expense or liability for claims, damages or losses arising out of or related to any environmental pollution or other environmental damage, condition or problems which it did not cause, including but not limited to those in existence prior to the Effective Date of this Agreement and SOCAR shall indemnify and hold harmless Contractor, its Sub-contractor and its and their consultants, agents, employees, officers and directors from any and all costs, expenses and liabilities relating thereto.

(c) Any damages, liability, losses, costs and expenses incurred by Contractor arising out of or related to any claim, demand, action or proceeding brought against Contractor, as well as the costs of any remediation and clean-up work undertaken by Contractor, on account of any environmental pollution or environmental damage (except for such pollution or damage resulting from Contractor's Wilful Misconduct) caused by Contractor shall be included in Petroleum Costs.

Annex 9 is more detailed. It establishes a special environmental sub-committee; puts forth "standards", which are general and specific guidelines for the contractor to follow; and contains further reference to external safety and industrial hygiene standards."

OBLIGATIONS

1. Overview

- Energy investment contracts typically contain provisions on work commitments and other obligations of the investor, including local content requirements, confidentiality and decommissioning obligations. While there may be other equally significant obligations that may arise for the parties, for the purpose of this Handbook the ones most relevant to the energy sector have been discussed.

2. Types of obligations

Work programme and budget

- Most oil and gas contracts impose an obligation on the investor to submit an annual work programme, along with the budget, describing in detail the estimate of expenditure for carrying out the operations. The annual work programmes and budget clause is integral to the contract because it defines and regulates the primary operational and financial obligations of the investor.
- There are various names that may be attributed to this clause such as "Work Obligations", "Exploration Work Obligations", "Minimum Expected Exploration Work Commitment and Expected Minimum Exploration Expenditures", "Production Period Work Programme", "Annual Work and "Budgets" among others. However, irrespective of the nomenclature, the clause should describe in detail the operations to be carried out during a calendar year (appraisal, seismic surveys, drilling and other development and productions plans, facilities to be constructed, procurement plans, etc.).

Box 1

Angola Model Production Sharing Contract for Deep Water Blocks:

"Article 19 (Development and Production Work Plans and Budgets)

- 1. From the date of approval of the plan referred to in Article 18, and thenceforth by fifteen (15) August of each Year (or by any other date which may be agreed) thereafter, Contractor Group shall prepare in accordance with professional rules and standards generally accepted in the international petroleum industry a draft annual Production Plan, a draft Exploration and Production Work Plan and Budget (if applicable) and a draft Development and Production Work Plan and Budget for the following Civil Year and may, from time to time, propose to Sonangol that it submit amendments to the approved Work Plans and Budgets to the consideration of the Ministry of Petroleum.*
- 2. The draft Development and Production Work Plan and Budget and the draft Production Plan referred to in the previous paragraph shall be prepared on the basis of the approved General Development and Production Plan and any subsequent amendments to the same.*
- 3. The draft Production Plan and the draft Development and Production Work Plan and Budget shall be approved in writing by the Operating Committee and shall be submitted by Sonangol to the Ministry of Petroleum for approval under the Petroleum Activities Law.*
- 4. The Contractor Group is authorized and hereby undertakes to execute, under the supervision and control of the Operating Committee, and within the limits of the budgeted expenses, the approved Development and Production Work Plans and Budgets, together with any revised versions of the same."*

- Similarly, host government mining contracts will also require the investor to prepare and submit to the Host State the work programme and budget for the different stages of the project. These provisions, however, will typically be less detailed in a mining contract. This is because a mining concession is considered less risky than an oil and gas exploration and production project. Parties have more knowledge of what can be exploited at the commencement of a mining project whereas, in most oil and gas contracts the investor will have less clarity on whether it will in fact make a commercial discovery.

Relinquishment

- Most contracts oblige the investor to relinquish parts of the contracted area or blocks back to the Host State. This does not include those parts of the block where a discovery has been made by the investor or which are undergoing appraisal. The purpose of a relinquishment clause is essentially to ensure that the investor surrenders the unused blocks to the Host State in a timely manner. This will not only allow the investor to work dedicatedly on the areas where there is a discovery but also give the Host State an opportunity to re-license the unused blocks to other prospective investors.
- Contracts generally provide for two types of relinquishment: (1) mandatory (2) voluntary. Under a mandatory relinquishment clause the investor has a compulsory obligation to part with a portion of the block. On the other hand, under voluntary relinquishment mechanisms the investor has a right, rather than an obligation, to surrender a part of the contracted area to the Host State. Under such an arrangement, the investor may relinquish any or all of the area at any time, after giving an advance notice to the Host State and after fulfilling its work and/or expenditure commitments.

Decommissioning and abandonment

- One of the key obligations of the investor is the decommissioning and abandonment of installations at the end of the project. Decommissioning refers to the process of physical removal and disposal of structures at the end of their working life.
- Decommissioning is particularly complex due to the unpredictability of its date and cost. It is a complex multi-layered process, covering a long period of time, and requiring the involvement of various stakeholders such as government agencies, extractive companies, third party contractors, local communities, and nongovernmental organizations.
- Although decommissioning and remediation are part of a project's life cycle, it is common to find that they receive little attention during the planning, design and operation phase. This can potentially lead to many unforeseen issues and challenges as the project reaches the end of its economic life. Consequently, parties are advised to make provision for these activities in the early stages of the project itself.
- From the perspective of the Host State, it is important to ensure that a scope of work is prepared for decommissioning, abandonment and remediation activities in order to minimise and manage health, safety and environmental risks. It is crucial to ensure that the parties responsible for these activities are clearly defined and reserves of financial funds are maintained to address the decommissioning issues.

Confidentiality

- Confidentiality clauses generally have a standardised formulation. While the language may differ between different contracts, the main elements of the clause are almost always the same. Typically, the definition of "confidential information" will include all data, plans, maps, scientific and technical information, reports and documentation related to the project. A confidentiality clause will state the conditions under which parties may disclose confidential information to a third party and also mention the other exceptions to the confidentiality obligation.
- The confidentiality clause will generally have a long stop date, after which the confidentiality obligations will cease to exist. This may range from two years following termination of the contract (e.g. Cambodia, Equatorial Guinea) to ten years (e.g. Angola, Sudan).

Local content

- Local content provisions address how future investors will interact with the Host State from the standpoint of engaging locally available resources: human, tangible and intangible. Incorporation of local content provisions will, in other words, demonstrate how states see the local content realm functioning, its penetration as well as the general and particular circumstances surrounding it. By including local content provisions, the Host State will pursue and aim to accomplish engagement of local available resources by means of stipulating them in a contract.
- Most often, local content provisions are found in investment contracts within the extractive industry (concessions, contracts of work, joint venture agreements, and production-sharing arrangements (less used nowadays). However, other investment contracts in the energy sector, apart from the extractive industry, may also contain local content clauses, especially if they govern previously unexplored areas like renewables.
- Few existing host government agreements for oil and gas pipelines include a provision on local content. For instance, the Trans-Adriatic Pipeline (TAP) HGAs deal with local content/local support. The TAP HGA Albania (paragraph 22) obliges the project investor to give preference to Albanian suppliers in those cases where Albanian suppliers are in all material respect competitive. The TAP HGA Greece (paragraph 8) first acknowledges that the project represents a major investment in the Hellenic Republic, followed by an obligation of the project investors to encourage the use of Greek companies and labour throughout the project supply chain, in accordance with the Community Treaties and the WTO law. The West-African Gas Pipeline (WAGP) HGA (Schedule 11, Paragraph 1.4) also makes local content an evaluation point of the major contract bidding procedures.

Box 2

The Afghan Amu Darya Basin contract:

“The contractor agrees to as far as possible train and employ qualified Afghan nationals...and...will undertake the schooling and training... The contractor will require the contractors and subcontractors to do the same.”

Timor-Leste’s production sharing contract for Area A stipulates that “the Contractors shall draw to the attention of suppliers based in Timor-Leste, in such a manner as the Ministry agrees, all opportunities for provision of good and services in petroleum operations.”

The Ghana-Tullow agreement provides that “in the acquisition of plant, equipment, services, and supplies... [the] contractor shall give preference to materials, services, and products produced in Ghana...if [they]...meet standards generally acceptable to international oil and gas companies...”

General obligations of the Host State

- In addition to setting out the obligations of the investor, the contract must also state the obligations of the Host State. These obligations include, but may not be limited to, granting all necessary permits and licenses for conducting construction and operations, providing entry and work permits for employees and contractors, providing permits for importing equipment and materials, and generally preventing any obstruction to the project operations.
- In addition to the duties mentioned above, some other obligations, such as those relating to confidentiality, will be applicable not only to the investor but also to the Host State. However, it is possible that some contracts may vary the extent to which such common obligations are applicable to the parties. For instance, more onerous confidentiality obligations may be placed on the investor than the Host State or vice-versa.

Box 3

The 1997 Turkmenistan Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmenistan:

“Article 7 Rights and Obligations of Competent Body and Concern:

71.1. (a) the right to have full and complete access to the Contract Area at all reasonable times with a right to observe Petroleum Operations and the right to inspect all assets, records and data owned or maintained by Contractor relating to Petroleum Operations and this Agreement. In doing so, Competent Body shall not unduly interfere with Contractor’s Petroleum Operations. However, Competent Body may make a reasonable number of surveys, drawings, tests and copies for the purpose of implementing this Agreement. In so doing, Competent Body shall be entitled to make reasonable use of the equipment and instruments of Contractor and its representatives shall be given assistance by Contractor for such functions. Contractor shall afford to Competent Body’s representatives all facilities and privileges afforded to its own personnel in the field, including the use of available office space and housing, free of charge;

(b) copies of all manuals and technical specifications, design documents, drawings, construction records, data, programs and reports prepared or maintained in respect of Petroleum Operations as are customary in international oil industry practice;

(c) the right to audit Contractor’s accounts with respect to all Petroleum Operations as provided in Article 36;

(d) the right to receive at the Delivery Point unencumbered title to Competent Body’s share of Petroleum hereunder; and (e) such additional rights as may be attributed to Competent Body hereunder.”

3. Information to be assessed

- Though the preamble of the contract does not directly create rights and obligations for the parties, however, its interpretation and language must be given due consideration. This is because the preamble reflects the will of the parties and helps to reaffirm their commitment towards fulfilling their respective obligations. Therefore, the specific language used in each case and its relationship to the rest of the contract is crucial.

Work programme and budget

- The failure to meet the minimum work and expenditure can have grave consequences for the investor. Typically, in such a case (except where such failure has resulted due to a *force majeure* situation) the investor will be required to compensate the Host State for the deficit. Conversely, where the investor performs more work than required under the annual work programme, it may be entitled to carry forward any work performed and deduct it from the work to be performed in the coming years.

Relinquishment

- It is important to remember that there may be considerable variation in relinquishment obligations. For instance, the time stipulated for relinquishment will usually be determined based upon the size of the contract area, the total time granted for the actual exploration and the nature of the exploration area. Generally, relinquishment obligations are more stringent in high oil and gas producing countries rather than those with low production. The areas to be relinquished may constitute between 50% and 75% of the original contract area. Relinquishment may take place in phases, with an obligation to surrender a certain percentage of area every few years.
- It is important for the Host State to ensure that the acreage it receives from the investor can be re-licensed. The contract must not specify only the percentage of the block that the investor is required to surrender because in such a case, it is possible that the investor will return small fragments of acreage that collectively amount to the stated percentage. Therefore, the relevant Minister/Ministry must carefully assess the shape and size of the surrendered area and the investor should be relieved of its relinquishment obligations only after the formal approval of the relevant authority is obtained.

Decommissioning and abandonment

- Parties should ensure that the decommissioning and remediation provisions should be clearly provided in the original contract. In the absence of such a provision, the original contract will need to be renegotiated to take account of the decommissioning obligations of the investor. This may be particularly problematic for the Host State if the contract contains a stabilisation clause that limits the ability of the Host State to renegotiate the provisions of the original contract.
- Under some arrangements, typically Build-Own-Transfer (BOT) projects, the Host State will retain ownership over production facilities and continue operations even after the termination of the contract. In such cases, the parties should ensure that there is a clause covering the decommissioning of installations that will not be taken over by the Host State.
- It is important for both the parties to make sure that the timelines mentioned in the contract for completion of work are realistic. Delays in decommissioning projects are likely and parties should therefore clearly mention in the contract (i) delays that are either at the investor's or the Host State's risk and (ii) delays that are categorised as *force majeure* events.
- Investors should be aware that laws and regulations pertaining to decommissioning in different countries are varied and at times overly complicated. Apart from framing the decommissioning plan and obtaining approval for it, other legal issues will need considerable attention. These issues include the funding of decommissioning costs, litigation risk with contractors, and compliance with international and national environmental laws.
- From the perspective of the Host State, it is crucial to ensure that investors do not undertake only superficial remediation to minimize costs. One way to guarantee this does not occur is to use a financial mechanism such as a performance bond or reserve fund. It is equally relevant to make sure that the cost for decommissioning are calculated as accurately as possible. This is because in the case of a shortfall in the finances, the Host State may have to cover the deficit.

Confidentiality

- The confidentiality clause should list out the permitted disclosees, to whom a party can disclose confidential information without the need to obtain prior consent. While this may vary between jurisdictions, this list will usually include affiliates, potential assignees, banks, consultants, arbitrators or other experts in connection with the agreement and employees, who generally must also undertake to maintain confidentiality of the information.
- It is relevant to note that the level of confidentiality required under the contract may vary between countries. For instance, some countries may only impose an obligation on the investor to use its best endeavours to ensure affiliates observe confidentiality. On the other hand, some countries may require formal confidentiality agreements to be signed between the party seeking to disclose and the permitted disclosee.
- While the definition of “confidential information” may not usually include the contract itself, however, in a number of countries it is expressly stated that the contract itself is a confidential document and therefore it cannot be disclosed by a party without the prior consent of the other party.
- While most contracts apply confidentiality to all information, in some instances the parties may deviate from this approach and specify that disclosures may be made for public interest reasons. Such a clause is significant not only because it takes into account the public interest in information flowing from the contract, but also in that it recognizes that not all information needs to be confidential.
- Additionally, it is important for the parties to bear in mind that they may be required by law to disclose information, without violating the confidentiality clause. However, there may be situations

where other clauses may restrict such a disclosure. Such a situation could arise where the government introduces a new law requiring full contractual disclosure but certain existing contracts, with limited disclosure requirement, contain a stabilization clause that freezes the law at the time the contract is executed. In such a case, the new law mandating the disclosure of contracts may not undermine the provisions of the confidentiality clause.

Box 4

The Denmark Model License of 2005 for Exploration & Production of Hydrocarbons which provides for public disclosure:

"Section 1 Confidential Information All information exchanged between the Parties hereto in the context of this Agreement shall be considered and treated as confidential information, subject to Article VII, Section 2 of the MDA. The Parties hereto hereby agree not to divulge such information to any other Person without the prior written consent of the other party, which consent shall not be unreasonably withheld and/or delayed. However, the foregoing shall not be applicable to CONCESSIONAIRE's or the GOVERNMENT's bankers, advisors and all those who are, in a special way, connected with the Operations. Section 2 Public Information The obligation of confidentiality set forth in Article VII, Section 1 above shall not apply either to information exchanged between the Parties hereto which is in the public domain or to information exchanged by the Parties which the CONCESSIONAIRE is required to reveal to any other Person by law applicable to it."

Local content

- Requirements by host governments towards local content are different across geographical regions, but, in general, because local content provisions can be key to translating resource investments into sustainable benefits for the local population, particular importance should be given to framing them from the contractual standpoint.
- Another important aspect of local content to be kept in mind is its limitation or restriction under applicable international treaty(ies), which the Host State is a party to. One such major limitation can be found under the Agreement on Trade-Related Investment Measures (the "TRIMs") produced at the time within the GATT/WTO process¹⁴ as well as in the General Agreement on Trade in Services (GATS), the Agreement on Subsidies and Countervailing Measures (ASCM), and the Agreement on Government Procurement (GPA). The TRIMs agreement prohibits the use of local content that requires a specific percentage or quantitative target of local goods purchases by companies, and has trade-balancing requirements that restrict the volume or value that a company can import to an amount related to the level of products it exports.
- Finally, the Energy Charter Treaty (ECT), which is the only multilateral treaty in the area of energy, also refers to TRIMs (Article 5) similar to WTO/GATT. In case of a trade dispute between Contracting Parties, at least one of which is not a WTO Member, the ECT's dispute resolution provisions will apply (Article 29 + Annex D).

4. Negotiation goals

- It is important to ensure that the contract is constructed in a manner that ensures an overall balance of rights and obligations for the investor as well as the Host State. For instance, parties must carefully conduct negotiations on the work commitments, which contain most of the exploration risk since few exploration efforts are in fact successful and lead to development of a field.
- It is relevant to note that, energy investment contracts contain obligations which, by their very nature, restrict the autonomy of the parties. An investor, when acquiring exploration rights, aims to

¹⁴ The TRIMs Agreement clarifies existing rules contained in Articles III (National Treatment) and XI (Prohibition on Quantitative Restrictions) of the GATT, 1994.

retain maximum freedom of action in relation to the extent of exploration, taking on minimum expenditure obligation or carrying out exploration work. On the other hand, the host state will also wish to retain some flexibility regarding its national priorities and policy space. Due to these reasons, host states must aim to strike a proper balance between the interests of the investor and the energy policy of the country.

5. Model clause options

Clause option for the general obligations of the contractor

Box 5

Model Production Sharing Contract of the Republic of Cyprus (2007):

“Article 6: Contractor's Obligations Relating to the Conduct of Hydrocarbons Operations

6.1. The Contractor shall supply all the necessary funds and purchase or rent all the equipment and materials required for the performance of the Hydrocarbons Operations. It shall also supply all the technical expertise, including the use of the foreign personnel required for the performance of the Annual Work Programmes. The Contractor shall be responsible for the preparation and implementation of the Annual Work Programmes which shall be performed in the most appropriate way in accordance with good international petroleum industry practice.

6.2. Where the Contractor consists of several entities, it shall, upon the Effective Date, provide the Minister with a copy of the joint operating agreement which binds the entities constituting the Contractor, while specifying the name of the entity appointed as "Operator" which shall be responsible for the conduct of Hydrocarbons Operations.

6.3. Within three (3) months following the Effective Date, the Contractor shall open an office in the Republic of Cyprus and keep it during the term of this Contract. Said office shall include in particular a representative authorized to conduct the Hydrocarbons Operations to whom any notice under this Contract may be served.

6.4. The Contractor shall conduct the Hydrocarbons Operations provided under this Contract diligently and in accordance with good international petroleum industry practice, and the provisions of the Regulations.

6.5. The Contractor shall provide working conditions, living accommodations on offshore installations, and access to medical attention and nursing care for all personnel employed by it or its subcontractors in Hydrocarbons Operations, in accordance with good international petroleum industry practice.

6.6. If, after the Effective Date, other Persons are granted permits or licences within the Contract Area concerning the exploration and production of any minerals or other substances other than Crude Oil or Natural Gas, the Contractor shall use its best efforts to avoid obstruction or interference with such licensees' operations within the Contract Area. The Ministry shall use its best efforts to ensure that operations of third parties do not obstruct the Contractor's Hydrocarbons Operations within the Contract Area.

6.7. In the exercise of its right to build, perform, work and maintain all facilities necessary for purposes of this Contract, the Contractor shall not occupy land located within less than fifty (50) meters from any building, used for religious purposes or not, burial place, enclosing wall, yard and garden, house, group of dwellings, village, urban centre, well, water point, reservoir, street, road, , pipeline, works of public interest, infrastructure works, tourist areas, unless prior authorization by the Minister has been granted. The Contractor shall repair any damage caused during such work. Model PSC 20 February 2007

6.8. The Contractor and its sub-contractors undertake to give preference to Cypriot and European Union enterprises and goods, under equivalent conditions in terms of price, quantity, and quality, conditions of payment and delivery time. The Contractor and its sub-contractors undertake to issue calls for bids to Cypriot and foreign candidates for supply, construction or services contracts the value of which exceeds two hundred thousand (200,000) Euros, it being understood that the Contractor shall not unduly break down said contracts into components. A copy of such contracts shall be provided to the Minister upon execution thereof.

6.9. The Contractor and its sub-contractors undertake to give preference, under equivalent economic conditions, to the purchase of goods required by the Hydrocarbons Operations versus the renting thereof or any other kind of leasing. For that purpose, the Contractor shall specify in the Annual Work Programmes all the leasing contracts the value of which exceeds fifty thousand (50,000) Euros.

6.10. From the commencement of the Hydrocarbons Operations, the Contractor shall assure priority employment for Cypriot and European Union personnel and contribute to the training of those personnel in order to allow them access to any position of skilled worker, foreman, executive and manager. For that purpose the Contractor shall establish at the end of each Calendar Year in agreement with the Minister a plan for recruiting Cypriot and European Union personnel and a plan for training and improving such personnel in order to achieve progressively greater participation of Cypriot and European Union personnel in the Hydrocarbons Operations.

6.11. The Contractor shall also contribute to the training and improving of the professional skills of the civil servants of the Ministry of Commerce, Industry and Tourism, in accordance with a plan established in agreement with the Minister at the end of each Calendar Year. For that purpose: (a) during the term of the exploration period, the Contractor shall allocate to said plan or, at the Minister's election, place at the disposal of the Minister for implementing said plan, a minimum amount of _____ (_____) Euros per year. (b) from the date of first declaration of a Commercial Field within the Contract Area, said amount shall be increased to _____ (_____) Euros per year.

6.12. Hydrocarbons Operations shall be subject to supervision by authorised representatives of the Minister. Pursuant to Section 21 of the Law, the authorised representatives of the Minister shall have the right, *inter alia*, to supervise Hydrocarbons Operations and to inspect the facilities, equipment, materials, records and books relating to Hydrocarbons Operations, provided that such inspection shall not unduly delay the proper conduct of said Operations. For purposes of permitting the exercise of the above-mentioned rights, the Contractor shall provide the representatives of the Minister with reasonable assistance regarding transportation and accommodation, and transportation and accommodation costs Model PSC 21 February 2007 directly related to supervision and inspection shall be borne by the Contractor. Said costs shall be deemed to be Hydrocarbons Costs and recoverable pursuant to the provisions of Article 8.2.

6.13. The Contractor shall regularly inform the Minister of the performance of Hydrocarbons Operations and promptly of the accidents which have occurred, if any. Notices and reports shall be provided by the Contractor to the Minister in accordance with the provisions of the Regulations. 6.14. The Contractor shall forthwith notify the Minister of any discovery of mineral substances made during the performance of Hydrocarbons Operations.

Some contracts may place an obligation on the investor to make all the investments, bear all costs, and provide all necessary equipment, personnel, technology required for conducting operations.

Box 6

The 2008 Brazilian Model Concession Agreement:

"13.1 - During the effective period of this Agreement and according to its terms and conditions, the Concessionaire shall have, except as contemplated in paragraph 2.6, the exclusive right to perform the Operations in the Concession Area, for this purpose being obliged to, at its own account and risk, make all investments and bear all necessary expenses, to supply all necessary equipment, machines, personnel, service and proper technology and to assume and respond for losses and damages caused, directly or indirectly, by the Operations and their performance, regardless of pre-existing fault, before the ANP, the Federal Government and third-parties, according to paragraphs 2.2, 2.3 and other applicable provisions of this Agreement."

Clause option for annual work programme and budget

Box 7

Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic Of Uganda by and Between the Government of the Republic of Uganda and Tullow Uganda Limited:

"Article 6 Work Programmes and Budgets: 6.1 So long as any Exploration Licence or Production Licence issued to Licensee herein remains in force, within thirty (30) days from the Effective Date, Licensee shall prepare and submit to the Advisory Committee for its review and, where required pursuant to Article 5, approval, a detailed Work Programme and Budget, setting forth the Exploration Operations and/or Development Operations which Licensee proposes to carry out during the licence period and the estimated cost thereof. The Work Programme and Budget for the period from the date of effectiveness of the Exploration Licence to the end of the said licence shall be presented to the Advisory Committee within thirty (30) days of the Effective Date for review in accordance with paragraph 5.3.1.

6.2 A Work Programme and Budget submitted to the Advisory Committee during the Exploration Period pursuant to this Article and every revision or amendment thereof shall be consistent with the requirements set out in Article 4 relating to minimum work and expenditure for the Exploration Period within which the Work Programme and Budget will fall.

6.3 After giving notice to the Advisory Committee, Licensee may amend any aspect of the Work Programme or Budget relating to Exploration Operations submitted to the Advisory Committee provided such amendment is consistent with Licensee's obligations under Article 4. Any notice given pursuant to this paragraph shall state the reasons why, in the opinion of Licensee, an amendment is necessary or desirable and the views and recommendations of the Advisory Committee with respect to any such amendment shall be given due consideration by Licensee. In all other cases where Licensee wishes to amend the Work Programme and Budget, the amendment shall be referred to the Advisory Committee for its review and approval, which approval shall not be unreasonably withheld, before Licensee may proceed with its operations on the basis of such amended Work Programme and Budget."

Clause option for the relinquishment provision

Box 8

Model Production Sharing Agreement between the Government of the United Republic of Tanzania (2013)

“Article 6: Relinquishment of Contract Area:

(a) If the Contractor has requested TPDC to apply for any extension of the Exploration Licence, the Contractor in consultation with TPDC shall select such parts of the Contract Area to be relinquished by TPDC, and TPDC shall in accordance with the Act relinquish said parts of the Contract Area as follows: i. On or before the end of the Initial Exploration Period TPDC shall relinquish such parts of the Contract Area corresponding to at least fifty per cent (50%) of the original Contract Area. ii. On or before the end of the First Extension Period TPDC shall relinquish at least fifty per cent (50%) of the remaining Contract Area. iii. At the end of the Exploration Period, TPDC shall relinquish the remainder of the Contract Area which is not a Development Area. The area to be relinquished shall be contiguous and compact and of the size and shape that will permit the effective conduct Petroleum Operations in the relinquished area.

(b) No relinquishment shall relieve Contractor of accrued, but unfulfilled obligations under the Agreement. In the event the Contractor desires to relinquish its rights hereunder in the whole of the Contract Area without having fulfilled all accrued Minimum Exploration Work Programme under Article 5, it shall pay to TPDC, prior to the date of such proposed total relinquishment, the sum equal to the remaining amount of the non-discharged guarantees corresponding to such accrued, but unfulfilled work obligations.

(c) The provisions of this Article shall not be read or construed as requiring Contractor to select and TPDC to relinquish any part of the Contract Area which constitutes or forms part of either a Location or a Development Area provided, however that if at the end of the first Sub-period, Second Sub-period, First Extension Period or Second Extension Period as the case may be, Contractor elects not to enter the ensuing period, Contractor shall relinquish the entire Contract Area except for any Development Area.

(d) Contractor shall have the right at any time to request TPDC to relinquish all or part of the Contract Area provided it has undertaken the work obligations of the relevant Exploration Period during which such relinquishment is made.”

Clause option for the decommissioning obligation

Box 9

Model production sharing contract of the Republic of Equatorial Guinea:

“ARTICLE 24 - DECOMMISSIONING

24.1 Relinquishment or Decommissioning

24.1.1 Subject to Article 2.5.2, the Contractor may at any time relinquish and/or abandon any portion of the Contract Area or any Well not included in a Field subject to having given three (3) months prior notice to the Ministry, provided that the Contractor shall have fulfilled all of its obligations under this Contract and that it has given the Ministry full details of the state of any reservoir and the facilities and equipment in such area in addition to any plans for the removal or dismantling of such facilities and equipment including all technical and financial information. All decommissioning operations must be undertaken in accordance with the Hydrocarbons Law.

24.1.2 The decommissioning of a Field by the Contractor and its corresponding decommissioning plan shall require the prior approval of the Ministry in accordance with the Hydrocarbons Law. The Contractor shall prepare and deliver to the Ministry a plan for the decommissioning of all Wells, facilities and equipment, the rehabilitation of the landscape and the continuation of Petroleum Operations, if applicable, in accordance with the Hydrocarbons Law. 48

24.1.3 Unless the Ministry elects to keep the facilities and equipment in order to continue Petroleum Operations in accordance with Article 24.3.3, the Contractor is obligated to fully decommission all Fields within the Contract Area.”

Options for the confidentiality clause

Clause option 1

Box 10

Petroleum Agreement between the Office National de Recherches et d'Exploitations Pétrolières (the NOC) and the Contractors (19 March 2004):

“20.1 Each of the Parties shall treat as confidential the terms of this Agreement, and information gathered by it as a result of the operations described in this Agreement (“Confidential Information”), and shall not divulge Confidential Information to a

person who is not a Party. Provided that a Party may divulge Confidential Information:

(a) to the extent such Confidential Information is required to be furnished pursuant to any arbitration or legal proceedings, or by virtue of any law applicable to such Party;

(b) to any of its Affiliates, provided any such Affiliate maintains confidentiality as provided in this Article;

(c) to its employees or those of its Affiliates for the purposes of conducting operations hereunder, subject to each Party taking customary precautions to ensure Confidential Information is kept confidential;

(d) subject to Article 20.2, to a contractor, subcontractor, professional adviser or auditor employed or potentially to be employed by any Party in relation to the operations described in this Agreement, where such disclosure is required for the effective performance of the recipient's duties;

(e) subject to Article 20.2, to a credit establishment or any other financial institution in connection with the prospective funding of a loan or other financial agreement to be entered into for financing operations described in this Agreement;

(f) subject to Article 20.2, to a bona fide prospective transferee of the whole or part of a Percentage Interest in this Agreement, including an entity with which such Party is conducting bona fide negotiations directed toward a merger, consolidation or the sale of a majority of the shares in such Party or any of its Affiliates which control such Party directly or indirectly;

(g) to the extent Confidential Information must be disclosed by the Party as a public communiqué for the purpose of complying with laws, regulations and requirements of the [State] or pursuant to any rules or requirements of any other government or stock exchange having jurisdiction over such Party, or its Affiliates;

(h) if, before such disclosure, the Confidential Information had become public knowledge or had been legally obtained by the Party or any Affiliate from a source other than under this Agreement; or

(i) if such disclosure is approved in writing by all of the Parties.”

Clause option 2

Box 11

The Iraqi Technical Service Agreement:

“33.1 - All information and data obtained in connection with or in relation to this contract shall be kept confidential by the parties and their affiliates and shall not be disclosed or communicated to any third party without the other party's prior written consent.”

Clause option 3

Box 12

The Timor Leste production sharing agreement with Conocophillips:

“15.6 - The ministry shall not publicly disclose or make available, other than as required by the act or for the purpose of the resolution of disputes under this agreement, any data or information mentioned in section 15.1 until the earlier of: (i) five (5) years after it was acquired by the contractors; and (ii) this agreement ceasing to apply in respect of the point at or in respect of the point at which it was acquired.”

- Some contracts may differentiate between the obligations of the investors and those of the Host State.

Box 13

A “strict” version of the clause provided under Brazil’s Modern Concession Agreement (2001):

“33.1 - All and any data and information produced... shall be confidential and therefore, shall never be disclosed by the concessionaire without the prior written consent of ANP... the undertakings of paragraph 33.1 shall remain in full force and effect and shall survive the termination or recession of this agreement, for any reason whatsoever.”

The obligations on the Brazilian government, as represented by ANP, are somewhat more relaxed:

“The ANP undertakes not to disclose any data and information obtained as a result of the operations and which regards the part(s) of the concession area retained by the concessionaire, except when such disclosure is necessary for compliance with legal provisions, which are applicable to the ANP or with the purposes for which the ANP was created.”

Clause options for the local content requirements

- Typically, local content provisions are structurally distributed within a contract, or are placed within one dedicated article. The distribution throughout the contract, i.e., within multiple articles, takes place when, for instance, local content requirements are used multi-dimensionally, as suggested above. Below are examples of simplistic local content clauses that can be found in multiple articles.

Clause option 1

Box 14

“Article Y. Local content requirements regarding local manpower

The Contractor shall ensure that XX%% of its total manpower on the Project shall be sourced and employed from country Z.”

Alternatively: *“The Contract shall ensure, with respect to the Project, that XX%% of its managerial positions will be filled by nationals of country Z.”*

Clause option 2

Box 15

“Article [...] Local content requirements regarding materials

The Contractor shall ensure that certain materials [...] shall be sourced and procured locally.”

- In case where local content requirements are found only within one particular area, for example, covering sourcing and employment of local manpower, then contractually these requirements are drafted and placed into one article.

Box 16

Production-sharing contract of Trinidad and Tobago (2010):

“Article 39 Local Content

39.1 Contractor shall comply with the Government’s Local Content Policy in force and as modified from time to time

39.2 Contractor shall maximize to the satisfaction of the Minister the level of usage of Local Goods and Local Services, businesses, financing and the employment of nationals of the Republic of Trinidad and Tobago”

- There also be a mixture of local procurement and a social infrastructure component and a further stipulation regarding training programmes and employment:

Clause option 1

Box 17

Model Production-Sharing Agreement of Turkmenistan (1997):

“Article 20 Local Procurement, Social And Infrastructure Project

20.1 In procurement, Contractor shall give preference to goods which are produced or available in Turkmenistan and services which are rendered by Turkmenistan’s citizens and companies, provided such goods and services are offered on terms equal to or better than imported goods and services with regard to quality, price and availability at the time and in the quantities required.

20.2 Locally produced or available equipment, materials and supplies shall be deemed equal in price to imported items if the local cost of such locally produced or available items at Contractor’s operating base in Turkmenistan is not higher than the cost of such imported items, after transportation and insurance costs thereof have been added.

20.3 Contractor shall fund social or infrastructure project(s) as may be agreed to between Competent Body and Contractor.”

Clause option 2

Box 18

“Article 21 Training and Employment:

21.1 Contractor Undertakes To Train And employ qualified Turkmenian citizens in its Petroleum Operation and, following the Date of Commencement of Commercial Production, Contractor shall undertake the schooling and training of Turkmenian citizens for staff positions, including administrative and executive management positions. Contractor will also require its subcontractors to do the same. Contractor undertakes to gradually replace its expatriate staff with qualified Turkmenian citizens as they become available. An annual program for training and phasing in of Turkmenian citizens shall be established by Operator and shall be submitted for approval to the Management Committee along with the annual Work Programmes and Budgets referred to in Article 11. Within thirty (30) days of the end of each Calendar Year, Operator shall submit a written report to Competent Body describing the number of personnel employed, their nationality, their positions and the status of training programs for Turkmenian citizens.”

21.2 Contractor shall expend a minimum of ____ (____) US dollars during each twelve (12) Calendar Month period during the Exploration Licence term for training pursuant to paragraph 21.1. Following the Date of Commencement of Commercial Production, the minimum expenditure for training pursuant to paragraph 21.1 in each twelve (12) Calendar Month period during the term hereof shall be _____ (____) US dollars.

21.3 Contractor shall be free to employ foreign nationals to the extent that qualified Turkmenian nationals cannot be found to fill a position. Subject to the requirement of any law relating to immigration, Competent Body shall provide the necessary work permits and other approvals required for the employment of expatriate personnel in Turkmenistan by Contractor for purposes of this Agreement.”

1. Overview

- This chapter is concerned with how parties to energy investment contracts allocate the risk of loss or damage arising from a party's non-fulfilment of its obligations. The allocation of responsibilities and the prospective allocation of liability are never solely a matter of the parties' choice. For instance, a contract typically cannot modify the parties' non-contractual liability to third parties, other than those third parties that derive their rights from one of the parties. Similarly, certain liabilities may not be freely bargained to the extent they are mandatory under the applicable law. These include any mandatory laws that apply by virtue of the location of the contracted activities. An obvious example is that many national laws prohibit the exclusion of liability for a party's own intentional breach or gross negligence.
- The purpose of an investment contract is in principle the same as those of any commercial contract in this respect. However, there are also some important differences that affect the parties' expectations and the occurrence and allocation of liability (Please see the chapter on "Governing Law" for a detailed discussion).
 - The treatment of liability is typically regulated not by a single article but rather by a combination of several articles. The definition and combination of these articles varies significantly between individual investment contracts. For example, some contracts have articles or even whole sections headed specifically "Liability". On the other hand, some have provisions that are substantially similar but are distributed throughout the contract under a different heading or headings. Still others have few such provisions or even none at all.
 - Against this background, common liability provisions can be categorised under the following types:
 - Schemes for Allocating Risk in Cross-Border Investments
 - "Liability" clauses
 - Definition of Loss and Damage
 - Definition of "Fair Market Value" as the measure of compensation for expropriation
 - Definition of "Costs" or equivalent provisions for compensation for change of law
 - Relationship to international investment agreements
 - Insurance

I. Schemes for allocating risk

1. Terminology

- The schemes for allocation of risk discussed in this section will rarely be identified in a separate, dedicated article. Instead, they will typically be created by a combination of several articles. These articles, in turn, will draw on a handful of characteristic definitions which will be contained either within a stand-alone "Definitions" section or will be dispersed within the contract according to the article with which they are introduced or most closely connected, or in a mixture of both.

Box 1

The ECT Model Host Government Agreement for Cross Border Pipelines, 2006 (ECT Model HGA) contains general provisions on liability in a distinct “Part V” headed “Liability” but it also contains important specific provisions on liability in separate articles within a separate “Part VI” headed “Final Provisions”.

In addition to this, the definitions are mainly contained within an initial Article 1 headed “Definitions and Interpretation” within a “Part 1” headed “Interpretation and Scope of the Agreement”. However, the measure of compensation for a change of law is contained in a defined term, “Costs”, which is not in the Definitions section but rather in the clause setting up the change of law regime (Article 37.2), and the measure of compensation for expropriation is not defined as a term at all but rather stipulated in a stand-alone sub-clause (Article 38.2).

2. Purpose and objective

- For more simply structured investments it is sufficient to address questions of liability between the Host State and just the contracting entity on the investor’s side, perhaps with the inclusion of a group parent company. A more detailed consideration is required for more elaborate structures, in particular where the value chain crosses a number of borders. The complexities involved in such cross-border transactions are many and various, but two are most critical:
 - First, the effects of a disruption or cessation of transit may be greatest for legal entities that do not have a first-degree relationship with the contract, and that may also change over time.
 - Second, these effects may be far greater than the political or economic value of the particular investment located within the territory of the Host State.

3. Information to be assessed

- The Host State needs to take account of the state agencies and state-owned entities that are not identical to the state party that enters into the agreement. It is necessary in particular to consider whether it is the Host State or a particular agency (such as a Ministry) that is entering into the governmental agreement. The Host State should adopt definitions and provisions taking into account any state-owned entities or other state-side entities that might fall outside the definition of the state party but nonetheless have rights and responsibilities, and therefore potential claims and liabilities, under the agreement.
- Another practical consideration to take into account is enforceability. Often only the SPV itself will be a party to the contract. For this reason, ways must be found to make the rights and responsibilities of any wider circle of interested persons enforceable through the dispute resolution mechanisms of the agreement or related agreements.

4. Inputs of additional specialists

- The complexities of allocating risks and responsibilities, particularly in a cross-border context, make it necessary to bring to the negotiating table a good understanding of all of the technical, economic and political risks of the whole value chain over the life of the investment. This may well require additional specialisms beyond those needed for the other aspects of the particular investment agreement.

5. Negotiation goals

- The common goal for both parties is to find a reasonable allocation of the risks, taking into account the political implications (e.g. the acceptability of the government paying damages for loss of profit) and, the availability and cost of insurance for particular types of risks. Against this common background, the Host State’s goal will be to balance its cost, both of performance and of the risk of

liability, against the value of the investment to its economy and the political acceptability of the terms of the investment agreement. On the other hand, the investor’s goal will be to offlay a level of risk commensurate with the broader impact of any disruption of the particular investment to the organisation as a whole and to provide an adequate incentive for the government to continue performing its obligations beyond a change of political climate or regime.

6. Interaction with other relevant provisions

- As discussed earlier, these definitions are designed to interact with the general provisions regulating liability, the definition of “loss and damage” and, specific schemes of compensation for expropriation and for change of law.
- As mentioned above, it is also essential to consider whether the scope of the dispute resolution clause is adequate to include the extended scope of investor groupings.

II. Liability clauses

1. Terminology

- A number of energy investment contracts have clauses, or a suite of clauses, headed “Liability”. A good example is the ECT Model HGA. On the other hand, certain contracts, such as the TANAP HGA, may contain individual clauses of a similar nature, but do not group them under a distinct heading.
- Some contracts, like the WAGPP IGA, may have only one of such headings (most commonly in this case *force majeure*) but no clauses dealing specifically with liability in the scope of these particular clauses. Others still might deal with an aspect, such as *force majeure*, within a differently titled clause. For instance, the Ivanhoe IA addresses *force majeure*, in the event of a failure by the investor, within a chapter entitled “Rights and Obligations of the Government and Cabinet Member Responsible for Mineral Resources”.

Box 2

Part V of the ECT Model HGA is headed “Liability” and includes the following four articles:

- Liability of the Project Investors
- Liability of the Host Government
- Nature of Host Government Obligations
- Force Majeure

The TANAP HGA has three of the four articles, similarly named but each appearing separately, headed:

- “Liability of TANAP Project Entity”
- “Liability of the Host Government”
- “Force Majeure”
- A variation on this is the BTC HGA, which has consecutive articles dealing with the Host State’s liability under the heading “Compensation for Loss or Damage”, and with the direct project companies’ liability under the quite different heading “Limitation of Liability”.

2. Purpose and objective

- The purpose of these “Liability” clauses is to lay down any desired general rules about the allocation or assessment of liability. These may include the following:
 - A principle that the project vehicle will be liable to the Host State or any of a defined group of other state entities for breach of a defined group of project agreements, irrespective of the

particular state entity that entered into the agreement on behalf of the Host State. Where the investment contract is entered into by several joint venture investor parties, this clause might regulate whether or not their liability is joint as well as several.¹⁵

- A reciprocal principle setting down general principles for the liability of the Host State to the contracting investor entity and perhaps also to a broader defined group of equity holders of that investor.
- A provision that, where loss or damage is caused both by the Host State (or one of its entities) and the project company (or its investors), each will be liable only to the extent of its fault.
- Limitations of liability, such as the exclusion of punitive or exemplary damages.¹⁶
- Stipulation of the currency of payment of any damages and whether and if so what interest is payable.
- Where the Host State is also interested in the investor as part of the investment consortium, such regulation as is necessary to distinguish between the Host State's interests and liabilities *qua* state and its interests and liabilities *qua* investor.

3. Information to be assessed

- Whether or not to include some or all of these clauses requires a consideration of the particular circumstances and dynamics of the investment from two perspectives:
 - First, does the point need to be regulated from an economic viewpoint? For instance, does the organisation of the project agreements give rise to the risk that a legitimate claim for loss, in line with the parties' intended allocation of risk, might otherwise be "orphaned" due to questions of privity of contract?
 - Second, does this goal require specific treatment within the framework of the applicable law or laws?
- In terms of negotiating tactics, it is obvious that any discussion of these points is likely to result in a request for a reciprocal provision from the opposing party. Any wish for asymmetric treatment must be persuasively argued.

4. Inputs of additional specialists

- Any such clause will need to the advice of a specialist in the applicable law or laws.

5. Interaction with other relevant provisions

- As with any clause of general application, the need for such a clause (or suite of clauses), and its effect, must be considered in the context of each of the particular rights and obligations in the investment contract.

III. Definition of "Loss and Damage"

1. Terminology

- Many investment contracts contain a definition headed "Loss or Damage" or similar. This practice is not universal and a similar provision may be included instead within a clause dealing specifically with

¹⁵ See, e.g., BTC HGA at Article 11.1

¹⁶ See, e.g., BTC HGA at Article 11.1

the liability of the investor or the Host State.¹⁷ In some contracts, such as the Ivanhoe IA, there is no such provision at all.

2. Purpose and objective

- The purpose of such a clause is to define if, in the event of a claim, certain types of losses may be included in or excluded from recoverable loss for the purposes of the contract. Such a clause will typically have two components. First, it will define what direct loss is recoverable. Second, it will address specifically whether consequential (i.e. indirect) loss is included within the scope of recoverable damages.
- What constitutes direct or indirect loss is a matter of interpretation under the applicable law, taking account of any explicit inclusions of particular kinds of loss within the definition of “direct” loss in the investment contract.
- Where no provision is made regarding indirect loss, like in the ECT Model HGA, the question will similarly be determined by general principles of the applicable law.

3. Information to be assessed

- As explained above, an investment contract may well differentiate between two or more types of event in terms of defining the consequences of breach or other ground of non-fulfilment. The definition of “Loss and Damage” therefore needs to be considered within the context of this overall scheme and in relation to any separate definitions of “compensation for expropriation” and for “change of law”.
- The right to claim interest is treated differently in different agreements. For instance:
 - The ECT Model HGA includes interest explicitly within the definition of Loss and Damage and contains no other provision specifically dealing with it save as a component payable as part of the compensation of “Costs” for a Change of Law.¹⁸
 - The TANAP HGA includes interest as a part of “Loss and Damage” and has a more general provision within a “Miscellaneous” provision at the end stating that interest is payable on any amount payable under the agreement.¹⁹
- An additional and extremely important consideration in relation to the definition and above all interpretation and application of a “Loss and Damage” clause is the content of the Recitals or Preamble to the investment contract. These may contain references to facts or other circumstances that might be influential, or even decisive, in determining under the applicable law whether a particular kind of loss is direct or indirect and thus whether or not it is recoverable.

4. Model clause options

- **Clause option defining direct loss**

Box 3

The ECT 2006 Model HGA is characteristic in this respect: *“Loss or Damage shall mean any loss, cost, injury, liability, obligation, expense (including interest, penalties, attorneys’ fees and disbursements), litigation, proceeding, claim, charge, penalty or damage suffered or incurred by a Person.”*

¹⁷ See, e.g., WAGPP IPA Articles 36 and 37, and the section on “Liability Clauses”.

¹⁸ ECT Model HGA, Article 37, Option 1, sub-clause 4(b)(2)

¹⁹ TANAP HGA, Article 37.4

- **Clause option providing exclusion of indirect loss**

Box 4

An example of an exclusion of indirect loss is in the WAGPP IPA: the WAGPP IPA: *“Unless otherwise provided in this Agreement, compensation for consequential or incidental loss shall not be included ...”*¹

- There is a similar exclusion in the TANAP HGA definition of “loss or damage”, but in this case with an exception to take account of a mandatory provision under the applicable (Swiss) law that precludes a party effectively excluding liability for its own gross negligence or wilful misconduct: *“... excluding any indirect or consequential losses or damages and loss or deferral of profit unless caused by any gross negligence or wilful misconduct imputable to [the injured party]”*.

- **Clause option specifically including indirect loss**

Box 5

An example of a specific inclusion of indirect loss is in the BCT HGA definition of “loss or damage”:
“Solely in the case of an act of Expropriation by a State Authority, Loss or Damage may include indirect, incidental or consequential losses (including, for the avoidance of doubt, any loss of profits, reliance losses, costs of mitigation or third party costs).”

This applies only to a claim for expropriation. As a matter of interpretation, it may be taken as an indication that the contracting parties intended to exclude indirect loss for all other claims. The same effect could be achieved alternatively by adopting an exclusion of indirect loss in this definition and addressing the question of indirect loss recovery for cases of expropriation within a separate definition of “Fair Market Value”.

IV. Definition of “Fair Market Value” as the Measure of Compensation for Expropriation

1. Terminology

- Most investment contracts contain a provision to address the case of expropriation. Many, but not all, have a dedicated article for this purpose. Most provisions addressing the question of expropriation contain a definition of “Fair Market Value”. This may appear either in the expropriation article itself or within the Definitions section.

2. Purpose and objective

- The purpose of such a clause is to differentiate the consequences of an expropriation from those for non-expropriatory breaches of the investment contract. The reason has its origins in international law, where it is generally recognised that a Host State has the right to expropriate private property in the public interest provided certain conditions are met. One of these is that the Host State pays prompt and sufficient compensation. This may be contrasted to the concept of “reparation” for an unlawful international act. The concept of reparation in an investment contract, subject to a national law, will typically be addressed by the approximate equivalent of the general definition of “Loss and Damage” already described, and the concept of “compensation” for expropriation, as in an investment treaty, by means of a definition of “**Fair Market Value**”.

3. Information to be assessed

- Where the measure of compensation is specifically defined, it will become the prime measure of compensation for such an event. It will then be a matter of interpretation whether damages for loss and damage may be payable in addition to this value, whether for expropriation or for breach of another parallel obligation of the contract. In the absence of such an express provision, this question will be left to the general rules of construction of the applicable law.
- In this context, the parties should consider whether to apply this measure of compensation only to a lawful expropriation (i.e. a governmental taking that complies with the requirements of public interest, non-discrimination, due process and prompt, albeit disputed, compensation) and to leave unlawful takings to be compensated by the usual measure for “loss and damage”, or to apply this same standard to both lawful and unlawful takings. This is a matter of drafting.

4. Model clause options

- Clause prescribing compensation of fair market value for expropriation

Box 6

The ECT Model HGA, article 38:

“Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).”

There is an important “Explanatory note” to this article, which reads as follows:

“The calculation of the value of a long-term Investment can be extremely complex and problematic. The Parties may wish to consider including more detailed provisions in this regard. Project Investors may also wish to bear in mind the possibility that the value of the Project to them may exceed its fair market value.”

- In practice, many cross-border investments make more detailed provisions regarding compensation for expropriation to address the difficulty of establishing a fair market value for disruption. There are two elements in the definition of fair market value to consider in this respect. The first is the definition of quantum and the second is the choice of investor group entitled to claim the compensation. Both these elements appear in the TANAP HGA.
 - First, it rejects the classic definition of fair market value in international law and creates instead a counter-factual for assessment by reference to the injured investor’s “overall business including any related investments”. This implies a recognition that the allocation of loss for this risk in relation to a cross-border investment should be measured by reference to the effect of the loss of transit capacity on the broader value chain rather than in terms of a reduction in the value of the investor’s share of the stand-alone pipeline business which is the immediate object of the investment agreement.
 - Second, consistent with this intention, the clause entitles the broadest Investor Group, that of “Project Participants”, to claim such compensation.

Box 7

The TANAP HGA

“Fair Market Value” means the value to a Project Participant of its Investment with the intention of putting the Project Participant in the position it would have been in if no Expropriation had occurred having taken into account the effects of the Expropriation on its overall business including any related Investments in relation to TANAP Project. Such value shall be calculated assuming a going concern, assuming a willing buyer and a willing seller in a non-hostile environment, and disregarding all unfavourable circumstances leading up to or associated with the Expropriation;”

- This extension of the scope of compensation and of the class of person able to claim it specifically for an act of expropriation appears also in the BTC HGA. By contrast, the WAGPP IPA, through its article 35.2, adopts the classic international law standard about quantum but extends the circle of protected party to the project Company’s “Affiliates” in its article 35.1.

Box 8

Fair market value under the BTC HGA, Article 1/Appendix 1, “Definitions”:

“the value of a Project Participant’s interests, investments, property, commercial arrangements, rights, privileges and exemptions which are taken, diminished, devalued, damaged or otherwise detrimentally affected as a result of the Expropriation, taking into account that Project Participant’s overall business and its related investments ...”

V. Definition of “Costs” or Equivalent Provisions for Compensation for Change of Law

1. Terminology

- The terminology of investment contracts is varied in this respect:
 - Some adopt the terminology of the ECT Model HGA’s “option 1”, which employs a special definition of “costs” for the detrimental consequences to an investor of a defined “change of law”. In addition to the ECT HGA “option 1”, the TANAP HGA also uses this model.
 - An alternative presented in the ECT Model HGA’s “option 2” is the “economic equilibrium” clause which provides an obligation that this be maintained, combined with either an implicit or an explicit obligation to pay loss or damage for a failure to do so. An example of an implicit obligation is the ECT Model HGA “option 2” while an explicit obligation of this nature can be found in article 10.1 (iii) of the BTC HGA, which lists among the types of claim for loss and damage:

“any failure by the State Authorities, whether as a result of action or inaction, to maintain Economic Equilibrium as provided in Section 7.2(xi).”
 - A third alternative is presented by the WAGPP. This creates the defined concepts of an “agreed regime”, consisting of the entire international and internal *lex specialis* created for the investment,²⁰ and of a corresponding “regime failure”,²¹ for which compensation is payable as for an act of expropriation.²²
 - Others again, such as the Ivanhoe IA, adopt the language of “stabilisation” (explicitly in relation to tax, but also in terms of an undefined “stable operating environment” in relation to other matters²³), with the emphasis being on the continued actual or deemed observance of this regime. The agreement provides no specific remedy for the Host State’s failure to maintain the regime, the intention presumably being to rely instead on investment treaty claims including breach of the fair and equitable standard and expropriation for the Host State’s failure to do so.

2. Purpose and objective

- Most investment contracts contain a provision to address the consequences of a change of law by the Host State that has a detrimental effect on the investment. The present section is concerned with how investment contracts may deal with this issue in terms of liability, and how this might compare or contrast to the more general provisions on liability already discussed above.

²⁰ WAGPP, Article 1 “Definitions” and Article 7

²¹ Article 36.1

²² Article 36.3

²³ Ivanhoe IPA, Article 15.23

- As with the case of compensation for expropriation, a change of law liability clause will typically have two components:
 - First, it will define the amount of liability by reference to a definition of “costs”.
 - Second, it will define the Investor Grouping by whom, or on whose behalf, such “costs” are claimable

Box 9

The definition of “costs” under the ECT Model HGA, article 37 option 1 sub-section 2

“any new or increased cost or expense, or any reduction in revenue or return, directly resulting from, or otherwise directly attributable to, that Change of Law, which is incurred or suffered (whether directly or through the intermediary of any Operator) in connection with the Project by any Project Investor.

Such costs or expenses may include:

(a) capital costs;

(b) costs of operation and maintenance; or

(c) costs of taxes, royalties, duties, imposts, levies or other charges imposed on or payable by the Project Investor.”

Associated with this definition of “costs” is a corresponding definition of “savings” provided in article 37 option 1 sub-section 3:

“any savings or reduction of cost or expense, or increase in revenue, directly resulting from, or otherwise directly attributable to, that Change of Law, which is enjoyed or realised (whether directly or through the intermediary of any Operator) by any Project Investor.”

- The ECT Model HGA “option 1” treats a change of law separately. This is to allow the state party the opportunity to resolve any dispute by negotiation, including the possibility of reversing the change or paying compensation, before the investor takes it to a formal dispute. The Model also provides a reduced period for the investor to raise a complaint (the suggestion in the Model is within one year) to strike a balance between the investor’s rights on the one side and the need for legislative freedom and certainty on the other. The TANAP HGA adopts a similar approach, but with some differences.

Box 10

The approach taken by the TANAP HGA:

- First, it adopts the narrower definition of a “Discriminatory Change of Law”, limited to changes that are both discriminatory and that fall within a limited number of specified provisions.
- Secondly, the Interest Grouping is the intermediate one of “Interest Holders”.
- Thirdly, it gives the state the option to pay any compensation either as a lump sum or in annual instalments or as a reduction of any tax payable by the investor.
- Fourthly, it has a carve-out for proportionate measures in relation to environmental protection, public health and similar rights.
- Fifthly, it has two provisions to ensure the compatibility of this specific right with other liability provisions:
 - First, any reimbursement of “costs” must be taken into account in awarding “Loss and Damage; and
 - Secondly, where a change of law amounts to an Expropriation, it shall be treated as an Expropriation and not as a change of law.

3. Information to be assessed

- As with the case of expropriation, where this measure of compensation is specifically defined, it will become the prime measure of compensation for such an event. It will then be a matter of interpretation whether damages for loss and damage may be payable in addition to this value, whether for change of law or for breach of another parallel obligation of the agreement. In the absence of such an express provision, this question will be left to the general rules of construction of the

applicable law. An example of an explicit regulation of the relationship between this claim and others is in the TANAP HGA. Further, it is important to note that the TANAP HGA specifically gives the Interest Holders the right to bring a claim for “costs” under the arbitration agreement in the HGA.²⁴

VI. Insurance

1. Terminology

- In most contracts addressing this issue the relevant article is titled “Insurance”.

2. Purpose and objective

- The purpose of such a provision is well illustrated by the ECT Model HGA, article 12. This clause requires the project investors to effect and maintain, and/or cause the contractors and operators to effect and maintain, appropriate insurance, in accordance with the internationally accepted standards and business practices of the Petroleum Natural Gas industry. This must cover, specifically, physical loss during the construction and operation, environmental damage, and third party claims for physical damage to property or personal injury.
- The WAGPP IPA takes a slightly different approach by stipulating, in its article 27, precise parameters for the insurance to be taken out in relation to pre- and post-construction.
- The TANAP HGA contains an obligation to maintain insurance like the ECT Model HGA, save that it gives the investor the option to take “reasonable alternative measures to cover the risk such as self-insurance mechanisms” should insurance not be available at commercially reasonable terms.
- Neither the Ivanhoe IA nor the BTC HGA explicitly obliges the investor to take out insurance and leave the issue to the investor’s discretion.

3. Information to be assessed

- The ECT Model HGA contains an additional provision that not only requires the investor to name the Host State as an additional insured in relation to cover for physical loss and third party claims due to physical loss and injury, but also that the investor procure “a waiver of subrogation from insurers under each insurance”. Neither the WAGPP IPA nor the TANAP HGA contains a similar term, which may raise issues of feasibility and cost.

²⁴ Article 29.4; see also Article 34.1(f) in this respect, which provides an alternative procedure for the TANAP Project Entity to bring claims to arbitration as agent for Interest Holders.

I. Financing Clauses

1. Overview

- Energy projects are very capital intensive. Most companies today rely on debt financing from banks, private equity funds and multilateral institutions to fund energy projects. Ensuring that energy projects are bankable is therefore key to their viability and success.
- Accordingly, the drafting and negotiating of funding/financing clauses discussed in this section requires an understanding of the funding structure of the energy projects concerned and, in particular, the nature of state support necessary to ensure the bankability of the project. Project sponsors often seek state guarantees in respect of energy projects. Whether such guarantees are actually needed must be carefully considered by lawyers representing the Host State especially given the extensive rights granted to investors under International Investment Agreements. Care should also be taken to review and consider the representations and warranties clauses contained in host government contracts as often financing/funding clauses are contained therein.

2. Types of financing clauses

- Most host government contracts contain financing/funding clauses. The most common clauses are those pursuant to which the states undertake to provide full support to the project sponsor/investor to secure financing for the project.

Box 1

Article 5(3) of the ECT Model IGA reads as follows:

“Each State shall co-operate in supporting all financing efforts by Project Investors within the framework of Project Activities, including, upon the reasonable request of any Project Investor, confirming or repeating in writing to any financial institution, multilateral lending agency or export credit agency of any representation, warranty, guaranty, agreement or undertaking contained in any Host Government Agreement or any Project Agreement entered into by such State.”

3. Information to be assessed

- From a project sponsor’s view point, it is most important that a financing/funding undertaking is inserted in the host government contract. It is typically inserted in the representation and warranties clause. As noted before, most host government contracts contain such an undertaking.
- Given the broadness of the undertaking offered by states to project sponsors regarding financing under the above-mentioned clause, a proviso is often inserted into the clause which makes it clear that the state is not obliged to itself finance the project and that it does not accept financial liabilities in regard to the project.

4. Model clause options

- **Financing/ funding clause option for host government contracts**

Box 2

“The State shall use all reasonable endeavours to co-operate with the [Project Sponsor/Project Investor/Companies] in relation to the process of raising finance for the Project but this shall not oblige the State to provide any finance for the Project or the [Project Investor/Companies] or accept financial liabilities with regard to them.

The State shall use reasonable endeavours to discuss with representatives of the lenders, multilateral lending agencies, export credit agencies and other providers of loan finance or guarantees in relation to the Project the provision of appropriate assurances that those entities will have an opportunity to step in and attempt to cure any breach of the terms of this Agreement or other licences, consents, permits, authorisations, exemptions or obligations in respect of the Project, to which either of the Companies is a party, beneficiary or recipient, so that the Project can retain the necessary rights to continue its activities.

Nothing in this Article [] shall affect Article [] save as expressly set out in Article 33

For the avoidance of doubt, this Article does not oblige the Government to provide finance for the Project, the Nabucco Pipeline System or the Companies or to accept financial liabilities in regard to them.”

II. Foreign Currency

1. Overview

- Many countries in which energy projects are constructed and operated maintain foreign exchange restrictions. For example, they may require that foreign currency is converted at a fixed rate of exchange into the local currency or prohibit or limit the transfers which can be made in foreign currency abroad.
- Project sponsors typically seek to minimise the exchange risk relating to their investment. Since the construction and operation of energy projects today rely on state of the art equipment and technologies most of which must be imported from abroad, project sponsors wish to ensure that they are able to pay for such equipment and technology from the revenue generated from the project. They also wish to be able to pay the foreign staff working on the project, repay the loans raised from financial institutions to develop the project and repatriate the profits generated by a project in a freely tradable currency. Most currencies around the world are not freely convertible and their exchange rates are volatile.
- A fully convertible currency or freely convertible currency is a currency in relation to which the state which issues it imposes no restrictions on trading the currency for another currency. The best-known examples of fully convertible currencies are the US dollar and the Euro. At present there are 17 fully convertible currencies in the world. Every year the IMF negotiates with central banks and governments pursuant to the Articles of Agreement to determine whether a currency is convertible or not.²⁵ There is, however, no single comprehensive definition of what is a freely convertible currency and many financial institutions do not trade currencies even though they are considered as convertible by the IMF. For this reason it is important to take great care when defining the term “Foreign Currency” for the purposes of drafting the foreign exchange clause in host government, production sharing or other energy related contract.

²⁵ Pursuant to Articles IV and VIII of the Articles of Agreement of the International Monetary Fund, available at <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>, last accessed 7 February 2017.

2. Information to be assessed

- When drafting foreign currency clauses in such contracts it should be borne in mind that almost all states in the world are members of the International Monetary Fund and are as such bound by the terms of the IMF Articles of Agreement. Pursuant to Articles IV and VIII of this agreement states are required inter alia (i) to promote a stable world-wide foreign exchange rate system; (ii) to notify the IMF of any changes it wishes to adopt to its exchange rate system and (iii) not to, without the approval of the IMF, impose restrictions on the making of payments and transfers for current international transactions except in accordance with conditions set out in Article VII, Section 3(b) and Article XIV, Section 2.
- The obligations imposed on states parties to the ECT should also be borne in mind when drafting foreign currency clauses. In particular, if the state in which an energy project is to be undertaken is a signatory to the ECT an investor may decide that a foreign currency clause does not need to be included in the host government or production sharing contract. Checking whether the bilateral investment treaties of the Host State contain a provision similar to Article 14 of the ECT should also be taken into consideration when drafting the clause. Although most BITs contain such provision it should be noted that the European Commission successfully challenged the free transfer clauses in the BITs Austria, Finland and Sweden entered into with non-EU member states in the Court of Justice of the European Union as incompatible with EU law. In view of the above and on balance, it is recommended that foreign exchange clause is inserted at the very least in HGAs and PSAs.

3. Model clause options

Main options for the foreign currency clause in host government agreements

Clause option 1

Box 3

The ECT Secretariat's Model HGA contains a foreign currency clause which can be adopted:

"Article 28

1. The Host Government confirms that, for the duration of and in order to conduct Project Activities, the Project [Investors/Participants] with respect to Project Activities inter alia: (a) to bring into or take out of the Territory Foreign Currency and to utilise, without restriction, Foreign Currency accounts in the Territory and to exchange any currency at market rates; (b) to open, maintain and operate Local Currency bank and other accounts inside the Territory and Foreign Currency bank and other accounts both inside and outside the Territory; (c) to purchase and/or convert Local Currency with and/or into Foreign Currency; (d) to transfer, hold and retain Foreign Currency outside the Territory; (e) to be exempt from all mandatory conversions, if any, of Foreign Currency into Local Currency or other currency; (f) to pay abroad, directly or indirectly, in whole or in part, in Foreign Currency, the salaries, allowances and other benefits received by any foreign employees; (g) to pay foreign Contractors abroad, directly or indirectly, in whole or in part, in Foreign Currency, for their goods, works, technology or services supplied to the Project; and (h) to make any payments provided for under any Project Agreement in Foreign Currency.

2. Where it is necessary for the purposes of this Agreement that a monetary value or amount be converted from one currency to another, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund ("IMF") or on the rate of exchange recognised by the IMF, or on the par value established in accordance with a special exchange agreement entered into pursuant to Appendix []."*

Clause option 2

Box 4

The Project Support Agreement between Romania and Nabucco Gas Pipeline International GmbH and Nabucco National Gas Pipeline Romania S.R.L. Concerning the Nabucco Pipeline System (Nabucco HGA Romania) 2011, article 23:

"FOREIGN CURRENCY

1. The State confirms that, for the duration of and in order to conduct Project Activities, each Company and any other Project

Participants shall have the right with respect to Project Activities:

- a. to bring into or take out of the Territory Foreign Currency and to utilise, without restriction, Foreign Currency accounts in the Territory and to exchange any currency at market rates;*
- b. to open, maintain and operate Local Currency bank and other accounts inside the Territory and Foreign Currency bank and other accounts both inside and outside the Territory;*
- c. to purchase and/or convert Local Currency with and/or into Foreign Currency;*
- d. to transfer, hold and retain Foreign Currency outside the Territory;*
- e. to be exempt from all mandatory conversions, if any, of Foreign Currency into Local Currency or other currency;*
- f. to pay abroad, directly or indirectly, in whole or in part, in Foreign Currency, the salaries, allowances and other benefits received by any foreign employees;* *g. to pay contractors and foreign contractors abroad, directly or indirectly, in whole or in part, in Foreign Currency, for their goods, works, technology or services supplied to the Project; and*
- h. to make any payments provided for under any Project Agreement in Foreign Currency, subject to any mandatory restrictions generally applicable on making payments within the territory in Foreign Currency.*

2. Where it is necessary for the purposes of this Project Support Agreement that a monetary value or amount be converted from one currency to another, the conversion rate of exchange to be used shall be based, for each currency involved, on the exchange rate as quoted by European Central Bank.”

Clause option 3

Box 5

The Host Government Agreement between the Republic of Albania acting through the Council of Ministers and Trans Adriatic Pipeline AG concerning the Trans Adriatic Pipeline Project (TAP HGA Albania) 2013, article 26:

“The State confirms that, as at the Effective Date, the Project Participants have the right under Albanian Law, inter alia: (a) to bring into, hold or take out of Albanian Territory foreign currency and to open, maintain and operate, without restriction, foreign currency bank and other accounts in Albanian Territory; (b) to open, maintain and operate local currency bank and other accounts in Albanian Territory; (c) to exchange any currency at market rates or at official rates which are set at non-market rates; (d) to purchase and/or convert local currency with and/or into foreign currency; (e) to transfer, hold and retain foreign currency outside Albanian Territory; (f) to be exempt from all mandatory conversions, if any, of foreign currency into local currency or any other currency; (g) to pay abroad, directly or indirectly, in whole or in part, in foreign currency, the salaries, allowances and other benefits received by any foreign employees; (h) to pay Contractors (whether local or foreign), directly or indirectly, in whole or in part, in foreign currency, for their goods, works, technology or services supplied to the Project; and to make any payments provided for under any Project Agreement or Implementation Contract in foreign currency, and the State shall ensure that the Project Participants shall at all times after the Effective Date have such rights under Albanian Law with respect to the Project Activities but, in each case, subject to any procedural requirements which are no more onerous than those required by accepted international standards.

26.2 The State shall take all steps and measures required to ensure that it and each other State Party has available to it at all times sufficient Convertible Currency and effective means of payment to transfer to the relevant Person full value at the relevant time. 26.3 For the avoidance of doubt, no State Party shall have any obligation to provide to any Project Participant any facility for the exchange of currency, including with respect to the exchange of currency at market rates or at official rates which are set at non-market rates.”

Main option for the foreign currency clause in production sharing contracts

Box 6

Model Production Sharing Agreement between the Government of the United Republic of Tanzania and Tanzania Petroleum Development Corporation and ABC Ltd 2013, article 33:

“The Contractor shall at all times comply with the procedures and formalities relating to dealings in foreign exchange which may be in force in the Republic of Tanzania from time to time. (b) The Contractor shall, in accordance with the Foreign Exchange Act (CAP 271) the Law and this Contract, have the right: (i) to open and keep one or more accounts denominated Tanzanian currency or United States Dollars, or other currency as duly authorised, with banks in the United Republic of Tanzania. (ii) to purchase Tanzanian currency and United States Dollars, or other currency as duly authorised, from any bank in the United Republic of Tanzania or other financial institutions, authorised for this purpose by the Central Bank of Tanzania.

(iii) Without prejudice to withholding tax due, all non-resident subcontractors if duly authorized by the relevant authorities in Tanzania and all the expatriate personnel shall be entitled to receive in any currency the whole or any part of their remunerations outside the Republic of Tanzania. All payments to resident subcontractors shall be made exclusively in Tanzania. (iv) Subject to withholding tax due, the Contractor shall have the right to freely declare and pay dividends to their shareholders and to remit the same to a place outside Tanzania, under the terms of the Law. (v) The Contractor has the obligation to inform the Central Bank of Tanzania the number of the account(s), bank details and other currency deposition and exchange dealings with other financial institutions without undue delay upon the occurrence. In addition, the Contractor shall deliver appropriate information and monthly periodic reports to the Central Bank of Tanzania and the Minister and as otherwise required by the authorities in accordance with the Law. The Central Bank of Tanzania shall be entitled to require audit to such accounts. Amounts spent on any such audits shall be cost recoverable paid by the Contractor. The Contractor shall waive banking confidentiality rights in benefit to the Government of Tanzania in respect of such information and accounts in order to facilitate any such audits.”

III. Taxation

1. Overview

- Issues of taxation in the energy sector are often complex and with several ramifications. This is because energy projects are often long-term commitments where investors need assurance, to some extent, of legal and financial stability for the duration of the investment. On the other hand, it is equally relevant that the Host State has a sovereign right to plan its revenue regime and to impose taxation measures when needed. This is because through the management of natural resources, in particular in the oil and gas industry, the state receives significant contributions to their revenues. However, for investors and states, good tax designs or long-term predictability in tax regimes are rather difficult to achieve and adhere.

2. Types of taxation clauses

- The most frequent tool investors utilise to manage the structural and temporal difficulties of tax regimes are contractual assurances, such as tax arrangements. Most energy contracts will include some form of taxation clauses, commonly known as fiscal stability or economic equilibrium clauses.

3. Purpose and objective

- Broadly speaking, there are two main objectives of the fiscal stability clause.
 - First, to have a clear strategy on the economic allocation of mitigating risks between the investor and the Host State.
 - Second, to have a clear and legally binding commitment from the Host State to not impose taxation measures that are arbitrary or discriminatory.²⁶

4. Negotiation goals

- Negotiators can shape stabilisation clauses to meet their primary fiscal stability concerns. For example, some stabilization clauses aim to “freeze” a tax regime at a specific time to ensure that future fiscal changes in law do not apply to that particular energy contract. Another way to contour the fiscal stabilization clause is by creating more flexible clauses where, in case a new fiscal regulatory change arises, the investor is entitled to indemnity and/or the re-opening of new negotiations where there is a new mutual-agreement that reflects the adjustments made to the initial tax scheme.

²⁶ Stabilization Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights, , accessed on 27th January 2017.

- Triggers of fiscal insatiability, outside the control of the contractual parties, are difficult to prevent or avoid. Nonetheless, these should also be considered –or at least discussed and somehow acknowledged– when setting up the contractual tax arrangements. For example, changes in oil prices might cause variation on a national tax scheme. However, this is not the only cause as to why national tax regimes can be uncertain. A rise on foreign investment, pending discoveries of natural resources, attractive tax regimes by competing neighbour countries (with similar resources) and political changes are other types of issues which might be considered as factors affecting the stability of fiscal regimes.
- Most importantly, numerical tools can contribute to the goals of both negotiating parties. On the one hand, they will assure that a fiscal stabilisation formula can be standardised and used in all the other similar investment energy contracts. This will help promote equal treatment to all investors in that specific energy sector. On the other hand, for the Host State, it will ensure an effective collection of taxes.²⁷

5. Information to be assessed

- Fiscal stability clauses in international investment energy contracts should include a clear and exhaustive list of the taxes that are covered under the clause (i.e. corporate income tax only or all taxes). Most importantly, the fiscal stability clause needs to be in accordance with the national law of the Host State.
- One of the challenges of fiscal stabilisation provisions drafters need to avoid is abstract wording of the clause since it may lead to different interpretations. For example, in a provision that stipulates for further adjustments, should unforeseen changes in the law arise, the word “adjustment” can be interpreted in different ways by the investor and the Host State.

6. Inputs of additional specialists

- To avoid different interpretations from the same provisions, it is recommended that contracting parties seek advice from tax specialists who can simulate the numeric threshold of fiscal stabilisation “adjustments”. A tax specialist’s advice can benefit the fiscal stability clause by basing it on formulaic methods and analytical tools of fiscal stability which can give more predictability for long-term energy projects.²⁸

7. Current trends, strange practices and relevant arbitration decisions

- Most of the countries with considerable amount of natural resources have already implemented in their national laws formulations regarding the type of fiscal stability clause they wish to apply.
- Under the ECT, there are very few examples of international arbitration practice where fiscal stabilization clauses have been reviewed. Recently, in *AES Summit v Hungary*, the arbitral tribunal drew a contrast between the notion of constant protection and security from the type of protections granted via stability agreements. While constant protection and security does not grant protection against a state’s right to legislate, a stabilization clause acts as the investor’s right to no unreasonable change in the law. Although, the efficiency of stability clauses has not *per se* been analysed by arbitral tribunals yet, fiscal stability clauses are often used as deterrents.

²⁷ ECT Article 21 (2)(b) and p. 25

²⁸ R. Boadway and M. Keen, Theoretical Perspectives on resource tax design, *The Taxation of Petroleum and Minerals: Principles, Problems and Practice*, P. Daniel, M. Keen and C. McPherson (eds.), Routledge (2010), pp. 13-74.

8. Interaction with other relevant provisions

- Stabilization clauses directly interact with two other contractual provisions of the international investment energy agreement. For example, any modification to the pricing arrangements clause might have a direct detrimental effect on the fiscal scheme agreed between the contracting parties.
- In addition, fiscal stabilization clauses which provide for further negotiations (to incorporate tax adjustments) require the existence of a dispute resolution process under which the negotiations can take place.

9. Model clause options

Clause option 1

- The aim of this clause option is to freeze all the fiscal laws for the duration of the international investment energy contract.

Box 7

1. *The GOVERNMENT guarantees to the INVESTOR to maintain fiscal stability of its national tax regime for the entire duration of the performance of this Contract. The INVESTOR is subject to the taxation provisions under (MENTION HERE ALL THE APPLICABLE Corpus after the effective date of this Contract shall not be applicable to the INVESTOR. NATIONAL TAX LAWS) and all other regulations, orders, and decrees promulgated thereunder (hereinafter "Tax Corpus").*
 - 1.1. *Any changes, amendments, additions, revisions, modifications or other changes to the Tax*
 - 1.2. *Additionally, any modification to the Tax Corpus that imposes higher taxes to the operations of the INVESTOR in performance of this Contract shall not be applicable.*

Clause option 2

- The aim is to protect the fiscal stability of the investor during the period of the international investment energy contract by providing for adjustments and compensation in case there are changes in the fiscal law.

Box 8

1. *The GOVERNMENT guarantees to the INVESTOR to maintain fiscal stability of its national tax regime for the entire duration of the performance of this Contract. The INVESTOR is subject to the taxation provisions under (MENTION HERE ALL THE APPLICABLE NATIONAL TAX LAWS) and all other regulations, orders, and decrees promulgated thereunder (hereinafter "Tax Corpus").*
 - 1.1. *Any changes, amendments, additions, revisions, modifications or other changes to the Tax Corpus after the effective date of this Contract shall not be applicable to the INVESTOR.*
 - 1.2. *Additionally, any modification to the Tax Corpus that imposes higher taxes to the operations of the INVESTOR in performance of this Contract shall not be applicable.*
2. *Any change in the Tax Corpus which the INVESTOR considers that it has affected the financial position under this Contract, upon the Investor's request is entitled to require compensation or adjustments to re-establish the fiscal stability between the INVESTOR and the GOVERNMENT. Parties have ninety (90) days to agree on the new adjustments. Should parties fail to agree within this time limit, the INVESTOR may refer the matter to the dispute resolution clause in this Contract.*

DISPUTE RESOLUTION

- This section discusses the different policy considerations that the parties may wish to keep in mind when negotiating a dispute settlement clause. It also provides suggested model wording to reflect the different options available. There are a number of dispute resolution mechanisms that can be utilised by investors and the Host State in energy investment contracts. The parties can opt for one or several of them together, depending on the needs of the specific project.

I. Good Offices

- This mechanism draws on the assistance of a trusted third party to facilitate parties in a dispute to establish contact and to explore ways to reach an amicable settlement. It always implies the voluntary cooperation of the parties with a neutral third party. It can be provided at any point in time once an issue arises and parties have difficulties in communicating directly. This is usually a preliminary alternate dispute resolution mechanism that could lead to a structured negotiation or to mediation.
- The third party can be a single state or a group of states, an individual, an organ of an international organisation, or a joint body. Existing examples of “good offices” of international organizations are the GATT, through its Director-General; the United Nations, through its Secretary-General; the ASEAN, through its Secretary-General; OLADE (Latin American Energy Organization), through its Permanent Secretariat; and the Energy Charter Secretariat, through its Secretary General.
- Good offices can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings. In addition, they can help the parties to overcome the initial procedural hurdles to administering the mediation process.

II. Structured Negotiation

1. Form of the negotiation provision

- Negotiation between the parties at the time of a dispute usually happens as a matter of course. As a result, a specific clause for negotiation may or may not be drafted into the contract. However, in most cases, it is formally included as part of a multi-step dispute resolution process.

2. Purpose and objective

- The practical benefit of including negotiation in the dispute resolution clause is that it requires the parties to attempt reaching a settlement at an early stage. If successful, the parties can avoid launching more formal proceedings that will prove to be financially burdensome and time consuming.
- The option of negotiation also creates a certain psychological comfort for the parties willing to negotiate but unwilling to suggest negotiations for fear of appearing weak. If it is a requirement under the contract, none of the parties give the impression of acknowledging its weaker position. Rather, they would appear to be simply following the provisions of the contract.

3. Negotiation goals

- In practice, if the parties have no shared interest in resolving their differences, negotiation will not succeed. For example, the parties might adopt the tactic of stating very different agendas. Also, negotiation will not suit a weaker party in dispute with a stronger party. Stronger here means with greater political and economic strength, and therefore having access to better legal support. Therefore, in order to be successful, negotiation needs the full co-operation of the parties and

objectivity as well as detachment in the parties' behaviour to avoid negative emotions and entrenched views that get in the way of a settlement.

4. Information to be assessed

- Negotiation should not be the only dispute resolution method relied upon since it may likely result in no resolution. Moreover, it must be remembered that the obligation to negotiate does not necessarily imply a duty to reach agreement.
- Drafters may consider proposing the outline for a programme of structured negotiations as the first step in any dispute. If negotiation is part of a multi-step dispute resolution clause, then it is advisable that drafters set a clear time frame when each step is finished. In the absence of such a timeline, failure to complete one step can act as an obstacle towards reaching a binding process.

5. Model clause option

Negotiation provision in a multi-step dispute resolution clause

Box 1

ARTICLE [•]

“.....The Parties will attempt in good faith to resolve any dispute or claim arising out of or in relation to this Agreement through negotiations between a of each of the Parties with authority to settle the relevant dispute. If the dispute cannot be settled amicably within days from the date on which either Party has served written notice on the other of the dispute then the remaining provisions of this Clause [] shall apply.”

III. Dispute Review Board

- Dispute Review Boards (DRBs) assist in the management of disputes involving long term and large projects (typically construction projects). They give aid to the parties by (1) providing a mechanism to predict and manage potential disputes before they precipitate, (2) offering advisory opinions on questionable or disputed matters, and (3) acting as an alternate dispute resolution process to settle any disputes that cannot be settled by the parties themselves.
- A DRB has two primary responsibilities. First, it must become acquainted with the project during the construction phase. This includes review by the DRB of the plans and specifications of construction, along with periodic visits to the project site. Second, the DRB must conduct hearings on any disputes referred to it.
- The DRB should comprise an uneven number of members. The parties may also nominate substitute members. The number of members invariably depends on the nature and scope of the functions to be undertaken by the DRB pursuant to the agreement as well as the complexity and duration of the project.
- It must be ensured that the members of the DRB are independent from the parties and are impartial in their assessment. They must be available to perform their duties and may not be appointed as arbitrators in any dispute related to the same project.
- Following the hearing, the DRB must issue a written recommendation or a decision, stating clearly its opinion. If one or both parties choose to reject the recommendations, the matter may be taken to the next stage of dispute resolution under the terms of their agreement.

IV. Mediation

1. Overview

- Mediation is a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties arrive at a negotiated settlement of their dispute. The mediator meets with the disputing parties and actively assists them in reaching a settlement based on their business interests and risk assessments or policy considerations and not only their legal positions. The parties have control over both the decision to settle and the terms of any settlement agreement.

2. Purpose and objective

- Mediation, particularly in investment disputes, has the potential to provide disputing parties with solutions which address their economic, social and political needs, interests and values at the time of the dispute. Mediated solutions allow for contracts to be extended, reformed or entirely replaced, sometimes providing parties with an opportunity to preserve long-term strategic relationships. Mediation can also save time and costs because only one mediator is required and less time is needed to educate the mediator on the parties' basic positions for purposes of exploring amicable resolution. Further, mediation settlements obviate the need for a lengthy arbitral process.

3. Information to be assessed

- An important thing to remember about mediation is that it is not a legally binding process. The results of mediation only becomes binding with a signed settlement agreement. For purposes of enforcement, parties could consider providing that the terms of the agreement may be incorporated in a Consent Award of Arbitrator, or Award upon Agreed Terms. Mediation should be seen as an adjunct to, and not a replacement for a binding process, such as international arbitration.
- Ideally, mediation should take place at an early stage of a dispute, such as before the arbitration hearing commences and may be even before the arbitral process is initiated. However, parties may even decide to apply mediation at any stage, or after hearings have taken place or an award entered. In this way the opportunity to mediate is not restricted only to the early stages.
- Parties should assess and make informed decisions regarding the different approaches to mediation and determine which approach best suits the parties and the disputes at hand, such as facilitative, evaluative, etc. The processes are not limited, and parties, with the expert's assistance, can have the process tailored to their preferences through process design.
- Mediation is an experience-based competency. Therefore, parties should explore standards needed for investment mediation and select mediators that have proven experience and whose profiles preferably include independently-prepared summaries of feedback from previous users of their services.
- The parties may also propose a framework to effectively implement the option of mediation/conciliation while providing for clear interaction with other forms of alternate dispute resolution and international arbitration. Such a framework should be administered by the current provider institutions, such as IMI, ICSID, SCC, PCA, and ICC. In any case, parties to the dispute should be able to agree upon applying any other conciliation frameworks.
- As with Good Offices, a time limit should be set for the mediation process in order to avoid indefinitely delaying the ability of the parties to undertake arbitration (or litigation if that has been chosen).

- It must be kept in mind that, like Good Offices, mediation will only be effective if both (or all) the parties are willing to make their best good faith efforts to resolve the dispute themselves. If one party is recalcitrant, and/or refuses to participate, there is no point seeking a mediated resolution.

4. Model clause options

- The following clauses provide three alternative means of including mediation as a means for resolving disputes between investors and the Host State. The clauses vary in the extent to which parties either have the option of adopting mediation, or have an obligation to use mediation as an initial channel for resolving a dispute.

Clause option 1

Box 2

**ARTICLE [•]
MEDIATION**

“The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the Agreement in accordance with the [X] (hereinafter “Rules”)¹, contained in Appendix [X] of the Agreement, and deemed to be incorporated by reference into the clause.”

Clause option 2

Box 3

**ARTICLE [•]
MEDIATION**

“In the event of any dispute arising out of or in connection with the Agreement, the parties stipulate in the first instance to discuss and consider referring the dispute to the [X] (hereinafter “Rules”)¹, contained in Appendix [X] of the Agreement, and deemed to be incorporated by reference into the clause.”

Clause option 3

Box 4

**ARTICLE [•]
MEDIATION**

“The Parties to the dispute shall seek to resolve the dispute by mediation. Within thirty (30) days after the date of the receipt by each Party to the dispute of the Notice of Dispute any Party to the dispute may initiate such mediation pursuant to the [X] (hereinafter “Rules”)¹, contained in Appendix [X] of the Agreement, and deemed to be incorporated by reference into the clause.

In the event the dispute has not been settled pursuant to the said Rules within [X] days following the filing of a Request or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled by final and binding arbitration.”

Clause option 4

- Concurrent mediation allows the parties to mediate when they are ready to engage in meaningful dialogue, while leveraging information learned and deadlines presented by the arbitral process. A model concurrent mediation clause might look like the following:

Box 5

**ARTICLE [•]
MEDIATION**

“Once arbitration proceedings have been initiated in accordance with Section (reference to arbitration clause), the parties agree to attempt to resolve their dispute by mediation in accordance with (name Institutional Rules). Mediation will proceed concurrently with arbitration and shall not be a condition precedent to any stage of the Arbitration process.”

V. Expert Determination

1. Overview

- Expert determination will usually only be appropriate for very specific types of factual disputes which can be resolved relatively quickly by an expert in the relevant field.
- Careful thought should be given, with respect to the contract as a whole, to whether certain provisions are likely to give rise to disputes which can be resolved relatively swiftly by a person with the relevant expertise. In the broader commercial context, examples of situations where expert determinations are used include long-term supply agreements where the prices or minimum/maximum quantity of the goods to be supplied are to be reviewed on a periodic basis, issuing of certificates as to quality or quantity of goods, accounting and valuation issues, determination of whether a party is entitled to engage certain provisions of an agreement on the grounds of economic change or terminate an agreement on the grounds that performance is no longer economically viable and, determination of price where there is no published market price in a given sector.

2. Information to be assessed

- If there are no disputes to be referred for expert determination, then the expert determination clause should be deleted in its entirety. If, however, certain disputes are to be referred to expert determination, then attention and consideration should be given to the draft language in the model clause. The clause may specify the issues, or types of issues, which may be subject to expert determination. It is also important to assess the extent to which they do not constitute the whole of the dispute, whether the determination of the expert is binding upon the arbitrators, or is only to be used as guidance for reaching the final award.
- The parties should also consider whether a dispute which is referred to expert determination can then be submitted in whole to arbitration or, as proposed in the model clause, certain disputes only be subject to expert determination, following which a final and binding decision is issued which can only be challenged before an arbitral tribunal on limited grounds.
- The expert determination clause may be drafted as a standalone clause with reference to institutional rules for the appointment of arbitrators. An alternative is to draft a clause which refers all aspects of the expert determination process to a given set of institutional rules. Such institutional rules can govern issues such as appointment of an expert, the procedure to be followed by such an expert, the agreed powers of such an expert and the legal effect of any final determination. Advice should be taken in individual cases as to whether such institutional rules are appropriate to a given circumstance. One other issue for consideration is that such rules can change over time, and so a reference to certain institutional rules might be out of date by the time of a dispute, which in turn can cause room for debate and potential delay.
- Expert determination is commenced by a “Request for Expert Determination”, which shall include not only a statement of the dispute and issues arising, a statement of relief claimed and copies of relevant supporting documentation, but also the contact details of between one and three potential experts each of whom is ready, willing and able to act. This puts an initial burden on the claimant to identify and approach potential experts to confirm their availability and ability to act, but also helps to speed up the appointment process.
- The appointed expert should generally be recognized as an expert in the field or fields of expertise relevant to the matter in dispute. There are a limited number of well-established appointing authorities for expert determinations. These include (at the time of writing) the International Centre for ADR of the International Chamber of Commerce, the Chartered Institute of Arbitrators, the

Centre for Effective Dispute Resolution, the London Court of International Arbitration, and the World Intellectual Property Organisation. There are also industry-specific organisations, depending on the jurisdiction. For example in England, the Chartered Institute of Management Accountants (CIMA), the Institute of Chartered Accountants in England and Wales (ICAEW), Institution of Civil Engineers, Institution of Mechanical Engineers, Institution of Chemical Engineers, Railway Industry Dispute Resolution, Royal Institute of British Architects and the Royal Institution of Chartered Surveyors. The parties negotiating this clause should consider what disputes are being referred to expert determination and should take advice as to the most appropriate appointing authority for that type of dispute.

- In the case of expert determinations there may be no need for an oral hearing and the decision may be made based on the documents. While this can help to accelerate the procedure and keep costs low, ultimately the expert retains the power to order a hearing if it considers such a hearing is necessary.
- Generally documentation should be submitted to both the expert and the other parties simultaneously. However, in cases of commercial sensitivity or confidentiality documentation the documents should be marked accordingly and in such cases the expert may not disclose such documentation to the other party. This is an indication that the disclosure process in an expert determination is potentially not as burdensome as in an arbitration, and furthermore is intended to allow for the situation in which a party may object to disclosing documentation in the course of an expert determination on the basis that such documentation may be used against that party in a future arbitration or other legal proceeding.
- The expert may seek legal and technical assistance if it deems necessary. This is intended to enable an expert to seek such assistance where a dispute is complex enough to require determination of an additional issue of fact or law outside of the expert's scope of expertise. In this case, the clause must state that the additional costs of any such assistance shall be borne equally by the parties. While this may give rise to a risk of rising costs of the expert determination process, that potential risk is to be balanced against the risk of a stalemate as to the expert's ability to render a complete determination on the issue or issues in dispute.
- While drafting the clause, parties may state that the expert determination will be held at the agreed seat of arbitration. This may assist in providing clarity as to which national courts (if any) shall provide a supportive or supervisory role in relation to the expert determination process. Advice should be taken on this point when selecting a seat for the purposes of the arbitration clause. Alternatively it may be advisable, or necessary, for the expert determination to be held at the site of the project itself. This should probably be specified in the clause to avoid lengthy arguments as to venue.
- It must be borne in mind that the expert determination process is private and confidential. It is important for the drafters to also specify the language of the proceedings and require certified translations of documents not in that language.
- The parties negotiating the clause should take into account the goals of efficiency and speed as set against the right of both parties to present their arguments and the ability of the expert to properly consider the issues in dispute. A typical period of time for such a clause might be to require the issuing of a determination within [30 to 90 business days] of the appointment of the expert.
- The clause must envisage a determination by the expert where such determination is final and binding upon the parties. There is no applicable international convention in relation to the enforcement of expert determinations (in contrast to, for example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in relation to arbitral awards). However, the "*final and binding*" language indicates that the determination is to be treated as a contract binding the parties, any breach of which is to be referred to arbitration pursuant to the model arbitration

clause. Advice should be taken on this point in particular in light of the governing law of the underlying agreement into which this expert determination clause is inserted.

- In contrast to arbitration (where typically a tribunal will have the power to allocate the fees and costs between the parties), it is typical practice in the context of expert determinations that the costs of the expert are split equally by the parties and that each party bears its own costs. This practice is based on the assumption that expert determination will be limited to finite issues and will therefore be a relatively quick and low-cost procedure. However, if the parties wish such costs are imposed upon one party or other, the same should be agreed upon in the clause.

3. Model clause options

- For those disputes which are to be referred to expert determination, the mechanism for such disputes to be referred to expert determination should be clear. The language of the model clause therefore should state that whenever a matter is referred to an expert under the relevant article of the contract, then the model clause on expert determination shall apply. This means that any relevant clauses elsewhere in the agreement which allow for expert determination should include clear language which is either permissive (e.g. “*any disputes arising under this clause may be referred to Expert Determination in accordance with clause [•]*”) or mandatory (e.g. “*any disputes arising under this clause shall be referred to Expert Determination in accordance with clause [•]*”).
- There is a risk of complication if permissive language is used, as one party might argue that a dispute under such clause could or should be referred to arbitration or other dispute resolution method. Mandatory language leaves less room for doubt and helps to achieve the overall aim, i.e. speedy resolution of a discrete dispute. However, if permissive language is preferred, it should be made clear that if either Party opts for the expert determination then the other Party will be bound by its result.

Box 6

**ARTICLE [•]
EXPERT DETERMINATION**

1. Whenever any matter is referred to an expert ("Expert") under Articles [•, • or •] of this Agreement, the provisions of this Article [•] shall apply.
2. The procedure for the appointment of an Expert shall be as follows:
 - (a) either Party may notify the other in writing that it wishes a dispute to be referred to an Expert (a "Request for Expert Determination");
 - (b) the Request for Expert Determination shall contain:
 - i. a concise summary of the nature and background of the dispute and the issues arising;
 - ii. a statement of the relief claimed;
 - iii. copies of all documents which have an important and direct bearing on the issues; and
 - iv. the name, address, contact numbers and qualifications of at least one and not more than three potential experts each of whom is ready, willing and able to act independently and impartially as the expert in the expert determination process (the "Expert Determination").
 - (c) The Party who receives a Request for Expert Determination shall within [•] Business Days of service of such Request, serve upon the other party a written response to the matters raised in the Request and copies of all documents not already included in the Request, which the responding Party considers have an important and direct bearing on the issues. Such response shall indicate which, if any, of the potential experts proposed by the Party serving the Request for Expert Determination is acceptable to the responding Party and, if none, include the name, address, contact numbers and qualifications of at least one and not more than three other potential experts each of whom is ready willing and able to act as the expert in the Expert Determination and who would be acceptable to the responding Party.
 - (d) If the Parties have not agreed upon the identity of an Expert within [•] Business Days of service of the Request for Expert Determination, either Party may apply to the appointing body specified in Article [•].2(e) ("Appointing Authority") to appoint an Expert, requesting that the appointment be made within 10 Business Days of receipt of the application.
 - (e) The Appointing Authority shall be as follows: i. in relation to a dispute under Article [•], [...]; ii. in relation to a dispute under Article [•], [...]; [etc.]
3. Prior to appointment, the Expert shall agree with the Parties, in writing, his terms of engagement, including fee rates, and shall sign a declaration to the effect that there are no circumstances known to him likely to give rise to justifiable doubts as to his independence and impartiality.
4. The Expert may be an individual, association, partnership or body corporate and shall be generally recognized as an expert in the field or fields of expertise relevant to the matter in dispute.
5. If the Expert shall die, or become unwilling, or become incapable of acting, or determines that he is not, or no longer is, independent or impartial, or does not in fact act in the matter for which he is appointed, the Parties shall appoint a new Expert by agreement or, if they have been unable to agree upon the identity of a new Expert within 15 Business Days of a written request by one Party to the other to do so, either Party may apply for the appointment of a new Expert in accordance with Article [•].
6. The Parties shall agree with the Expert the procedure for the determination, insofar as it is not set out below. In the event that agreement cannot be reached, then the procedure shall be determined by the Expert, whose determination shall be conclusive and binding on the Parties.
7. The procedure of the Expert shall:
 - (a) give the Parties a reasonable opportunity to make written representations to him; and
 - (b) require that each Party supply the other with a copy of any written representations and documents at the same time as they are made to the Expert (save that any documentation that the providing Party and the Expert deem commercially sensitive or otherwise requiring confidential treatment shall be marked accordingly and provided only to the Expert who shall be required not to disclose it to the other party).
8. An Expert shall be entitled to seek such assistance (including that of technical and legal advisors) as he may deem necessary to reach his determination.
9. Unless agreed otherwise by the Parties, the Expert Determination will be held at the seat of arbitration selected pursuant to Article [•] of this Agreement.
10. The Expert Determination process is private and confidential.
11. The determination of the Expert pursuant to this Clause shall:
 - (a) be made in writing and made available for collection by the Parties within [•] Business Days of the date of appointment of the Expert (or by such later date as the Parties may agree); and
 - (b) unless otherwise agreed by the Parties include reasons for each relevant determination.
12. The Parties may agree on a procedural language to be used in relation to the Expert Determination process. In default of such agreement, all matters under this Article shall be conducted, and the Expert's determination shall be written, in the [English] language. Each document which is not in the procedural language of the Expert Determination shall, unless otherwise ordered by the Expert, be accompanied by a certified translation into that language.
13. The Parties shall co-operate with the Expert and comply with his reasonable requests made in connection with the conduct of the Expert Determination.
14. The Expert shall act as expert and not as arbitrator. The Expert shall determine the matter in dispute referred to him, which may include any issue involving:
 - (a) the interpretation of any provision of this Agreement; and
 - (b) his jurisdiction to determine the matters referred to him.
 - (a) Except as provided in subparagraph (b) below, the Expert's determination of any matter referred to him shall be final and binding on the Parties to the Expert Determination and shall not be subject to any appeal. Each Party to the Expert Determination shall abide by and comply with the terms of the determination.
 - (b) The Expert's determination may be set aside by an arbitral tribunal constituted under Article [•] of this Agreement if the Party disputing the Expert's determination establishes that such determination was based on fraud, collusion or manifest error.
15. The fees and expenses of the Expert (including those of any legal or technical advice obtained by the Expert and including any fees of the Appointing Authority) shall be borne equally between the Parties.
16. Otherwise, each Party shall bear its own costs (including legal costs) in respect of the Expert Determination."

VI. Domestic Courts, Administrative Tribunals or Arbitral Tribunals

1. Overview

- In the absence of any agreement to the contrary, investment disputes between a state and a foreign investor will generally be settled before the national courts of the Host State (i.e., the courts of the place to which the dispute is likely to have the closest connection). Indeed, national courts have previously been the primary *fora* for foreign investors (and states) seeking relief in investment disputes.
- Various energy investment contracts contain clauses that require an investor to fulfil certain conditions connected to domestic courts before they take recourse to international arbitration. These include “mandatory recourse to domestic remedies in the Host State”, “fork-in-the-road” clauses and “no-U-turn” provisions.

2. Purpose and objective

- In some circumstances, it may be beneficial for both parties to have their case heard in a national court which may have more expertise in the application of domestic law and can thus sanction obvious misconduct of the host government. .
- On the other hand, foreign investors may—rightly or wrongly—be sceptical of the impartiality of national courts when deciding a dispute involving the state in question. Moreover, even if the local courts are considered substantively impartial, the state where they are located may possess a real or perceived procedural advantage.

3. Model clause options

- Mandatory recourse to domestic courts and administrative tribunals

Box 7

The BIT between Belgium/Luxembourg and Botswana (2003) provides an example:

“Article 12. Settlement of Investment Disputes [...] 2. In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the notification, the dispute shall be submitted, at the first instance to a court of competent jurisdiction of the latter Contracting Party for a decision. Either party may, six months after the submission of the dispute to a court of competent jurisdiction, refer the dispute to international arbitration.” (Emphasis added).

- “Fork-in-the-road” clauses require investors to choose between domestic courts and international arbitration at the outset. Once an investor starts domestic proceedings, it loses the right to resort to arbitration, and vice versa.

Box 8

An example of a “fork-in-the road” provision is Article XIII.3 of the Chile-Indonesia BIT (1999), which states:

“Once an investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final.”

- “No-U-turn”, or “waiver”, clauses permit investors to opt for international arbitration after commencing a claim for relief in domestic courts or tribunals. However, if the investor decides to

submit a claim regarding the same measure to international arbitration under the ISDS provision of an IIA, then it must abandon its right to pursue local remedies.

- This approach gives domestic courts the opportunity to redress wrongs before they are raised to the international plane and permits investors to try that venue first. Once the investor decides to seek relief before an international tribunal, however, it may not shift back to domestic courts.

Box 9

An example may be found in the Canada-Jordan BIT (2009), article 26:

“Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim to arbitration under Article 22 (Claim by an Investor of a Party on Its Own Behalf) only if: [...] e. the investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 22, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.”

VII. International Arbitration

1. Information to be assessed

- International arbitration provides an alternative to other remedies, such as diplomatic protection, or a resort to national courts or tribunals, that the investor might invoke against the Host State. International arbitration has numerous other features that may be attractive to states, such as the possibility of selecting arbitrators among persons having a specific knowledge of the subject matter of the dispute and, to a large extent, the guarantee of confidentiality.
- Whilst in domestic judicial proceedings a respondent can be summoned to appear in court, in international arbitration consent is required from both the Host State and the foreign investor to resolve their disputes through arbitration. Therefore, it is important to remember that without consent, a party cannot be forced to submit to arbitration and the arbitrators would have no authority to hear the claims. The scope of the consent granted by the parties also governs the kind of disputes that can be submitted to investment arbitration.
- Investors may bring claims against Host State on the basis of a treaty, a contract or both. Purely contract-based arbitration does not present any particular obstacle. The majority of investment contracts concluded in recent years contain a dispute settlement clause allowing either party to the contract to submit any dispute arising therefrom to arbitration. Investment disputes under these investment contracts can thus be easily initiated not only by foreign investors, but also by states.
- The wording of the dispute resolution clause in an investment contract is of utmost importance. Hence, one-sided wording should be avoided in the formulation of the clause. For instance, instead of providing that *“the Investor shall provide notice of the dispute...”* the clause should be drafted to state *“the Party seeking arbitration pursuant to this Article shall provide notice of the dispute...”* This is to ensure equal access to arbitration for the Host State and the foreign investor.
- Parties to an investment agreement are free to agree on the rules of arbitral procedure, including the constitution of the arbitration tribunal. Rather than drafting a custom-made procedure specific to each contract, the parties usually resort to a set of ready-made arbitration rules. In the absence of any specific provisions in the investment agreement, the composition of the tribunal in a dispute between two parties will be governed by the applicable rules chosen by the party initiating the proceedings or,

if no such agreement is made, by the laws or regulations covering arbitration in the place (seat) of arbitration.

- The choice of seat is of great importance to both the conduct and the outcome of the arbitration. There may be instances in which the law of the seat imposes uncommon constraints or requirements.²⁹ In other cases, however, the courts of the seat may be willing to issue provisional remedies or other orders in aid of arbitration (e.g. injunctions to preserve property (or enforcing arbitral injunctions to this effect)) or otherwise assist with arbitration (e.g., by summoning witnesses or refusing to decide cases themselves). There may also be cases in where decisions as to jurisdiction may be appealed, which, at worst, may cause considerable delays; or cases in which arbitration awards may be set aside by the courts of the seat on specific grounds, which may render the enforcement of the annulled award more difficult.³⁰ The parties should, therefore, carefully select the seat of arbitration as it will determine the extent to which the local court will involve itself in the arbitration process.
- The parties may also consider engaging in emergency arbitration before the constitution of the arbitral tribunal, or even before the commencement of an arbitration proceeding. It must, however, be noted that while this mechanism is available under the SCC and the ICC Rules, it is not available under ICSID, PCA or UNCITRAL. Further, emergency arbitration cannot apply if the parties have opted out of the Emergency Arbitrator Provisions or have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim, or other similar measures.

2. Current trends

- One of the criticisms levelled against investor-state arbitration in recent years was that over the years investment tribunals have frequently decided matters of public importance behind closed doors. The historical context of the development of investor state dispute settlement (ISDS) is relevant in this regard. Investor-state arbitration owes its origin to the adaptation of international commercial arbitration, whose genesis preceded that of investor-state arbitration by several decades. Traditionally, both written and oral proceedings and outcomes of commercial arbitration have been considered more or less confidential, though that view has been increasingly challenged in recent years. Against this background, it is not surprising that a general presumption of confidentiality has extended to investor-state arbitration.
- Although there is no general obligation of confidentiality in investment arbitration, there has been a general presumption that the principles of confidentiality and privacy should be respected in investment treaty arbitration procedures. Consequently, there have been signs in recent years indicating that ISDS is moving, albeit gradually, towards greater transparency. As acknowledged by the tribunal in the *Biwater Gauff v. Tanzania* case, “there is now a marked tendency towards transparency in investment arbitration”. The *Biwater* tribunal went on to state that given the treatment of awards and materials in investment arbitration generally, the presumption should be in favour of allowing the publication of decisions. The tribunal held, however, that the nature and subject matter of awards and other arbitration materials varies enormously, and for some it may still be inappropriate

²⁹ According to Eric A. Schwartz, *Is Procedure Really Neutral? The Seat: Does It Matter? (A Tale of More than Two Cities)*, in *Dispute Resolution International*, Vol. 6, 2012, p. 194, for example in Thailand an arbitrator is required to obtain a work permit in order to conduct a proceeding there and certain countries restrict the right of foreign counsel to appear or may impose restrictions on the nationality or religion of the arbitrators.

³⁰ Article 5(1) of the New York Convention provides: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (...) (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

to allow wider distribution. The tribunal proposed that this should be considered on a case-by-case basis.

- In 2014 and early 2015 two important multilateral developments took place addressing the existing transparency deficit in ISDS. On 1 April 2014, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Transparency Rules”), which had been adopted on 11 July 2013, came into effect. The Transparency Rules provide for increased transparency in investor-State proceedings conducted under the UNCITRAL Arbitration Rules. The principle of transparency is reinforced by Article 2, which provides for prompt publication of information about the commencement of arbitral proceedings, and Article 3, which provides for free public release of all key documents submitted in an arbitral procedure (including notices of arbitration, written statements and submissions, transcripts and all decisions and awards issued by the tribunal (subject to certain safeguards, including protection of confidential information). In accordance with this Article, expert reports and witness statements shall be made available to public upon request. The tribunal may further decide, after consultation with the parties, that the exhibits and other documents may also be made public. The principle of transparency set out in the Transparency Rules is not restricted to written submissions and documentation. Article 6 provides that arbitral hearings shall also be public. Moreover, Article 5 provides for participation of non-disputing third parties in certain circumstances.
- Subject to certain exceptions, the Rules apply automatically, but only to UNCITRAL arbitrations commenced under treaties concluded after 1 April 2014. The Rules apply to arbitrations commenced under earlier treaties only if the disputing parties or the contracting States so agree. This significantly limits the otherwise far-reaching transparency obligations under the Rules. The Transparency Rules were applied for the first time in investor-State arbitration in mid-2015 in UNCITRAL arbitration *Iberdrola v. Bolivia*³¹ and in ICSID arbitration *BSG Resources Limited v. Republic of Guinea*.³²
- Furthermore, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (“Transparency Convention”) was adopted by the UN General Assembly on 10 December 2014 and opened for signature on 17 March 2015. The Transparency Convention provides a mechanism by which States can express their agreement to the application of the Transparency Rules. In particular, in the absence of reservations by the signatories, the Transparency Rules will apply to disputes where: (i) both the respondent State and the claimant’s home State are parties to the Convention; or (ii) only the respondent State is party to the Transparency Convention, but the claimant agrees to the application of the Rules. The Convention will enter into force once signed and ratified by a minimum of three parties.³³ Once this occurs, the Transparency Convention will constitute consent by its contracting parties for the Transparency Rules to be applied in proceedings (whether or not conducted under the UNCITRAL Rules) brought under pre-April 2014 investment treaties to which they are party. Transparency has thus evolved into its new role by positioning itself as one of the global norms in international investment law.
- The Transparency Convention extends the reach of the Transparency Rules and – assuming it is widely adopted – may potentially have a significant effect on transparency in future investor-State arbitral proceedings.

³¹ *Iberdrola, S.A. and Iberdrola Energia, S.A.U. v. Bolivia*, PCA Case No. 2015-05. On 7 August 2015, the arbitral tribunal issued its first procedural order, recording the parties’ agreement to the applicability of the Transparency Rules to their proceeding (which had the effect of rendering possible the publication of this procedural order).

³² *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22. About a month after the procedural order issued in the *Iberdrola* arbitration, a procedural order in the case *BSG Resources* also recording the parties’ agreement to the applicability of the Transparency Rules to their proceeding (which had the effect of rendering possible the publication of this procedural order) was published on ICSID’s website.

³³ As of 19 October 2017, the Mauritius Convention on Transparency has entered into force after being ratified by Mauritius, Canada and Switzerland – meaning a commitment to transparency will become part of the treaty-based investor-state dispute settlement regime of these three states.

- In the ICSID context, both the ICSID Arbitration Rules and ICSID Additional Facility Rules were amended in 2006 to increase the transparency of proceedings. These Rules now provide that unless one of the parties objects, ICSID oral hearings may be attended by members of the public.³⁴ Moreover, ICSID tribunals may, follow consultation with the parties, permit submissions from third parties and, with both parties' consent any award may be published by ICSID.³⁵ Thus, in general, transparency in the ICSID realm requires the consent of both parties to the arbitration, with one exception – ICSID is required to publish excerpts of the legal reasoning of awards in all cases.
- Thus if the parties wish to set out a standard for confidentiality and/or transparency of their possible arbitration proceeding they should so state in their dispute resolution clause.

3. Interaction with other provisions

- It is important that the parties specify the choice of governing law in the contract it must be given due consideration while drafting the clause on dispute resolution. The question of state immunity must also be considered by parties while drafting the dispute resolution clause. A state's immunity to jurisdiction results from the belief that it would be inappropriate for one state's courts to call another state under its jurisdiction. States usually also have immunity from execution, as it is deemed to be improper for the courts of one state to seize the property of another state. As mentioned in earlier chapters, immunity from jurisdiction and execution may generally be waived.

4. Model clause options

Clause options for consent of parties for arbitration

- Consent of the Host State to arbitration may be given in one of the following three ways: (i) in bilateral or multilateral investment treaties; (ii) in a direct agreement between the parties to the dispute; and (iii) in the national legislation of the Host State. The consent can also take the form of a compromise, i.e. an agreement to submit existing disputes to arbitration. This option is not, however, used frequently.
- This provision can be considered a typical unilateral offer of consent by a Host State. The investor must thus accept the offer in order to perfect the agreement to arbitrate. This wording does not generally enable a Host State to bring an investment claim against a foreign investor.

Box 10

Unilateral consent in the ECT, article 26(3)(a): “[E]ach Contracting Party...gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.”

- The second commonly-invoked form of consent is a dispute settlement clause contained in a direct investment agreement between a Host State and a foreign investor which normally contain consent to arbitration by both the Host State and the foreign investor.

³⁴ ICSID Arbitration Rules, Rule 32(2); ICSID Arbitration (Additional Facility) Rules, Article 39(2).

³⁵ ICSID Arbitration Rules, Rule 37(2); ICSID Arbitration (Additional Facility) Rules, Article 41(3).

Box 11

The Model Host Government Agreement for Cross-Border Electricity Projects, article 43:

“Any dispute arising under this Agreement, or in any way connected with this Agreement, and/or arising from Project Activities (including this Agreement’s formation and any questions regarding arbitrability or the existence, validity or termination of this Agreement), involving:

(a) The Host Government, and

(b) one or more of the Project Investors,

shall, unless expressly referred to expert determination by Article 44 of this Agreement, be finally settled by arbitration pursuant to this Article to the exclusion of any other remedy. Each of the Parties hereto hereby gives its unconditional consent to any such submission to arbitration.”

- The third form of consent involves the Host State’s consent to arbitration with foreign investors via their national legislation. Like an investment treaty provision, a legislative provision containing consent to arbitration constitutes a mere offer to arbitrate to the foreign investor. In order to perfect the arbitration agreement, the investor must accept the offer. The investor may usually accept the offer by written notice to the state, or simply by initiating arbitral proceedings, at any time while the legislation is in effect.
- Taking the above proposal a step further, a Host State could enact legislation to the effect that any foreign investor, by the simple fact of making an investment, would be deemed to have consented to investor-state arbitration at the initiative of the state.

Box 12

The tribunal in the case *Československá Obchodní Banka, A.S. v. The Slovak Republic* (1999) considered that:

“[m]any investment laws of developing countries provide for the State’s acceptance of ICSID jurisdiction (or for alternative dispute resolution methods) for disputes with the investor arising out of a particular investment.”

The tribunal also held that under some national laws:

“the offer is deemed to be accepted as soon as the foreign investor files an investment application pursuant to such a law, regardless of whether the application includes a reference to the arbitration provision contained in the law.”

Clause options for defining the arbitration procedure

- The parties to an investment arbitration agreement are free to agree on specific procedural rules that will supersede the standard ones. Some differences in drafting may be advisable, depending upon the rules selected. The parties may, for example, wish to include specific details with respect to the composition of the tribunal and the appointment methods. Any rules agreed between the parties will prevail over the set of institutional rules selected by the claimant, or those set out in a relevant treaty.
- As regards the appointing authority, sole arbitrators are generally selected by agreement between the parties or, if no agreement is reached within the allotted time, by the chosen appointing authority (or, if none, the relevant arbitral institution). Both ICSID and SCC commonly act as appointing authorities. Should the claimant choose the UNCITRAL Arbitration Rules, although these do not provide for an administering institution, parties commonly designate an “appointing authority” to appoint the arbitrator(s) if the system of party appointments breaks down, and to deal with any challenges to the arbitrators. Many arbitral institutions (such as the ICC, the LCIA and the International Centre for Dispute Resolution (ICDR)) will act as appointing authorities under the UNCITRAL Rules, for a fee. If no appointing authority is designated and the system of party appointments breaks down, then the Secretary General of the Permanent Court of Arbitration (PCA) in The Hague will, pursuant to the UNCITRAL Rules, appoint an appointing authority.

Box 13

Article 43 of the Model Host Government Agreement for Cross-Border Electricity Projects (the “HGAs”), para 4:

“The Party initiating arbitration pursuant to this Article shall submit the dispute to, at its option:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the state of which the Project Investor is a national and the State are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the state of which the Project Investor is a national or the State, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce”

Box 14

Under the ICSID Convention and the ICSID Arbitration Rules, the parties can agree on the number of arbitrators. Article 37 of the ICSID Convention provides:

“(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36. (2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree. (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.”

Further, Article 38 of the ICSID Convention states:

“If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.”

Box 15

Under the 2017 SCC Rules, the parties can equally agree on the number of arbitrators and also on a procedure for their appointment. Article 16 of the 2017 SCC Arbitration Rules provides:

“(1) The parties may agree on the number of arbitrators. (2) Where the parties have not agreed on the number of arbitrators, the Board shall decide whether the Arbitral Tribunal shall consist of a sole arbitrator or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances.”

In addition, article 17(3) and (4) state:

“ 17(3) Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given 10 days to jointly appoint the arbitrator. If the parties fail to appoint the arbitrator within this time, the Board shall make the appointment.

17 (4) Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Board shall appoint the Chairperson. Where a party fails to appoint arbitrator(s) within the stipulated time period, the Board shall make the appointment.”

Box 16

The process under the 2013 UNCITRAL Arbitration Rules is more complex. Article 7(1) and (2) of the 2013 UNCITRAL Arbitration Rules provide:

“7(1) If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.”

7(2) Notwithstanding paragraph 1, if no other parties have responded to a party’s proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.”

Further, Article 6(1) of the 2013 UNCITRAL Arbitration Rules states:

“Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the “PCA”), one of whom would serve as appointing authority.” Article 6(2) then provides: “If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.”

Clause wording for enforcement of award

- The wording of this aspect must be designed to avoid any doubts with respect to the applicability of relevant international conventions and rules, such as the New York Convention and the UNCITRAL Arbitration Rules. With respect to the application of the ICSID Convention, if the Host State is a party to the Convention, the parties may also want to clarify that the “Project” shall be regarded as an “investment” for the purposes of Article 25 of the ICSID Convention. This is because the ICSID Convention requires that a dispute arise “directly out of an investment”, but does not define “an investment”. The mere submission of the dispute to the Centre would seem to imply that the parties consider that the dispute arises out of an investment. However, the parties may wish to consider making this supposition explicit.

Box 17

Article 43 of the Model Host Government Agreement for Cross-Border Electricity Projects (the “HGAs”), para 5:

“(a) The consent given in paragraph 1 shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and

(iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of the New York Convention.”

