An Integrated Approach to International Energy Investment Protection

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SYNOPSIS

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§ 1.01. Introduction

International energy investments operate at the intersection of two enduring and often competing imperatives: (i) the investor's drive for *stability* and (ii) the host state's assertion of *sovereignty*. Energy projects require significant capital commitments that are recoverable only over long-time horizons. Host governments increasingly seek greater control over and economic participation in the extraction and commercialization of their natural resources.

While legal scholarship traditionally emphasized *ex post* remedies such as litigation, arbitration, and insurance claims, our work on deals stresses a complementary focus on pre-remedy protections founded on rigorous risk analysis, prudent project selection, and sustained stakeholder relationships. To be sure, all of this early effort is given effect through the possibility of exercise and enforcement of remedies. But protections that only apply after an investment has failed should not be the dominant focus.

An international energy project is not a zero-sum game where only either the investor or the host government wins. Proponents must be attuned to the host government's incentives and returns. Transactional lawyers can best advance their client's goals by helping them integrate a variety of economic, legal and above all *practical protections that also enhance the value to the host government of respecting the bargain implicit in private foreign investment*. The most effective tools to protect a foreign investor begin with a candid analysis of the uncertainties and an evaluation of the risk tolerance and incentives of each of the project participants—not only the investor but also the host and home governments, suppliers and contractors, offtakers, financers, and local stakeholders and communities. Structuring the deal in a manner that preserves the value to host government and incentivizes the host government to honor its commitments can reduce the likelihood of disputes. The most successful energy projects are not those without risk, but those which are predicated on an integrated framework that balances the risks and incentives and offers the project participants flexible and durable ways to resolve misalignments of interests before a dispute and enforcement of remedy scenario.

This paper offers an overview of our integrated approach. It uses Venezuela as a recurring case study to illustrate how risk is neither abstract nor static but instead reflects the interaction of sector-specific policies, institutional capacity, and shifting geopolitical constraints over the lifecycle of a project. Section 1.02 examines the risks inherent in international energy projects, with particular emphasis on the identification and management of political risk. Sections 1.03 and 1.04 address the roles of prudent project selection and long-term relationship building, and Section 1.05 considers how incentive structures can drive stakeholder cooperation. Section 1.06 outlines specific contractual structures and provisions designed to support investment. Section 1.07 considers the legal remedies available in cases of investment deprivation or breach of contract. Section 1.08 concludes by emphasizing the benefit of documenting the intended benefits to all parties in the original project agreements.

§ 1.02. Identifying and Evaluating Risks

[1] Risks Generally

Any significant investment decision, whether domestic or international, should be undertaken only after a comprehensive identification and assessment of the risks associated with the venture. First, all investments face *market risk*, such as changes in the demand, supply or price of inputs and outputs, changes in the cost of capital whether debt or equity, credit erosion, illegality or default of project counterparties. Second, projects face *operational risk*, such as casualties, business interruption, delays and cost overruns, and other difficult to control events with respect to engineering, procurement, construction, operation and maintenance. Third, *physical and logistical risk* associated with a specific country, region or industry can change and amplify the other types of risks. Finally, *political risk* can arise from the broader political, social, economic and legal conditions prevailing in the host country and the home country of the investor (and other jurisdictions involved in the supply chain to or offtake from an energy project).[2]

Latin American energy projects provide many examples of these exposures. Investors face recurring nationalization movements, currency valuation, conversion and repatriation restrictions, uncertain liability for past and ongoing environmental conditions, corruption and lack of efficient institutions. At the human level, there is often a lack of skilled labor and contractor forces, and social unrest in the country at large or in communities that may bear the brunt of investment without seeing much of its benefit.[3]

[2] Political Risks

[a] Generally

There is no universally settled definition, but broadly understood, political risk is the uncertainty arising from governmental or social acts or omissions that adversely affect the value or viability of foreign investments in a host state. The common examples are expropriation, armed conflict, civil unrest, terrorism, discriminatory regulation, and restrictions on currency convertibility and funds repatriation.[4] Some commentators confine this definition to instances of intervention by the host state. However, political risk also includes societal instability (e.g., insurrection or criminal activity), and what is more, may also originate in the investor's home state—for example, through shifts in foreign policy or imposition of sanctions.[5] This paper

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[2] *See generally* Robert J. Spjut, *Transaction Risk: A Legal Guide to Contractual Management Strategies*, Tort Trial & Insurance Practice, American Bar Association (2018).

[3] Yeltsin Tafur, Eric Lilford & Roberto F. Aguilera, *Assessing the Risk of Foreign Investment within the Petroleum Sector of South America*, 2 SN Bus. & Econ. 56, 10–13 (2022), https://link.springer.com/article/10.1007/s43546-022-00221-6.

[4] Erin M. Culbertson & Michael D. Nolan, *Political Risk Insurance as a Means of Managing Investment Risks*, in *Bus. Guide to Trade & Inv.—Vol. 2: Int'l Inv.* 40 (Int'l Chamber of Com. 2018).

[5] U.S. sanctions imposed on Venezuela, including state-owned oil company Petroleos de Venezuela S.A. (PDVSA) and its affiliates, have fundamentally altered the political risk analysis for U.S. investors over the past decade. They highlight how sanctions and exceptions thereto (implemented through general and special licensing regimes) by an investor's home state can shift rapidly. A comprehensive list of Venezuela-related U.S. sanctions, general licenses

adopts a broad conception of political risk as including a variety of *governmental and societal interferences from both states that undermine the integrity of the commercial bargain embodied in an investment contract*. Within this broad conception, we will focus specifically on expropriation risk, regulatory risk, contract risk, and currency risk.

[b] Expropriation Risk

Expropriation occurs when a state takes property owned by a foreign investor and revests that property in the state or another party. If such an action occurs without due process or just compensation, it is generally understood to give rise to the state's responsibility under domestic and international legal systems and norms. A classic type of expropriation is nationalization, which refers to the direct taking of a project or an entire sector in pursuit of broader economic or political objectives.[6]

Direct expropriation first occurred in Venezuela in 1976 and then repeated during the 2000s, when the government under former President Hugo Chávez implemented widespread nationalizations in the oil, mining, and other strategic sectors as part of its Bolivarian agenda and its opposition to foreign control over natural resources.[7] Venezuela is again on the precipice of change after the removal of Nicolás Maduro from power in early 2026 and the ensuing shift in Venezuela's political landscape.[8] Both the U.S. Government and Venezuela's acting President have signaled a new openness to foreign investment in the country's oil and gas sector and the Venezuelan government has recently amended its Hydrocarbons Law in order to reduce barriers to foreign investment.[9]

Expropriation may also be indirect, where state measures effectively deprive the investor of the use or value of its property without formal transfer.[10] Many modern disputes concern this so-called "creeping" or "regulatory" expropriation, in which a series of fiscal, tax, regulatory, or administrative measures cumulatively results in the substantial neutralization of the investor's

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and related frequently asked questions (FAQs) can be found at https://ofac.treasury.gov/sanctions-programs-and-country-information/venezuela-related-sanctions. Moreover, U.S. actions in 2026 in Venezuela have been said to potentially increase instability. Alexander Main, director of international policy at the Center for Economic and Policy Research stated, "[B]y removing Maduro, they [i.e., the U.S.] potentially created a scenario of much greater instability ... Things can go haywire in a way that we can't really anticipate." *See* Magdalena Del Valle, *Trump's Venezuela Oil Boom Requires Stability That's Now Lacking,* BLOOMBERG (January 11, 2026), https://www.bloomberg.com/news/articles/2026-01-11/trump-s-venezuela-oil-boom-requires-stability-that-s-now-lacking.

[6] August Reinisch & Christoph H. Schreuer, *Expropriation*, in *Int'l Prot. of Invs.* ¶ 194 (2020) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-reinisch-2020-ch01.

[7] *Id*. at ¶¶ 180, 197.

[8] Alicia M. McKnight, Robert A. James & Willie Wood, *Venezuelan Energy Sector: Recent Developments, Challenges and Opportunities*, Pillsbury Global Trade & Sanctions Law Blog (January 15, 2026), https://www.globaltradeandsanctionslaw.com/venezuelan-energy-sector-developments-challenges-opportunities/.

[9] Keith Johnson, *Venezuela Reformed Its Oil Law. Now What?,* Foreign Policy (February 6, 2026), https://foreignpolicy.com/2026/02/06/venezuela-oil-law-reform-production-pdvsa-trump/; *see also*, David L. Goldwyn & Andrea Clabough, *What It Takes to Revive Venezuela's Oil and Gas Industry*, Atlantic Council (Jan. 8, 2026), https://www.atlanticcouncil.org/dispatches/what-it-takes-to-revive-venezuelas-oil-and-gas-industry/.

[10] Reinisch, *supra* note 6, at ¶¶ 156, 202.

rights or elimination of the value of its stake.[11] States may enact such regulations based on pressures to protect domestic industries or consumers, environmental or public health concerns, or police power grounds. Distinguishing indirect expropriation from a state's exercise of its valid regulatory powers is one of the more difficult questions under international investment law.[12]

[c] Regulatory Risk

Regulatory risk has been defined as the exposure "that there will be an impact from laws or regulations ... on business operations, and if negative[,] ultimately to the degree that achievement of financial goals will be hampered and potentially cause the business to fail."[13] Even where regulations do not amount to an indirect expropriation, they have emerged as a pervasive source of value erosion. A classic example is a new tax or royalty, or a requirement of minimum local-company ownership or control rights. More subtle examples arise in the context of labor, environmental, permitting and data privacy rules. The crucial factor is whether the state action has a discriminatory effect on foreign or private investment, notwithstanding the stated public purpose. Of course, states retain the sovereign right to regulate, and investors should therefore assess whether contractual backstops—such as stabilization or renegotiation clauses—are available to mitigate the impact of regulatory changes on their investments.[14]

[d] Contract Risk

Contract risk refers to the potential default or repudiation by an agreement counterparty.[15] In the context of energy investment abroad, this risk is often amplified by the counterparty being a government or local entity. Domestic courts may be unwilling or unlikely to enforce a contract against a state or state-owned entity and sovereign immunity may limit the exercise of jurisdiction by international courts and tribunals. The possibility of repudiation of government agreement obligations is always present and entails incremental exposure beyond mere non-performance of contract duties.

A recent decision involving CVG Feromineria Orinoco (CVG), a Venezuelan state-owned entity, furnishes a cogent example. CVG entered into an arrangement where it paid for certain services by delivering iron ore to the service provider. The relationship soured, CVG stopped ore deliveries, and the counterparty initiated arbitration claiming compensation for outstanding invoices. CVG's defense was that the contracts were invalid and thus unenforceable due to corruption or illegality under Venezuelan law. Importantly, the contracts at issue provided

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[11] *Id*. at ¶ 258.

[12] Christian Riffel, *Indirect Expropriation and the Protection of Public Interests,* 71 INT'L & COMP. L. Q. 945 (2022), available online at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/indirect-expropriation-and-the-protection-of-public-interests/0F5DF8774E1551D454F37EAE5D85B80B.

[13] Sharon Ward, *The Changing Function of Compliance: A Handbook to Managing Regulatory Risk* 24 (2nd ed. 2023) (ebook via ProQuest Ebook Central), https://ebookcentral-proquest-com.nyli.idm.oclc.org/lib/nyli/detail.action?docID=7273171.

[14] *See infra* Section 1.07.

[15] Helena Haapio & George J. Siedel, *A Short Guide to Contract Risk* 31–32 (2013) (ebook via ProQuest Ebook Central), https://ebookcentral-proquest-com.nyli.idm.oclc.org/lib/nyli/detail.action?docID=1139928.

for the application of U.S. general maritime law, and the arbitral tribunal found CVG liable for repudiation.[16]

[e] Currency Risk

Currency or foreign exchange risk arises when a transaction is denominated in the host country's local currency. The downside includes not only the macroeconomic risk of unanticipated general depreciation or devaluation, but also the prospect of general or specific restrictions on convertibility and transfer.[17] Convertibility risk occurs when local-currency payments cannot be exchanged into a foreign currency because either (i) the host country central bank lacks the foreign currency as a practical matter or (ii) the host country central bank actively imposes exchange controls as a matter of monetary policy.[18] Transfer risk arises when capital controls or other restrictions prevent the repatriation of funds across borders.[19]

International energy projects whose revenues are received in local currency in the host country, like power projects, are more vulnerable to currency risk. Projects that produce goods for export, like oil projects, can partially mitigate this risk by requiring contractual counterparties to pay in external ("hard") currencies and by holding those amounts in offshore accounts, only converting them to local currency to the extent necessary to pay local suppliers.

Venezuela illustrates the myriad ways in which currency risk can arise. Over the past twenty years, there have been several express restrictions on the conversion of bolívars into U.S. dollars (USD), with conversion being dependent on governmental authorization and subject to quotas. The central bank was frequently unable to handle significant currency conversions due to a lack of USD, euros, or other hard currency. A black market emerged, and along with it a significant price gap between the official and non-official exchange rates. In response to severe hyperinflation, there have been repeated "redenominations" of the currency (as well as the introduction of the failed "petro," an oil-backed digital cryptocurrency, and other digital currencies used by individuals and state-owned enterprises alike). Over the last twelve months alone, the bolívar has experienced a steep 530% drop in value.[20] There is something of a chicken-and-egg problem at present, as both the Venezuelan and U.S. governments are looking

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[16] Hristina Todorovic, *Analysis: U.S.-Based Tribunal Sees No Evidence of Corruption Behind Barter Arrangement Involving Supply of Iron Ore and Finds Venezuelan State-Owned Company Liable for Contract Repudiation*, Investment Arbitration Reporter (Aug. 16, 2024), https://www.iareporter.com/articles/analysis-us-based-tribunal-sees-no-evidence-of-corruption-behind-barter-arrangement-involving-supply-of-iron-ore-and-finds-venezuelan-state-owned-company-liable-for-contract-repudiation/.

[17] IMF surveillance and guidance reflect that exchange restrictions, multiple currency practices, and capital controls can be persistent and technically complex, materially affecting cash repatriation and procurement. Int'l Monetary Fund, *Guidance Note for the Fund's Policy on Multiple Currency Practices* (Dec. 20, 2023) (effective Feb. 1, 2024); Int'l Monetary Fund, *Annual Report on Exchange Arrangements and Exchange Restrictions* (Dec. 19, 2024).

[18] GISD Global Investors for Sustainable Development Alliance, *Managing Currency Risks to Scale Up SDG Investments in Developing Countries* 5 (Jan. 2025), https://financing.desa.un.org/sites/default/files/2025-02/Managing%20Local%20Currency%20Risk%20-%20Working%20Paper%20-%20UN%20GISD%20Jan%202025.pdf.

[19] *Id.*

[20] As of January 27, 2026. *See* Venezuela Currency, TradingEconomics.com, https://tradingeconomics.com/venezuela/currency.

to private investors to drive increased oil revenues to supply the very foreign currency that is needed for the stability required to induce investment.[21]

[3] Political Risk Planning and Management

An investor's tolerance for political risk should be identified as early in the project planning and structuring timeline as possible (and in any event no later than the initial investment decision).[22] Companies frequently engage in scenario planning to gauge how a given strategy will play out across distinct future conditions. Transactional attorneys can use the scenario planning to help structure the incentives and protections.

Multinational investors also manage risk through portfolio management, their own security resources, and building relationships across more than a single investment. Portfolio management reflects a company's global exposure; for instance, a firm with operations concentrated in low-risk environments may be better positioned to absorb an investment in a higher-risk jurisdiction than a company with no diversification or one already heavily exposed to high-risk environments. Security encompasses the measures taken to protect personnel and assets, including due diligence investigations, physical security of people and assets, and, in some cases, expatriate security training to prepare personnel for unfamiliar political conditions. Relationship-building can tap into the influence of stakeholders in state agencies.[23]

§ 1.03. Selecting Projects

[1] Investor's Competitive Advantage

With the general and political risks of a proposed investment identified and evaluated, the international energy company should identify the types of roles and projects for which it is best suited, and the countries in which it has the best prospects for success. In essence, the company should take a good, long look in the mirror. By objectively assessing its own qualities and the characteristics of the project and market, the investor can determine what strategic values (and limitations) and competitive advantages (and challenges) it enjoys (and suffers). This determination of value and advantage must be made both against international competitors and against the host country's own stakeholders, project participants and resources. The assessment should be conducted not only as of the investment date, but also throughout the anticipated duration of the investment.

[2] Party Roles

An important result of such a candid assessment may be that roles that make sense in a home country or in the developed world may not be appropriate in an emerging economy. It may

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[21] *Venezuela Private Sector Says Fresh Flow of Dollars Could Stabilize Exchange Market,* REUTERS (Jan. 21, 2026), https://www.reuters.com/world/americas/venezuela-private-sector-says-fresh-flow-dollars-could-stabilize-exchange-market-2026-01-21/.

[22] Robert McKellar, *A Short Guide to Political Risk* 59–76 (2017) (ebook via ProQuest Ebook Central) https://ebookcentral-proquest-com.nyli.idm.oclc.org/lib/nyli/detail.action?docID=587871.

[23] *Id.* at 81–95.

be prudent either to scale down (e.g., be a services provider rather than a turnkey contractor) or to scale up (e.g., be a turnkey contractor rather than an adviser).

For example, a large U.S. public utility was quite experienced in acting as general contractor for research and development facilities in its home territory, subcontracting with local specialty firms that were driven to meet and exceed the utility's requirements by credible enforcement mechanisms and by the prospect of repeat business. But when an affiliate of that utility attempted to act as contractor for a similar facility for an overseas government entity, it carried that same general contractor mindset into a setting where local subcontractors had weak repeat-player incentives and where legal and regulatory institutions did not reliably instill discipline. As a result, the affiliate became embroiled in disputes both with the host government company and with the subcontractors. In this example, if the affiliate had taken on more of a role by directly handling full performance or contracting with higher-priced international subcontractors, it would have resulted in less overall exposure.

Companies are also being held responsible—either legally or reputationally—for the actions of their contractors and subcontractors.[24] It may seem counterintuitive, but by taking on a more active role, a company can more effectively ensure its compliance standards are being met rather than relying on contractual provisions intended to flow down corporate codes of conduct with which local contractors and subcontractors may or may not be able to comply.[25]

[3] Country Risks

[a] Country Risks Generally

The potential investor should evaluate the *country risks* as applied to the particulars of the project in question. Does the client's home country create advantages or disadvantages in the target country compared with competitors? Does it make sense to associate with a joint venturer from the host country or from another outside country, given how third-country relationships can affect market access, compliance burdens, and political acceptance over the life of the project? Does the client's investment footprint in other jurisdictions create either problems or opportunities for the subject project, including through reputational linkages, supply chains, or heightened scrutiny of counterparties and beneficial ownership?

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[24] Witold J. Henisz & Bennet A. Zelner, *The Hidden Risks in Emerging Markets*, HARV. BUS. REV. (Apr. 2010) (explaining that modern political risk is commonly expressed through regulatory tools and selective enforcement rather than outright seizure); *see also* European Commission, *Corporate Sustainability Due Diligence* (noting Directive (EU) 2024/1760 entered into force July 25, 2024 is intended to require companies to identify and address adverse human-rights and environmental impacts across operations and global value chains); *see also* European Commission, *Corporate Sustainability Reporting*; IFRS Foundation, *Introduction to the ISSB and IFRS Sustainability Disclosure Standards* (describing global baselines for investor-focused sustainability disclosures).

[25] U.S. Dep't of State, *Voluntary Principles on Security and Human Rights* (describing the multi-stakeholder initiative guiding extractives on providing security consistent with respect for human rights). OECD Anti-Bribery Convention: Phase 4 Monitoring Guide (monitoring and enforcement procedures for Parties), https://one.oecd.org/document/DAF/WGB%282019%2971/REV1/en/pdf.

[b] Specific Measures of Political Risk

A variety of measures of political risk are available in specific countries for particular types of projects. In addition to qualitative political analysis, investors now commonly apply indicators of governance, corruption, and adherence to the rule of law with screening for foreign exchange and capital-control experience, sector-specific regulation, and international sanctions.[26] In today's market, that boils down to asking concrete questions about permitting timelines, license or concession revocability, intellectual property protections, the extent of regulator discretion, and the predictability of government agency administration.[27] Where appropriate, investors also consider whether political risk insurance or guarantee products can partially mitigate specific exposures such as transfer restriction, breach of contract, or political violence, recognizing that these tools address defined risks and do not substitute for project-level risk selection.[28]

However, generic descriptions of the investment "climate" or the "attitude" towards foreign direct investment in a given country may be less helpful than specific assessments of the energy sector and of the counterparties who will be involved in a given project. The particular insights derived from direct experience of project personnel or consultants in the energy industry in that country may be of greater value. Recent experience in volatile jurisdictions continues to support the view that "political risk" is rarely abstract; it depends on who the investor is, what it is doing, which government actors have leverage over the project's critical path, and what relationships the investors have to those government actors.[29]

[c] Unauthorized Payments

A looming problem is the possibility that government officials will expect payments of money or other items of value not authorized by the sovereign in the publicly disclosed investment contract. Since 1977, United States investors have been subject to especially stringent prohibitions on making such payments under the Foreign Corrupt Practices Act (FCPA). The Organisation for Economic Co-operation and Development (OECD) 1997 Anti-Bribery

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[26] Investors frequently triangulate governance and corruption indicators with sector-specific dispute and regulatory trends. *See* World Bank, *Worldwide Governance Indicators (WGI)*; Transparency Int'l, Corruption Perceptions Index 2024.

[27] UNCTAD, Recent Trends in Investor–State Arbitration Cases (Sept. 2025) (extractive and energy supply disputes comprised more than half of new ISDS cases filed in 2024).

[28] Political risk insurance and guarantees can mitigate defined risks (for example, transfer restriction or breach of contract) but do not eliminate underlying host-country volatility. *See* MIGA, *Currency Inconvertibility and Transfer Restriction*; MIGA, *Breach of Contract*; World Bank, *Policy Options to Mitigate Political Risk and Attract FDI*. However, political risk insurance is not available in all jurisdictions and frequently has carveouts and limitations that need to be considered. *See also* Joseph D. Jean, Alex J. Lathrop, David F. Klein, Alicia M. McKnight & Robert A James, *Doing Business in Venezuela: Political Risk Insurance is a Critical First Step*, Pillsbury Policyholder Pulse Blog (January 30, 2026), https://www.policyholderpulse.com/doing-business-venezuela-political-risk-insurance/.

[29] Contemporary political risk discussions in the insurance market emphasize regulatory interference, government intervention, and transparency as central concerns, supporting the point that risk is investor- and project-specific rather than abstract. *See* MIGA, *World Investment and Political Risk* (launch event summary).

Convention mandates similar regimes throughout OECD member states, and many but not all countries have established local laws to the same effect.[30]

U.S. law has expanded to bribery demands by the foreign officials, reflecting a broader policy objective of targeting kleptocracy and corruption that distort international markets.[31] In parallel, illicit-finance and transparency rules have increased scrutiny of intermediaries and ownership structures, including beneficial-ownership reporting requirements (as implemented and amended) and related anti-money-laundering frameworks, which can make opaque third-party arrangements a material compliance and diligence issue even where the underlying contract terms are otherwise lawful.[32] U.S. sanctions explicitly target foreign persons involved in corruption by others, making sanctions screening and counterparty diligence relevant to the same risk set as anti-bribery compliance.[33]

Some time ago, concern was expressed that these home country laws combatting demands for unauthorized payments placed an investor in a disfavored situation. But many negotiators for multinational energy firms confirm that those prohibitions are their best friends. Such laws permit the negotiators to "just say no," foreclose any discussion of such benefits, and protect the integrity and reputation of the investor—rather than face the prospect of trying to resist and deal with them over the course of the project.

[d] Investor Country Considerations

A related point is that political risks can arise as a result of the *investor's* home country, either generally or relative to the particular country or investment. The home country's attitude toward the investment also matters. For example, there is no Venezuelan political risk for international investment *per se*. U.S.-Venezuelan political risk is different from EU-Venezuelan risk, and they both differ from Asia-Venezuelan risk and Venezuela risk for Venezuelans.

Political risk from the investor's country can come in the form of sanctions, tariffs or licensing constraints against the country where the investment is made or where key inputs or financing are sourced.[34] Home countries can also regulate or prohibit transfers of sensitive

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[30] Such laws have been enacted in countries including Brazil (Law 10.467 amending the Brazilian Penal Code), Chile (Law 19.829 amending the Chilean Criminal Code), and South Korea (Act on Preventing Bribery of Foreign Public Officials in International Transactions). For a complete list of signatories to the OECD Anti-Bribery Convention, visit https://www.oecd.org/.

[31] *See* Foreign Extortion Prevention Act (codified at 18 U.S.C. § 1352) (criminalizing "demand-side" bribery by foreign officials, complementing traditional FCPA "supply-side" enforcement); *see also* U.S. Dep't of Justice, Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act and the Foreign Extortion Prevention Act (referencing FEPA and its codification at 18 U.S.C. § 1352).

[32] *See* Corporate Transparency Act (beneficial ownership information reporting) and subsequent narrowing of BOI reporting requirements by interim final rule (limiting BOI reporting to "foreign reporting companies"); *see* FinCEN, Beneficial Ownership Information Reporting and Interim Final Rule (*Federal Register*) revising and extending BOI reporting deadlines and scope.

[33] Global Magnitsky Human Rights Accountability Act (authorizing sanctions for foreign persons involved in corruption and certain human-rights abuses), which can make corruption-linked counterparties a sanctions risk as well as an anti-bribery risk.

[34] Office of Foreign Assets Control, *A Framework for OFAC Compliance Commitments* (May 2, 2019) (describing a risk-based sanctions compliance program and emphasizing ongoing risk assessment, internal controls,

technology (including "technology," "software," and technical services) into countries they find problematic, and may impose notification or prohibition regimes for certain outbound investments tied to national security technologies in "countries of concern."[35] Host countries as well as home governments enact and enforce boycotts of trade with certain nations, and in response other states enact anti-boycott prohibitions and reporting duties.[36]

Clients must assess their own countries' current laws, as well as the developing relationship between host and investor countries, to gauge the viability of a long-term energy investment. Economic sanctions originating with multilateral organizations such as the United Nations, or with the investor's home country (particularly the United States), are difficult to manage and have been of growing significance as a form of political risk.[37]

Since the international energy company has no choice but to comply, the techniques for managing the political risk of sanctions tend to consist of indirect forms of mitigation such as forecasting and anticipatory scenario analysis; reacting to specific measures before and after they arise (including through time-limited authorizations and wind-down planning); strengthening screening and internal compliance controls; restricting assignments or counterparties where sanctions nexus is foreseeable; and political engagement and structuring aimed at accomplishing business objectives without triggering or violating applicable sanctions.[38] Investors should prohibit assignments of interests to nationals of sanctioned countries among other means of achieving business objectives.[39]

[e] Venezuela

Venezuela furnishes a snapshot of how "country risk" is amplified by the interaction of other risks and geopolitical factors. Venezuela is home to the world's largest proven oil reserves and prior to 1976, foreign investors obtained concessions and paid royalties and taxes but otherwise controlled their oil and gas operations and revenues. The first nationalization of the oil industry occurred in 1976 with the creation of Petróleos de Venezuela, S.A. (PDVSA) as the

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testing/auditing, and training); *see also* OFAC, Issuance of Amended Venezuela-related General License (Mar. 24, 2025) (example of time-limited authorization and wind-down framing in a country program).

[35] 15 C.F.R. pt. 774 (Commerce Control List; items include commodities, software, and technology). Outbound investment: U.S. Dep't of the Treasury, Additional Information on Final Regulations Implementing Outbound Investment Order (Oct. 28, 2024) (final rule implementing Executive Order 14105; effective Jan. 2, 2025; establishes notification and prohibition categories for certain U.S. investments involving specified national security technologies and products in "countries of concern").

[36] *See* 50 U.S.C. §§ 4841–4843; 15 C.F.R. pt. 760; ITA Antiboycott Compliance; BIS Press Release, BIS Issues New Resource to Facilitate Antiboycott Compliance (Mar. 28, 2024) (publishing a boycott-requestor list and describing "enhanced enforcement" focus).

[37] U.N. Security Council sanctions overview (describing ongoing sanctions regimes and committee administration) and consolidated list infrastructure (screening formats).

[38] Brent D. Yacobucci, *Venezuela Oil Sector: Context for Recent Developments*, Cong. Research Serv., Insight No. IN12637 (Jan. 9, 2026), https://www.congress.gov/crs-product/IN12637 (describing January 2026 U.S. actions tied to Venezuelan oil and stated policy objectives); Associated Press, *Rubio tells senators there's "good and decent progress" in Venezuela since U.S. ousted Maduro* (Jan. 28, 2026) (describing U.S. oversight of oil revenue and continuing volatility).

[39] *See* Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. 183 (2001).

state-owned oil company responsible for exploration, production, refining and crude exports. During the 1980s and 1990s, PDVSA maintained partnerships with international companies and had a high degree of autonomy from the government and contributed a disproportionately large share of the country's revenues, despite falling oil prices and domestic political turmoil. That changed in the early 2000s, when civic strikes and work stoppages plagued PDVSA, resulting in a profound restructuring of PDVSA by the Chavez-led government and the exodus of tens of thousands of highly skilled workers, many of whom were blacklisted by the government. Shortly thereafter in 2006, the Venezuelan government decreed that PDVSA must hold a minimum 60% stake in all crude projects, forcing foreign investors to accept new contractual conditions or exit the country under protest, resulting in international arbitrations issuing awards of billions of dollars against the Venezuelan government.[40]

Venezuela's oil industry deteriorated over the ensuing decade, with the collapse in production deepening significantly following the U.S. imposition first of general sanctions in 2017 that restricted the country's access to international financial markets, and second of targeted sanctions in 2019 affecting the energy sector and PDVSA and its affiliates. Since then, the U.S. sanction landscape has continued to evolve, through the issuances of both general and specific licenses, creating recurring uncertainty about market access, payment channels, shipping and insurance, counterparties, and the continued availability of critical equipment and services.[41] Large-scale Venezuelan migration, particularly highly educated and trained professionals who had the means to emigrate, has further limited the availability of skilled labor, social unrest continues, security remains uneven particularly around ports and other infrastructures, the power sector has fallen into disrepair, and hyperinflation and currency devaluation have wreaked havoc.[42] In early 2026, following the extraction of Nicolás Maduro, U.S. measures have included a targeted attachment shield for certain Venezuelan oil-related revenues held in designated U.S. custody accounts and the issuance of general licenses for transactions that require payments to be made to such accounts pursuant to contracts that are expressly subject to U.S. governing law and dispute resolution.[43]

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[40] "Venezuela has faced more known [investor-state dispute settlement] claims than any other nation, more than 65, with about a third filed by oil and mining companies according to the United Nations Trade and Development. Most of the cases stem from nationalizations of oil and other industries in the 2000s and earlier […]". Nicholas Kusnetz, *Fight Over Venezuelan Oil Highlights Shadowy International Legal System*, INSIDE CLIMATE NEWS (Jan. 13, 2026), https://insideclimatenews.org/news/13012026/venezuela-oil-highlights-shadowy-isds-system.

[41] Yacobucci, *supra* note 38.

[42] Venezuela Situation, *UNHCR*, https://www.unhcr.org/emergencies/venezuela-situation (last visited Jan. 30, 2026); *see also* Megan Janetsky, *14,000 US-bound Migrants Have Returned South Since Trump Border Changes, UN Says*, INDEP. (Aug. 29, 2025), https://www.independent.co.uk/news/colombia-panama-costa-rica-trump-venezuelan-b2816577.html (last visited Jan. 30, 2026).

[43] Exec. Order No. 14,373, *Safeguarding Venezuelan Oil Revenue for the Good of the American and Venezuelan People*, 91 Fed. Reg. 2,045 (Jan. 15, 2026); Christopher R. Wall, Stephan E. Becker, et al., *OFAC Issues Venezuela General Licenses Authorizing Certain Oil-Related Activities,* Pillsbury Global Trade & Sanctions Law Blog (February 9, 2026), https://www.globaltradeandsanctionslaw.com/ofac-venezuela-general-licenses-oil/; Venezuela Sanctions Regulations 31 C.F.R. part 591, General License No. 46A (Department of the Treasury, Office of Foreign Assets Control, February 10, 2026) (replacing prior General License No. 46 issued on January 29, 2026); Venezuela Sanctions Regulations 31 C.F.R. part 591, General License No. 48 (Department of the Treasury, Office of Foreign Assets Control, February 10, 2026).

[4] Energy Investments in Particular

[a] Vulnerability of Energy Projects

Of all international investment subjects, energy projects are especially vulnerable to government intervention. The valuable natural resource or energy facility is in, or on, the host country's ground. The sovereignty of a nation extends to its natural resources, and in most countries such resources are owned by the public and administered by the government.[44] The principle of permanent sovereignty over natural resources has been reflected in various documents, including the 1963 United Nations Resolution on Permanent Sovereignty Over Natural Resources and the 1974 United Nations Declaration on the Establishment of a New International Economic Order.[45]

Once the resource is discovered and the infrastructure for extracting and exploiting it is built and paid for, there will be little appreciation in the host country for the exploration, development and construction efforts of the companies that took risks and incurred investments to achieve those results. This dilemma of the "obsolescing bargain" remains one of the more significant political risks associated with long-term, capital-intensive nature of international energy projects, and it increasingly intersects with policy pressures that can alter a project's economics or operability on short notice, including energy-security initiatives, climate and environmental regulation, and the expansion of sanctions, counter-sanctions, and export control regimes.[46] Governments looking for respect and self-determination on the national as well as international stage can be more protective of domestic energy sources than of other economic sectors. Host government actions to reset the terms of the original bargain increasingly play out through policy tools short of a formal taking, including abrupt changes in fiscal terms, intensified local content and procurement expectations, tightened investment screening for "strategic" assets, and restrictions that materially impair operations, supply chains, access to markets, or access to financing.[47]

[b] Emerging Economy Political Risk

Concerns over obsolescing bargains are particularly prevalent in the developing world and the formerly centrally planned economies, where countries are rapidly developing infrastructure that in turn demands new cash sources. Energy-rich countries are reluctant permanently to cede control of their valuable resources, or to acknowledge that prior transfers of control necessarily bind future governments. That reluctance is often expressed through sector-specific licensing regimes, discretionary approvals for "strategic" assets, state participation requirements, fiscal instruments that can be rebalanced through legislation or regulation, and

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[44] Md. Shah Alam & Abdullah Al Faruque, *The Principle of Permanent Sovereignty Over Natural Resources: Its Evolution and Relevance for Natural Resource Extraction in Bangladesh*, 31 GEO. ENV'T L. REV. 431 (2019).

[45] United Nationals Resolution on Permanent Sovereignty Over Natural Resources, U.N.G.A. Res. 1803 (XVII), United Nations Declaration on the Establishment of a New International Economic Order, U.N.G.A. Res 3201 (1974).

[46] Christopher B. Bowman, *Risk Mitigation in International Petroleum Contracts*, 51 GEO. J. INT'L L. 815 (2020).

[47] Chilenye Nwapi, *Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries*, 8 LAW & DEV. REV. 187 (2015); *see also* Lorenzo Casini et al., *Energy Security, Energy Transition, and Foreign Investments: An Evolving Complex Relationship*, 13 LAWS (MDPI) 48 (2024).

performance requirements such as local content and local procurement expectations.[48] The withholding of full protection to foreign participants, or the conditioning of participation on continuing compliance with shifting domestic policy priorities, illustrates a general reluctance of countries to relinquish control over natural resources.[49]

[c] Developed Country Political Risk

Difficulties from government intervention are not confined to the developing world. The United Kingdom and the United States, for instance, can be regarded as agents of creeping expropriation or regulatory political risk every time they enact new regulations that eat away at a project's viability. To include earlier episodes of petroleum fiscal revision, developed jurisdictions have used windfall levies, tightened environmental and permitting requirements, and recalibrated subsidy and market support mechanisms in ways that can materially affect expected returns, including in sectors that previously appeared to rest on stable baseline assumptions.[50]

Oil and gas companies' experience with governmental adjustment of leasing and fiscal terms is also instructive. In the mid-1970s, the United Kingdom introduced a wholesale renegotiation of license terms, a new form of petroleum taxation, and a mandatory carried interest for its newly established state oil company for North Sea field development.[51] In the United States, federal onshore leasing regulations have been revised to implement statutory changes to royalties (being increased by the Inflation Reduction Act and subsequently decreased by the One Big Beautiful Bill), rentals, minimum bids, and bonding requirements.[52] As these events illustrate, even developed countries can pose significant political risks for energy investment. A well-developed system of laws, a solid judiciary, and an established legislative process are valuable but do not guarantee contract stability. Nor is a democratic form of government a guaranty of insulation from assaults on the integrity of the client's bargain. As the past year in the United States has demonstrated, a change in government, rather than the form of government per se, remains a predominant factor influencing political risk.[53]

[d] Venezuela

Venezuela illustrates the "long tail" of the obsolescing bargain in the energy sector: once assets and infrastructure exist, pressure to rebalance the benefits associated with those assets reappeared in the form of repeated nationalizations and the legal consequences have extended for years through investor-state and commercial dispute pathways. Reporting in 2026 has

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[48] *See supra* note 43.

[49] Casini, *supra* note 47.

[50] J. Benton, Heath, *Stability, Stagnation, and Legitimate Expectations: Energy Transition Disputes in Investment Treaty Arbitration*, J. INT'L DISP. SETTLEMENT (advance article, 2023); *see also* HM Revenue & Customs, Energy Profits Levy Reforms 2024 (Policy Paper) (published Oct. 30, 2024).

[51] *See* Peter D. Cameron, *Stabilization in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors*, Association of International Petroleum Negotiators (July 5, 2006), https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw4-Stabilisation-Paper.pdf.

[52] Bureau of Land Management, *Fluid Mineral Leases and Leasing Process*, 89 Fed. Reg. 30916 (Apr. 23, 2024) (final rule).

[53] J. Benton, *supra* note 50.

emphasized how legacy energy-sector disputes and arbitral claims can shape bargaining leverage and economic outcomes well after an underlying taking or restructuring, particularly where claimants pursue enforcement against overseas commercial assets or proceeds streams and sovereigns pursue defensive structuring.[54] More recent instability was not confined to the host state's formal actions but instead arose from U.S. judicial process and sanctions posture, which altered who controls cash, which transactions are practicable, and what "stability" means in practice.[55] Recent U.S. sanctions designations and enforcement actions directed at sanctions evasion networks in Venezuela's oil trade underscore how market access and revenue reliability can be affected by external enforcement, including vessel and counterparty risk, even where the project asset remains in place.[56]

[5] Internal Client Characteristics

A client-specific consideration is the risk appetite of the multinational enterprise and its own investors. In this regard, it is important to recognize that the perspective of shareholders, the headquarters' executives, compliance department or the finance department may be very different from the preferences of the local business unit. Even different divisions within a business unit may have competing projects and interests.

Little appears to be written on how the internal characteristics of the investor impact the harm suffered as a result of the occurrence of a political risk event. Increasingly, however, arbitral practice and commentary address the extent to which an investor's own diligence and conduct shape both the protection available and the allocation of loss, including by limiting the reasonableness of asserted expectations and by reducing compensation where the investor's decisions or failures contributed to the injury.[57] Accordingly, a firm's internal governance and risk discipline, including the quality of its diligence, compliance posture, and capacity to adapt operations and financing in response to legal and regulatory change, can materially affect both exposure and outcomes. Examples include the ability of international energy companies to mitigate currency risk by using local currency from one project in the host country for operations relating to another project in that country, and the ability of resilient and patient firms to weather temporary political risk events to their advantage over competitors with less staying power. A careful, candid evaluation should be made early in the development process, as the client's ability to navigate political risk, delays and transaction costs is one of the most important factors in whether a given investment will ultimately be successful.

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[54] Nicholas Kusnetz, *Fight Over Venezuelan Oil Highlights Shadowy International Legal System*, INSIDE CLIMATE NEWS (Jan. 13, 2026), https://insideclimatenews.org/news/13012026/venezuela-oil-highlights-shadowy-isds-system.

[55] *See supra* note 43.

[56] Press Release, U.S. Dep't of the Treasury, *Treasury Targets Oil Traders Engaged in Sanctions Evasion for Maduro Regime* (Dec. 31, 2025), https://home.treasury.gov/news/press-releases/sb0348.

[57] Jorge E. Viñuales, Investor Diligence in Investment Arbitration: Sources and Arguments, 32 ICSID Rev. 547 (2017) (manuscript).

§ 1.04. Cultivating Relationships

[1] Key Stakeholders

Overseas investors must evaluate, select and cultivate relationships with key stakeholders at all levels and over all relevant times. In addition to the national and local government, private parties have significant impacts on the success of the investment. These other stakeholders include local communities, nongovernmental organizations, lenders, political risk insurers, and home-country regulators.[58]

[2] Government Relationships

[a] Relationships Across Political Branches

It is clichéd but it remains critical to cultivate relationships at all applicable levels of the host government. In some countries, engagement with the legislature can strengthen durability by situating the project within publicly tested processes and budgetary oversight. In other countries, relationship management with the relevant executive ministry may be the most practical route to authorizations and ongoing administrative cooperation. Such relationships are driven by, but not exclusively dependent on, legal rules that require executive decrees or legislative acts to authorize and implement the investment in question. In either setting, investors must distinguish between formal legal competence and *de facto* decision-making influence, and must account for the possibility that oversight bodies, courts, auditors, and other institutions will later scrutinize the same approvals relied upon at entry.[59]

[b] Diversified Relationships

Relationships should be diversified wherever reasonably possible. Today's government function may be privatized tomorrow, and functions currently performed by private firms may be nationalized in the future.[60] Concentrated contacts at a high level in the current government may confer large current influence and protection, but may be especially vulnerable to a change in administration, personnel turnover, intra-government rivalry, shifting enforcement priorities, or a later integrity review of the government's dealings. A prudent approach therefore seeks institutional continuity, by cultivating working-level counterparts across finance, customs, environmental, labor, security, and state-owned enterprise interfaces, and by maintaining

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[58] Lisa J. Laplante, *The Wild West of Company-Level Grievance Mechanisms: Fixing the Corporate Accountability Gap*, 64 HARV. INT'L L.J. 1 (2023) (describing the post-2011 growth of "operational-level grievance mechanisms" in response to the UN Guiding Principles).

[59] Douglas Sarro, *Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance*, 13 GERMAN L.J. 1526 (2012), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/B8DD8852385C1F26469F35C1974E0233/S2071832200017971a.pdf/do_lenders_make_effective_regulators_an_assessment_of_the_equator_principles_on_project_finance.pdf.

[60] Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717–21 (2010) (describing privatization as the contracting out of government services and explaining how governmental functions are shifted to private actors); *see also* Amy L. Chua, *The Privatization–Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 226 (1995) (observing that many developing states have "been cycling back and forth between privatization and nationalization").

authorized and documentable channels for engagement that can withstand later audit, legislative, prosecutorial, or compliance scrutiny.[61]

Changes in political parties and changes in the very form of government of course increase the chances of intervention. A government contract, particularly in the energy sector, will likely feature a term longer than the current term of the head of state or prime minister. A new government may take a hard look at the previous government's dealings. "It's easy for an opposition party to appeal to nationalism by claiming the [prior] government sold out to foreigners in allowing them to control critical infrastructure."[62] Shifts in the social and economic environment may have led to the change in government and therefore increase the risk of adverse intervention, including renegotiation, delays in approvals, or more assertive regulatory or fiscal measures.[63]

[c] Local Relationships

Relationships should not be maintained solely at the level of the national government. The client must consider the relationships of the client and the sovereign to the provincial or municipal governments, which may oppose the project in question (or any project at all) through permitting, land-use controls, local taxation, labor and security constraints, and coordination with community stakeholders. Local opposition to major energy infrastructure can be both persistent and outcome-determinative, even where national-level approvals have been obtained.[64]

The investor and its stakeholders may be able to offer special incentives to local authorities. However, the investor must be ever mindful of the competition and other dynamics between national and local governments, including the incentives of local officials to distance themselves from national decisions or to renegotiate local benefits. The international energy company will have to make a subtle and complex judgment as to whether to engage directly in domestic political debates or instead attempt to stay out of the fray.[65]

[3] Nongovernmental Stakeholders

Government support at both the national and local levels does not necessarily confer immunity on the energy project. Support—or at least the lack of objection—from communities and nongovernmental organizations can bolster an investment and the conditions for expanded

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[61] Rachel Brewster, *Arbitrating Corruption*, WASH. U. L. REV. ONLINE (Mar. 18, 2024) (noting that, where bribery allegations are substantiated, arbitrators have refused to hear investors' claims); *see also* Tim O'Shea, *Blame to Go Around: Treaty Language and the Corruption Defense in Investor-State Arbitration*, 53 GEO. J. INT'L L. 735, 735–37, 740–42 (2023).

[62] *See* Louis Wells & Eric Gleason, *Is Foreign Infrastructure Investment Still Risky?*, HARV. BUS. REV., Sept-Oct. 1995, at 48–49.

[63] Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. J. TRANSNAT'L L. 1347, 1349 (2003); Peter D. Cameron, *Stabilization and the Impact of Changing Patterns of Energy Investment*, 10 J. WORLD ENERGY L. & BUS. 389, 389–90 (2017).

[64] Alexandra B. Klass & Hannah J. Wiseman, *Local Energy*, 60 UCLA L. REV. 470 (2013) (local control and siting friction in energy development); *see also* Charlotte A. Roesler, *Clean Energy and Private Property*, 110 IOWA L. REV. 2101 (2025).

[65] *Id.*

opportunities, including by reducing operational disruptions. Where indigenous or similarly situated communities are affected, evolving legal and quasi-legal expectations concerning consultation and, in some settings, free, prior, and informed consent, can determine whether an investor's relationship strategy is viewed as legitimate over the long term.[66] Local community interests and participation mechanisms can also shape dispute trajectories and outcomes, including through transparency, benefit-sharing arrangements, and multi-actor contracting practices that reduce the likelihood of sustained opposition.[67]

[4] Local or International Partners

Clients should identify and cultivate advantageous partnerships with private sector economic entities outside the national government. Sometimes, a project can be more attractive if a client can partner with local or other international firms. Moreover, a number of countries have legislation mandating local participation or hiring, and modern local content frameworks can operate as both an economic policy tool and a political-risk management lever, depending on how "local" beneficiaries are defined and incorporated.[68]

Separate from the political benefits of partnering with a local sponsor, partnering with private sector entities has also been identified as an important technique for spreading the risks involved in energy projects.[69] Moreover, in certain jurisdictions, such partnering is not optional but is instead a mandatory requirement. Any partnership, local or international, spreads capital and political exposure but also reallocates decision rights, so the practical trade-off is between risk sharing and the added governance complexity and potential loss of operating flexibility that can surface over the project lifecycle.

[5] Contract Counterparties

An investor can undertake a variety of risk transfers to contract counterparties. Engineering, procurement and construction contractors regularly absorb the exposure to delays, cost overruns, and mechanical or process failures (albeit for a fee and subject to force majeure and other conditions and limits).[70] To protect against shortages in materials, an investor can obtain long-term and diversified supply commitments and can demand security for the suppliers' obligations. Price escalations and schedule extensions can be contractually passed on to offtake

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[66] *See* Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* 441–452 (2005) (comparing experiences of foreign investors); Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429 (2017).

[67] *See* Local Communities and International Investment Law, 55 GEO. J. INT'L L. (2024), https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2024/09/GT-GJIL240031.pdf.

[68] Chilenye Nwapi, *Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries*, 8 LAW & DEV. REV. 187 (2015), https://ideas.repec.org/a/bpj/lawdev/v8y2015i1p187-216n6.html.

[69] "When a company tries to 'spread the risk' it usually tries to form joint ventures to create a united and stronger front against an interventionist host country." Margarita Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 219 (2002).

[70] Robert A. James, *Construction Gigaprojects* (2026), available at https://www.pillsburylaw.com/a/web/tZtSK6aoZ7GhZEvWsoeqYw/construction-gigaprojects.pdf.

purchasers. Both assured cash flow and some insulation from alternative projects can be obtained through deliver-or-pay or take-or-pay obligations of project suppliers or offtakers.[71]

Counterparties that are state-owned entities are frequently sought to allocate political risks away from the international energy company. These contractual allocations include (i) shifting exchange rate and local inflation risk to state-owned offtakers through dollar-denominated or indexed pricing; (ii) shifting risks of adverse change in law to state-owned offtakers through "grossing up" of payments in the event of additional taxes; and (iii) shifting the risk of political violence or war to state-owned offtakers or suppliers through strong force majeure provisions. These risks are often ultimately shifted to the host government, through a guaranty by the host government of the obligations of the state-owned counterparty.[72]

However, sometimes, those counterparties themselves create additional risks. In Venezuela, upstream participation has been required to be channeled through PDVSA-majority owned mixed company joint venture structures. The mixed-company's production is to be sold to a PDVSA subsidiary, which in turn is the sole entity authorized to conduct export sales. Corruption and mismanagement resulted in arrearages in payments by the PDVSA offtaker to the mixed companies, triggering cash shortages and cascading defaults to suppliers and oilfield service companies. The January 2026 legislation intends to change this by allowing the Ministry of Hydrocarbons to authorize foreign companies to have greater ownership stakes, higher degrees of operational control, and the ability to directly export and sell production; however, questions remain with respect to implementation and revocability of these rights by the Ministry.[73]

[6] Political Risk Insurers

[a] Sources of Political Risk Insurance

International energy companies may consider purchasing political risk insurance, or international or governmental export credit funding or guaranties that afford similar protection. Public and multilateral providers, such the Multilateral Investment Guarantee Agency (MIGA) and the U.S. Development Finance Corporation (DFC), as successor to Overseas Private Investment Corporation,[74] continue to play a distinct role in depoliticizing investment disputes

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[71] Phil Loots & Nick Henchie, *Worlds Apart: EPC and EPCM Contracts: Risk Issues and Allocation* (Nov. 2007) (explaining why project financed construction commonly uses fixed-price structures to transfer schedule, cost, and performance guarantee risk to the contractor, subject to negotiated relief events such as force majeure); *see also* Ernest E. Smith, Royalty Issues: *Take-or-Pay Claims and Division Orders*, 24 TULSA L.J. 509 (1989) (describing take-or-pay payment structures and their function in allocating volume and revenue risk in long-term commodity purchase arrangements).

[72] John P. Bowman, *Risk Mitigation in International Petroleum Contracts*, 50 GEO. J. INT'L L. 745 (2019) (surveying contractual techniques used in host government or national oil company contracting to manage political and fiscal risk, including stabilization and tax/fiscal adjustment mechanisms, allocation-of-risk approaches, and the role of government-backed commitments supporting project economics); John Mauel, *Common Contractual Risk Allocations in International Power Projects*, 1996 COLUM. BUS. L. REV. 37–59 (1996).

[73] Johnson, *supra* note 9; Fintool, *Venezuela Ends Two Decades of Oil Nationalization, Opens Sector to Foreign Investment* (Jan. 30, 2026), https://fintool.com/news/venezuela-oil-reform-privatization-foreign-investment.

[74] *See generally* Multilateral Investment Guarantee Agency, *Investment Guarantee Guide,* at https://www.miga.org ("MIGA Investment Guide"); Overseas Private Investment Corporation, *Program Guide,* at https://www.opic.gov

and in offering coverages tailored to sovereign-interference risks.[75] DFC, as an agency of the U.S. government, and MIGA, as a member of the World Bank Group, have the advantages of providing a measure of deterrence against adverse government actions and allow them to influence the resolution of potential disputes. Investors should appreciate the limitations on coverage afforded by traditional political risk insurance, and the risks associated with the need to invoke formal dispute resolution or to satisfy procedural prerequisites to qualify for certain coverages.[76]

Political risk insurance for breach of contract can mitigate exposure, but it typically presupposes a workable dispute-resolution pathway. Policies often require the investor first to invoke the contract's agreed mechanism, frequently international arbitration, and then demonstrate either a denial of recourse or the host state's failure to honor a resulting award within prescribed waiting periods. Domestic-court intervention therefore remains a practical constraint on insurance claims, because injunctions, set-aside proceedings, or protracted enforcement challenges can materially affect both the timing and availability of coverage.[77]

[b] Investor and Project Criteria

To obtain political risk insurance, investors and their projects must meet criteria that vary from insurer to insurer. Development finance providers generally require a qualifying nexus to a member country (for example, U.S. sponsorship for DFC; membership requirements for MIGA) and a determination that the project advances development objectives.[78] Insurers routinely evaluate governance and compliance (anti-corruption, sanctions and export controls, anti-money laundering controls, and beneficial ownership standards), as well as project-level environmental, social, labor, and security dynamics that can drive instability or trigger home-country enforcement risk.[79]

In the current marketplace, underwriting and "eligibility" analysis has become less limited to country-risk scores and formal legal title, and more focused on operational continuity

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(OPIC Handbook). Private insurance coverage of political risks varies depending on the insurer but tends to be more expensive than the sponsored counterparts discussed in the text.

[75] *See generally* Ibrahim F. I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INV. L.J. 1 (1986) (and related discussion of MIGA coverage categories and rationale).

[76] Paola Morales Torrado, *Political Risk Insurance and Breach of Contract Coverage: How the Intervention of Domestic Courts May Prevent Investors from Claiming Insurance*, 17 PACE INT'L L. REV. 301 (2005) (explaining breach-of-contract coverages and how domestic-court intervention/exhaustion dynamics can affect the availability of insurance recovery).

[77] *Id*. (explaining how domestic-court involvement can delay or prevent satisfaction of policy conditions for breach-of-contract political risk coverage); *see also* Dev. Fin. Corp. (DFC), *Political Risk Insurance* https://www.dfc.gov/sites/default/files/public/2023-04/DFC-Political-Risk-Insurance.pdf (describing insurance categories and coverages that turn on defined dispute-resolution steps and specified triggers, including post-award non-payment concepts).

[78] BUILD Act: *Frequently Asked Questions About the New U.S. International Development Finance Corporation*, Cong. Rsch. Serv., R45461 (Jan. 15, 2019) (describing consolidation of OPIC into DFC); U.S. Int'l Dev. Fin. Corp. (DFC), Cong. Rsch. Serv., IF11436 (Feb. 20, 2020) (describing DFC political risk insurance and reinsurance authorities).

[79] *See supra* note 76.

drivers that are likely to trigger state action, social unrest, or home-state enforcement. As a result, political risk insurers increasingly evaluate a project's environmental and social footprint, stakeholder engagement and grievance mechanisms, labor and supply chain controls (including forced labor and trafficking risk), and private-security and community-conflict posture. These considerations often mirror the diligence frameworks used by international lenders (for example, the International Finance Corporation (IFC) Performance Standards and the Equator Principles) and reflect a broader trend in which financial institutions function as *de facto* transnational regulators of environmental, social, governance and human rights risk. In practice, these factors can affect not only price and availability, but also the ability to maintain coverage and satisfy conditions to a claim.[80]

[c] Scope of Insurance Coverage

As a general matter, political risk insurance does not cover many risks common to investments in developing countries, such as inflation, interest rates, commodity price changes, cost overruns, currency devaluation, or other negative business trends. In addition, it will not cover commercial risks deemed to be within the investor's control. Coverage and mitigation in this space are often approached as a menu: conversion or transfer authorizations, offshore cash-management structures, contractual setoffs, and financial hedges, alongside (or instead of) insurance, depending on the jurisdiction and the investment structure.[81] The management of political risks therefore needs to be integrated within the client's overall approach to investment risks and insurance portfolio.[82]

Political risk insurance generally protects against currency inconvertibility, expropriation, and political violence. It may also cover a government's breach of contract, including breach of a concession agreement, or non-honoring of a sovereign financial obligation. This coverage is typically conditioned on specific proof and timing requirements (including waiting periods), and commonly contains legality, sanctions, and compliance-related exclusions that can become decisive in periods of policy volatility.[83]

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[80] Jennifer Gordon, *The U.S. Forced Labor Import Ban: A Tool for Raising Labor Standards in Supply Chains?*, 76 U.C. L.J. 1025 (2025) (explaining how import bans can create top-down supply chain accountability pressure that directly affects financing and compliance risk); *see also* Kirsten Mikadze, *Public Participation in Global Environmental Governance and the Equator Principles: Potential and Pitfalls*, 13 GERMAN L.J. 1386, 1386–1411 (2012) (describing the Equator Principles as a private-governance regime in project finance and analyzing participation and legitimacy constraints).

[81] Morales Torrado, *supra* note 76 (explaining how dispute resolution sequencing and domestic court interventions can delay or defeat contract breach insurance recovery); Celine Tan, *Risky business: political risk insurance and the law and governance of natural resources*, 11 INT'L J.L. CONTEXT 174, 174–94 (2015) (describing PRI as part of a broader governance architecture around natural-resources investment, not merely loss compensation).

[82] Jean, et al., *supra* note 28.

[83] Özge Tosun, *The Law of Political Risk Insurance* (2025) (discussing exclusions and illegality/sanctions-related limitations in political risk insurance, and how they interact with claim triggers and subrogation); *see also* Morales Torrado, *supra* note 76 (illustrating how "breach of contract" products can hinge on adjudicatory milestones, and how judicial or arbitral pathways can affect insurance timing and availability); *see also* John S. Diaconis, *Political Risk Insurance: OPIC's Use of a "Fiduciary Agent" to Facilitate Resolution of Subrogation Claims*, 23 INT'L L. 271 (1989) (describing how public PRI products operationalize subrogation and recovery, and the practical frictions investors face in claim-related dispute resolution).

[7] International Lenders

Investors can evaluate the potential involvement of multilateral financing institutions such as the IFC a regional multinational group such as the Inter-American Development Bank, or an export credit agency such as Japan's J-EXIM. A host country may be less likely to nationalize or impair the economics of a project if a major institution has a stake. Working with financers from countries deemed more steadily friendly to the host country may also give the government pause before it interferes with a negotiated deal. Diversification can lead to more favorable financing options or reduce the amount of financial exposure.

On the other hand, incurring debt and diversifying investments more generally have the inherent effect of reducing an investor's control over its project, and make it difficult to take quick, concerted action. In the current landscape, financing and continued disbursement may be conditioned on sanctions and anti-money laundering compliance, anti-corruption controls, and environmental and social action plans. Increasingly, those conditions also extend to labor and human rights due diligence across the value chain (including forced labor and trafficking risk), community impacts and security arrangements, and the borrower's ability to demonstrate governance and monitoring over contractors and suppliers. Multilateral development bank safeguard regimes have also continued to diffuse outward as global "reference points" that influence private finance, and they can operate as both a risk screen and a tool for structuring engagement with local stakeholders.[84]

§ 1.05 Incentivizing Stakeholder Cooperation

[1] Dynamics of Host Government Contracting

Private parties accustomed to striking bargains in the shadow of a well-developed legal system must recalibrate their expectations when undertaking major investments with a foreign state or its instrumentalities. In a private commercial setting, an unfortunate bargain often must be chalked up to experience, with a party's need to preserve its reputation for future deals constraining it from sharp dealing. In the government setting, a bargain that turns into a bad bet for the sovereign can and will be "cured" by a wide variety of means, not all of which are capable of prevention by legal means.[85] A single major energy transaction may be the parties' only relationship, and future deals may be driven by demand from other parties with short memories—or with the conviction that, somehow, their experience will be different.

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[84] Philipp Dann & Michael Riegner, *The World Bank's Environmental and Social Safeguards and the evolution of global order,* 32 LEIDEN J. INT'L L. 537–59 (2019) (explaining the World Bank's safeguard evolution and describing how these safeguards diffused into other multilateral development banks and the private sector as global normative reference points).

[85] *See* Lorraine Eden, Stefanie Lenway & Douglas Schular, *From the Obsolescing Bargain to the Political Bargaining Model*, *in* INTERNATIONAL BUSINESS AND GOVERNMENT RELATIONS IN THE 21ST CENTURY 251, 252–55 (Robert Grosse ed., Cambridge Univ. Press 2005) (discussing how initial advantage of a multinational enterprise can erode over time as host country bargaining power increases).

[2] Sharing Upside and Downside Exposures

[a] Aligning Economics

The voice of long experience counsels that *if a deal appears too good to be true, it probably is*. The international energy company should consider aligning the economics so that at least some benefit is shared by the government—and some burden is shared by the investor—in circumstances beyond the government's control. Production sharing agreements, progressive royalty regimes, and price-linked fiscal mechanisms are increasingly used to address this concern.[86]

A topical example from the energy industry is the profit or production sharing agreement (PSA) whereby development costs are fully recovered by the operator before large distributions of additional sums are made to the government. Such a PSA, without sophisticated modifications, defers and even eliminates the government's share of the take in the event of cost overruns. This can be particularly sensitive if, as would be typical, the government believes those overruns were within the private operator's control. This dynamic appears to have been one factor prompting Guyana to revise the fiscal terms of new oil contracts, including by limiting reimbursement of development costs and thereby increasing the government's share of oil proceeds.[87]

[b] Sustained Benefits to Host Country

To maximize an agreement's durability, direct foreign investment should deliver tangible benefits to the host country, not just the investor—and not only far off in the future, but also in a broad variety of foreseeable nearer-term scenarios. Investment can bring a developing country needed infrastructure, new capital and industries, a diversified economy, job growth, and an influx of knowledge and technology. But the timing of these benefits to the host country may be considerably different from the timing of the corresponding benefits to the investor.[88] Companies are more likely to attract continued favorable treatment first by highlighting these benefits, and then by implementing agreements that distribute the benefits equitably under varying economic situations.

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[86] Eduardo G. Pereira et al., *Evolving Trends in Production Sharing Agreements & Cost Recovery Systems*, OIL AND GAS, NAT. RES., AND ENERGY J. 605, 605–12 (2022).

[87] Marianna Parraga and Sabrina Valle, *Guyana seeks higher royalties, revamped terms for new oil contracts*, REUTERS, Aug. 17, 2021; *see also Guyana: 2023 Article IV Consultation - Press Release; and Staff Report*, INT'L MONETARY FUND, 379 (2023), https://www.elibrary.imf.org/view/journals/002/2023/379/article-A001-en.xml.

[88] Yan A. Zhang, Yu Li & Haiyang Li, *FDI Spillovers Over Time in an Emerging Market: The Roles of Entry Tenure and Barriers to Imitation*, 57 ACAD. OF MGMT. J. 698, 698–700 (2014) (demonstrating that the benefits to a host country from foreign direct investment (FDI) measured through productivity and additional spillover benefits accumulate gradually over time rather than materializing contemporaneously with investor returns); Organisation for Economic Co-operation and Development (OECD), *Policy Framework for Investment* 10 (2006) ("The benefits of investment do not necessarily accrue automatically or evenly across countries, sectors and local communities."), https://one.oecd.org/document/C%282006%2968/en/pdf.

[c] Progressive Fiscal Terms

Progressive fiscal mechanisms provide one means of translating the objective of sharing costs and benefits into concrete economic terms. A progressive royalty rate, distribution system or tax regime can be used to calibrate government take to project performance and market prices.[89] The parties should establish a development budget and milestone timetable with contingencies and allowances for overruns in the private contractor's favor. After those contingencies and allowances are exhausted, the cost recovery from revenues can decrease or ultimately terminate, and the contractor can share the pain of lower returns while the public entity starts to see some distributions. Alternatively, the royalty rate can be tied to crude oil or natural gas market prices. When market prices are very low, so is the royalty rate; when prices rise, the percentage royalty rate increases. The cost element and the market price element can be combined in a measure of return on investment, which in turn can drive the royalty rate. Some variation on these themes is common in modern production sharing and entity joint venture production arrangements.[90]

[3] Fixing Total Government Take

Another common method of aligning the private interest with the interest of at least the executive branch of a government entity is to devise economic arrangements around the concept of *total government take.* This term is usually defined as the sum of (i) all taxes, duties, fees and other exactions at all government levels *plus* (ii) the royalty rate, profit and other commercial distributions that would be due to the government under the investment contracts.[91] It is commonly defined as a particular percentage of revenues received during a given time period.

Total government take can be used as the baseline for a self-enforcing equilibrium clause.[92] If legislation or regulation is enacted or applied in a manner that causes the total take to increase above an agreed baseline level, then the government's commercial distributions can be set off against those increases so that the take remains constant (or is not increased by more than a given amount or factor).[93]

[4] Conditions Precedent to Investor Obligations

Foreign investment is an arena in which it is often better to be a debtor than a creditor. Since it is very difficult for a foreign investor to sue after the government's non-performance, wherever practical it is advisable to structure commitments so that the government is to perform first as a condition precedent to the foreign investor's promised action.[94] Then, if that

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[89] Pereira et al., *supra* note 86 at 605–12.

[90] INT'L MONETARY FUND, *Fiscal Regimes for Extractive Industries: Design and Implementation*, 15–18 (2012), https://www.imf.org/external/np/pp/eng/2012/081512.pdf.

[91] *Government Take*, ENERGY GLOSSARY, SLB (2026), https://glossary.slb.com/Terms/g/government_take.aspx.

[92] *See* Robert A. James, *Self-Enforcing Equilibrium Clauses in International Investment* (program materials for Investment Protection course, UC Berkeley Law, 2008).

[93] An international survey of offset principles with particular focus on the rights of financial institutions is William Johnson & Thomas Weden, *Set-Off Law and Practice: An International Handbook* (3d ed. 2018).

[94] Spjut, *supra* note 2 at 307.

performance occurs, the foreign party is obliged to render its part of the bargain. Needless to say, the international energy company may be required to post considerable security to assure the government that the return performance will be made. And it is not easy to negotiate such an order of performance. Where it is possible, however, staying in arrears incentivizes the government to perform in accordance with the bargain—without the foreign party's needing to resort to, or even to threaten, formal dispute resolution proceedings.

[5] Satisfying Host Country Markets

The private investor can induce cooperation by agreeing to make energy products available to the home market. Such supply may take place at prices below the world market. Alternatively, a host government could take its royalty "in-kind." Structured correctly, this can meet the host country's energy needs while still ensuring a profit. More importantly, it may lower the likelihood of government intervention as the host country directly derives significant benefits from the project. The investor may want to include protections such as maximum volumes, cash payment terms or their equivalent, and minimization of excise or other taxes or exactions applicable to these preferential sales.

[6] Furnishing Technology and Training

Host countries are often interested in obtaining technology and training. This is especially true in developing countries that have a large technology deficit. Companies that offer training to local workers in high-skill positions benefit the host country and encourage a stable investment. Appropriate secondments of home country personnel into the project entity or the investor's corporate group can facilitate relations down the road.

[7] Utilizing Host Country Labor, Contractors and Services

Companies can offer (or be required) to bring domestic interests and resources into a project as a means of enhancing the agreement's stability. By committing to domestic inputs such as local employment, contractors, insurance and other services, a client can give a stake in the project to individuals and organizations who can influence opinion in the home country. Again, those benefits can be conditioned on the governments and the local parties' continuing to observe contract provisions. A successful example of this can be seen in the Tengizchevroil project in Kazakhstan, which has a significant local content procurement commitment.[95]

[8] Investing in Local Communities

Energy investors can enlist further support by identifying and addressing local interests. Prudent grants or loans to local governments or to nongovernmental organizations are not only an investment in the community, but also an investment in the long-term stability of a project itself.

Increasingly, the durability of an investment depends not only on formal government support, but also on the project's perceived legitimacy among affected communities and other

[95] *See Kazakhstani Content*, TENGIZCHEVROIL LLP, https://tengizchevroil.com/kazakhstani-content (last visited Feb. 9, 2026).

stakeholders.[96] Investors should consider integrating environmental, social and governance principles into community investment strategies, including transparent engagement with local populations, mitigation of adverse environmental impacts, and the promotion of sustainable economic development. Meaningful consultation, grievance mechanisms, and monitoring processes can reduce the risk of community opposition and project disruption. When structured appropriately, local community investment can reinforce community support for the project while preserving the investor's flexibility to adapt to evolving circumstances and applicable standards.

§ 1.06. Obligations Mandating Investment Support

[1] Establishing Specific Obligations

Incentives for voluntary cooperation are important, but they can only go so far to protect an investment. In practice, the relationship between private and public parties is administered in the shadow of the investment contracts that impose specific obligations on them. While not always practical to enforce such obligations legally against foreign public entities, at a minimum their presence provides political cover for governments to justify acting consistently with those terms. We stress that not all host government agreements can and should contain any particular obligations. In addition, frequently the investment agreement contains guiding principles, the detailed implementation of which are spread across a series of regulations, permits and commercial contracts involving additional governmental stakeholders and other project participants. The following roster of potential protections may be useful to consider in structuring a transaction in a manner that supports stability and long-term cooperation.

[2] Investment Agreement Structure

The form and structure of investment agreements vary greatly from industry to industry and country to country. Oil and gas investment agreements can include production sharing, royalty, and other concession documents executed by the host government or its agencies. Power project investment agreements can include implementation agreements, offtake agreements, guaranties, and indemnities. Regardless of the industry, investment agreements range from brief grants of specific rights to comprehensive documents addressing such matters as local permits, change in law, currency conversion and transfer, use of infrastructure, security, tax treatment, immigration, offshore bank accounts, and put options in the event of extended political force majeure. A properly structured investment agreement can provide not only a degree of contractual recourse against a host government in the event of breach, but also an underpinning for certain types of political risk insurance that require a host government contractual obligation.

[a] Parties and Legal Form

The investor must ascertain whether the party will be the state itself or an agency or state-owned company. Even if a contract contains clauses that suggest a government is responsible, courts may find that a signatory agency is acting independent of the state and therefore has not

[96] Chukwuemeka Obed Ebeh et al., *Community Engagement Strategies for Sustainable Construction Projects*, 20 INT'L J. OF ENG'G RSCH. AND DEV. 367 (2024).

bound the state or successor government, or subjected it to international arbitration.[97] Requiring the state, through an appropriate representative, to sign an agreement will clarify whether a state should answer for the conduct of an independent state agency.

On the investor side, parent entities or affiliates of project companies should be beneficiaries of appropriate protections under the investment agreement. In this manner, parties outside of the host country's jurisdiction will have greater powers to enforce the bargain.

Because of the tax, host country law, liability and financing issues involved, the type of entity to act as the project company is typically determined before execution of the investment agreement. It is generally advisable that the project company be the party to the investment agreement from the outset. In many states, especially developing countries, the legal framework for foreign investment is codified in investment, corporate or industry sector laws requiring that the project company be a specific type of entity and that the shareholders of the project company include local participants. As a result, investment agreements sometimes provide assurances by the host government that the project company has been duly organized, the necessary government approvals for the project company will be obtainable, and the host country limited liability and tax treatment characteristics of the project company will be maintained.

The experience of investors in joint ventures with states highlights the importance of precise party designation and entity structuring in state-related investments.[98] As noted above, in Venezuela foreign participation historically proceeded through PDVSA-related contractual structures and later, PDVSA-majority owned mixed companies, with the mid-2000s nationalizations forming the backdrop to multiple investor-state disputes.[99] It also required that PDVSA conduct all operations and all production be sold by the mixed companies to a PDVSA subsidiary, who in turn was the sole entity authorized to conduct export sales. PDVSA and its subsidiaries provided services and supplies, such as diluent, to the mixed companies. As a result, debts owing among PDVSA, its affiliates and the mixed companies often obscured or redirected cash flows and liabilities that could only be corrected via complex net debt settlement mechanisms. In that setting, careful drafting of sovereign involvement becomes central to enforceability and risk allocation.

[b] Right to Pursue Project

Unless domestic statutes are clear, the host government agreement can confer an express right on the investor to pursue the project. That right may be exclusive, subject to becoming non-exclusive or being terminated if certain milestones are not timely achieved.

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[97] Bridas S.A.P.I.C. v. Gov't of Turkm. (Bridas I), 345 F.3d 347 (5th Cir. 2003); *see also* Bridas S.A.P.I.C. v. Gov't of Turkm. (Bridas II), 447 F.3d 411 (5th Cir. 2006); Republic of Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452 (S.D.N.Y. 2007).

[98] Robert A. James, *Strategic Alliances Between National and International Oil Companies*, Working Paper No. 104, Program on Energy & Sustainable Dev., Stanford Univ. (2011).

[99] *2007 Investment Climate Statement – Venezuela*, U.S. DEP'T OF STATE (2007), https://2001-2009.state.gov/e/eeb/ifd/2007/80762.htm; *see also* B. Seth McNew, *"Full Sovereignty Over Oil": A Discussion of Venezuelan Oil Policy and Possible Consequences of Recent Changes*, 14 LAW & BUS. REV. AM. 149 (2008).

[c] Technical Standards

The host government agreement can also expressly state the standards to which the project will be developed and operated. Such standards may include design, capacity, throughput and similar technical characteristics, as well as environmental, health and safety standards. In particular, defining the scope of abandonment and reclamation obligations at the end of a natural resource extraction project can be important. Where a state or state-owned oil company has owned and operated an asset and an investor is looking to invest in that asset or to develop new or adjacent assets, right fencing of existing liabilities and establishing clear standards for end-of-life asset decommissioning takes on paramount importance. These standards may be those of the host country or, more commonly in the energy industry, may codify current and anticipated worldwide practices.

[d] Duration of Project and Protections

The agreement may specify the term of the project or the duration of investment protections, or it may remain silent, in which case the term is often presumed to align with the project's economic life. The investor may seek rights of termination in the event of failure of cooperation covenants or force majeure events, if practical. If a definite term is set for the duration of either the project or the protections, then renewal terms at the option of the investor are typically desirable.

[e] Suspension Rights

Carefully crafted force majeure, impracticability, frustration and similar suspension clauses can delineate each party's responsibilities under a variety of extreme circumstances threatening the integrity of the project's economics. These clauses are a type of condition subsequent and can enable the affected party to suspend or be excused from its obligations when events outside its control make performance impracticable or frustrate the economic value of the project. Traditional force majeure clauses contemplate natural disasters, but nothing prevents parties from considering economic and legal changes, or from creating suspension rights for foreseeable occurrences that might not qualify as force majeure under the applicable law. The decision of an investor's own home country to embargo a host nation, or sanction a country that manufactures a key component, can be just as debilitating as any physical cataclysm. For example, COVID-19, tariffs and disruptions in supply chains have made their way into force majeure clauses in recent years—as either express inclusions or express exclusions. However, these types of clauses typically do not apply to economic impacts, such as the impairment of benefits, the completion of tasks by one party for its own benefit or the increase in costs associated with those tasks.[100]

[100] Spjut, *supra* note 2 at 308–17.

[f] Location of Assets

Some authors suggest minimizing assets and activities under the host country's jurisdiction and control.[101] The less a host country has to gain from expropriation, the less likely it is to undertake such an act. An investor benefits because if expropriation does occur, fewer of its assets are at risk. This recommendation is not easily followed by investors in energy or infrastructure projects, which by their nature require substantial fixed assets and therefore a long-term physical presence within the host country. Practically speaking, cash is typically the principal asset of an energy project that can typically be "offshored," and consideration should be given to whether offshore trust or escrow accounts should be utilized to promote financial discipline and transparency and address currency risks.

[g] Assignability and Preemptive Rights

Investors will want to consider inserting a clause that gives them the right to transfer to another party, or a clause giving them a right to object to an assignment by another contract party (particularly if of a nationality with which a party cannot associate, due to U.S. or U.N. sanctions, for example). However, the government may insist on similar assignment and preemptive rights (such as rights of first refusal), and the risk of yielding such benefits to the government must be weighed against the private party's need for flexibility and liquidity.

[h] Project Sale and Purchase Options

Another alternative is a put option in the hands of the investor to sell its investment to the government at an agreed or formula price. Such options are difficult to negotiate and invite the corresponding request for a call option in the government's hands.

[3] Affirmative Cooperation Duties

One important subset of the clauses in any host government agreement consists of provisions obliging the government to take certain actions that are neither mandated nor prohibited by domestic legislation or by treaties. These are activities where the executive branch of government has the discretionary power to assist the project and the investor, though it may need to induce ministries, agencies, local governments or other independent state subjects formally to take the action in question.

[a] Cooperation on Permits

The host government agreement can require the cooperation of the national and local governments with respect to permits, franchises, licenses, and other governmental approvals. This cooperation is required not only on the issuance of permits, but also on their administration, renewal, and enforcement on a non-discriminatory basis. Ideally, permit fees and conditions should not be allowed to increase the overall government take.

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[101] Lukas Vanhonnaeker, *Promoting Successful and Sustainable Foreign Direct Investment through Political Risk Mitigation Strategies*, 1 CHINESE J. OF GLOB. GOVERNANCE 133, 148 (2015).

[b] Acquisition of Land Rights

The host government agreement should empower the investor company to acquire land and facilitate its acquisition activities. In some cases, eminent domain power can be held by the project company, or the government can agree to exercise that power in its own name for the project's benefit. In addition to rights of current surface users, such complexities as cultural resources, national parks and reserves, and even cross-border and boundary disputes may be involved.

[c] Use of Infrastructure

The host government agreement can confirm that the investor or the project company will have adequate access to transportation, utilities and other infrastructure. Such provisions might give the investor company shipment priority or guarantee non-discriminatory transportation tariffs for facilities controlled by independent agencies or public utilities.

[d] Facilitation of Project Finance

Investment agreements may also contain provisions to facilitate project finance. Lenders typically require that the lender have an opportunity to cure project company defaults. The investment agreement may therefore contain an express consent to assignment of the agreement and proceeds for security purposes, and a covenant on the part of the host government not to rescind or terminate the agreement without first giving project lenders notice and opportunity to cure. Alternatively, the agreement may require the host country to execute a separate consent and agreement reasonably requested by the project lenders. Investment agreements also frequently contain provisions that address certain governmental approvals relating to financing, such as central bank or exchange control approvals of loans, foreign currency accounts, and lender insurance. These provisions range from host government covenants of support to political force majeure protections, triggered in the event of failure to obtain or lapse of such required governmental approvals.

[e] Additional Investments

It may be in an international energy company's interest to include provisions allowing for additional, discretionary investments. Hardwiring an agreement with approvals for expansion, additional infrastructure, or increased transport capacity such as additional trains can increase an energy investment's continuing stability and give an investor the ability to adapt to changing conditions. Lawyers can help frame these provisions to highlight the benefits to the host country as well as to the investor. A cautionary note, however: a simple clause declaring that an expansion is pre-approved may not be self-executing, given the vast number of environmental permits, commercial approvals and other discretionary acts that may be required of government officials at all levels.

[4] Regulatory Standards or Exemptions

Another subset of host government agreement clauses consists of provisions that either exempt the project and its investors and stakeholders from existing regulations that are unfavorable or fix a standard by which ongoing regulations will apply to the investment.

[a] Legal Baselines

It is often useful for an investment agreement with a sovereign entity to recite the law that was applicable at the inception of the investment and that was contemplated in the bargain represented by the investment contract. The investor should endeavor to establish baselines—non-discriminatory levels of enforcement in that country, or the standards of an international organization. Those baselines should be capable of clear definition, both as of the investment date and at later dates.

[b] Tax Baselines

Similarly, the agreement should describe the applicable tax treatment or provide a hypothetical set of examples incorporated as exhibits. To the extent that a new tax regime, or exception from the existing tax regime, is a foundational baseline for the investment, that expectation should be documented. Such provisions can document the parties' intent on how such taxes are to affect the overall government take.

[c] Currency Conversion

The investment contract can include a currency conversion provision guaranteeing that funds received in local currency can be exchanged for another currency. Many nations already have laws that allow free conversion of currency, but international contracts regularly include such a provision. Such clauses can help protect against possible changes in the law and ensure that investors can meet their obligations to foreign lenders and stakeholders. As previously discussed, contemporary Venezuela illustrates the practical challenges of currency conversion and underscores the importance of robust currency-conversion mechanisms in foreign investment transactions.[102]

[d] Local Content and Technology Transfer

At a minimum, the investor should seek clarification on what local content and technology transfer is required for the project. Ideally, the investor should seek a commitment to use reasonable efforts to seek local resources (e.g., through advertising and bidding), but not to guarantee that local resources will always be hired or used.

[e] Immigration Rules

Complex energy projects often require foreign nationals to come to the host country, either for the construction and development phases or for a longer term to conduct operations. Ordinary worker visa requirements can delay or prevent the efficient flow of project services and transfers of technology. The host government agreement can require that these processes be streamlined.

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[102] *See supra* notes 20–21 and accompanying text.

[f] Profit Repatriation

If the host country has or is likely to impose restrictions on the repatriation of earnings and profits, it may be lawful for the host government agreement to exempt the project and the investor from those constraints. Often, it is the central bank or independent monetary authority that must provide the waiver, so the host government can be enlisted to use its influence to cause the exemption to be granted.

[g] Offshore Bank Accounts and Fund Transfers

Some host countries are associated with the risk of current or likely constraints on the opening of foreign bank accounts by a domestic party, or on the transmission of funds to such accounts. Those restrictions often can be lifted by action of the government or action of the central bank as prompted by the government, and the investment agreement can so provide.

[h] Technology Restrictions

Either the host government or the investor's home country may prohibit or impose conditions on transfer of technology required for the energy project. Such a transfer of technology can even be deemed to occur when a home country national possessed of certain know-how simply enters the foreign country. Clearances may need to be sought from either or both countries to assure that technology necessary for the energy project is properly utilized, while safeguarding both countries against any unauthorized use of the technology (e.g., for military purposes).

[i] Customs Duties and Processes

Energy projects typically require massive imports of equipment, both to be incorporated or consumed in the facilities themselves (e.g., plate and rolled steel, pressure vessels) and to be used and then re-exported in the construction and operational process (e.g., cranes, rigs). It is essential that the process of importing and re-exporting such equipment be streamlined to the fullest extent permitted by law, both in the host country and in any countries of origin. Any customs duties or fees associated with these movements should not have the effect of increasing the government's overall take. These assurances are often found in the host government agreement.

[j] Excise or VAT Taxes

The acquisition of equipment and raw materials can trigger large obligations under value-added tax (VAT) regimes or sales, use or similar excise taxes. In some cases, the host government agreement can exempt the energy project from such impositions; in many others, the agreement can clarify that such taxes are in fact payable, but are then creditable against other obligations such as income tax, royalty obligations or other distributions from the project company.

[k] Income Taxes

The host government agreement can confirm the applicability of bilateral tax treaties, tax holidays, rules on amortization and depreciation, and rules on deductions, credits and other income or profits tax attributes. Some of these confirmations may require further acts by other jurisdictions, agencies, or branches of government. Again, the agreement can at a minimum confirm the executive branch's obligation to seek such assurances from those entities.

[l] Other Regulations

The host government agreement can address a wide variety of other regulations, either by confirming that they do not apply at all to the energy project or by clarifying how the applicable ones will be implemented. Thus, the government might confirm that a pipeline project is not to be considered a common carrier or otherwise subject to regulation by a public utilities or monopolies commission. The agreement might prohibit local authorities from issuing, interpreting or enforcing regulations that are at variance with the benefits confirmed at the national level or that have the effect of increasing the government's overall take. The agreement might further confirm that all personnel, at all government levels and agencies, are prohibited from seeking or exacting any unauthorized payments (as defined in local law, the FCPA, or the OECD Anti-Bribery Convention).

§ 1.07. Remedies For Deprivation of Investment

[1] Negotiation

Before addressing legal remedies, we again emphasize the benefit of planning for negotiations in response to a potential dispute. Negotiation is typically the first method of dispute resolution, aimed either at creating a new relationship, or at achieving an efficient resolution after disagreements arise to maintain a continuing relationship.[103] Where good-faith dialogue remains feasible, negotiated settlements enable the parties to limit further economic losses, avoid reputational harm, and reduce the costs, delays, and uncertainties inherent in formal proceedings.

Negotiation will happen, so it pays to plan for those conversations ahead of time. The agreements can specify procedures for escalation to senior executives or the optional or mandatory participation of a mediator, with crisply defined time periods ensuring that the discussions do not produce an indefinite or infinite "do loop" that inhibits the eventual initiation of formal dispute resolution processes.

The sustained volume of investment disputes and arbitrations demonstrates that good-faith negotiations are not always possible. Since negotiations may fail, the investor must assess the availability of formal legal remedies, whether under domestic investment laws, contractual dispute-resolution clauses, or applicable bilateral or multilateral treaties and conventions.

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[103] Mustafa Oğuz Tuna, *Alternative Dispute Resolution in Energy Industries* 48 (2022) (ebook via ProQuest Ebook Central), https://ebookcentral-proquest-com.nyli.idm.oclc.org/lib/nyli/detail.action?docID=6886851.

[2] Legal Remedies

Legal remedies are necessarily reactive and arise only after substantive issues have materialized and negotiated outcomes have not succeeded. Although the invocation of remedies typically indicates that the core objectives of a project have already failed, securing a final decision and then enforcing a judgment or arbitration award may require several years, particularly in complex cross-border disputes.[104]

2025 caseload statistics show a "record level" of investor-state arbitration proceedings before the International Centre for Settlement of Investment Disputes (ICSID), with 347 cases administered, the highest in its history.[105] Central America and the Caribbean accounted for 19% of the new cases, while South America accounted for 18%.[106] Moreover, the electricity sector and the oil, gas, and mining sector continue to account for a significant share of disputes, representing approximately 12% and 43% of cases, respectively.[107]

[3] National Status of Claimant

The international investment protection regime is premised on extending protections only to investors who are nationals of a contracting state other than the host state where the investment is made.[108] As most foreign direct investment is undertaken by corporations,[109] the question of which legal entity will serve as claimant—whether the project company, an affiliate, or another contract party—is critical in evaluating available remedies. The nationality of a corporate entity is typically assessed by reference to its place of incorporation, its place of effective management, or the nationality of those exercising control.[110]

A company's classification as domestic or foreign may affect its international legal remedies. For example, in *National Gas S.A.E. v. Egypt,* the claimant was incorporated in Egypt but argued ICSID jurisdiction on the basis that it was controlled by entities from the United Arab

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[104] For example, the average duration of ICSID proceedings from registration to the issuance of an award has been said to be 3.86 years. *See* Jeffery P. Commission & Rahim Moloo, *Procedural Issues in International Investment Arbitration* 194 (2018). *See also Víctor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2. (The tribunal issued the award on May 8, 2008, and the decision on the annulment application was issued on Jan. 8, 2020. Having been introduced on November 7, 1997, this case is known as the longest dispute in the history of ICSID.)

[105] ICSID Releases Caseload Statistics for the 2025 Fiscal Year, With Expanded Data Insights, ICSID (Aug. 25, 2025), https://icsid.worldbank.org/news-and-events/comunicados/icsid-releases-caseload-statistics-2025-fiscal-year-expanded-data.

[106] *Id.*

[107] ICSID, *The ICSID Caseload – Statistics* 12 (Issue No. 2025-2), (Aug. 27, 2025), https://icsid.worldbank.org/sites/default/files/publications/2025-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics.pdf.

[108] Campbell McLachlan, Laurence Shore, et al., *Nationality,* in *International Investment Arbitration: Substantive Principles,* 156, 189 ((2nd ed. 2017) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/KLI-KA-McLachlan-2020-Ch05.

[109] Simon Foote QC, *The Bona Fide Investor: Corporate Nationality and Treaty Shopping in Investment Treaty Law* 1-2 (Int'l Arb. Law Lib., vol. 63, 2021) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/KLI-KA-Foote-2021-Ch01.

[110] McLachlan, et al., *supra* note 108 at 157.

Emirates.[111] On examination, the United Arab Emirates parent companies were themselves ultimately controlled by an Egyptian national. The tribunal decided that the claimant was not under foreign control as required by the ICSID Convention; instead, it was effectively Egyptian-controlled. Thus, it held that ICSID's nationality test was not satisfied and thus no jurisdiction existed over the claim.[112]

While it may be strategically useful to include an offshore parent as a party to—or third-party beneficiary of—investment agreements, investors must be careful to avoid treaty shopping through artificial or *post hoc* manipulation of corporate nationality.[113] Arbitral tribunals may characterize such conduct as an abuse of process and decline jurisdiction or admissibility, meaning that restructurings undertaken principally to secure treaty protection—especially once a dispute has arisen or become foreseeable—may ultimately undermine, rather than strengthen, an investor's prospects for substantive protection and effective dispute resolution.[114]

[4] Host State Legal Protections

A host state may present foreign investment protections that appear attractive on their face. However, subsequent legal or political developments may alter the effectiveness or enforceability of those protections. For example, in 2025 Kyrgyzstan enacted a new investment law that introduced a multi-tiered dispute resolution process requiring existing foreign investors to exhaust negotiation, mediation, and local litigation before accessing international arbitration.[115] This is notable, as the earlier law let investors go straight to arbitration.[116] This demonstrates that statutory guarantees may later be modified, limiting investor remedies. Thus, no matter how certain local legislation may appear, changes to those laws or the interpretation thereof may later impair or increase an investor's expectations and protections.

[5] Investment Contract Remedial Clauses

[a] Stabilization

Stabilization clauses typically provide that the contractual relationship between a host state and a project company or foreign investor will be governed, for the duration of the

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[111] *National Gas S.A.E. v. Arab Republic of Egypt,* ICSID Case No. ARB/11/7, Award, ¶¶ 3–7, 99–114 (Apr. 3, 2014).

[112] *Id.* at ¶¶ 144–149.

[113] "Treaty 'shopping' is the process by which investors seek to procure coverage of an investment treaty by attainment of a requisite nationality." Foote, *supra* note 109 at 1.

[114] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 96–98, 555–569, 584–588 (Dec. 17, 2015). In this case the tribunal had to decide whether a 2011 restructuring making claimant a Hong Kong investor could validly create treaty protection under the Hong Kong–Australia BIT when Australia's allegedly violative measures, announced in 2010, were foreseeable and the investment was then owned by a Swiss parent. The arbitral tribunal found that the restructuring's "main and determinative, if not sole, reason" was to secure treaty protection and held that the initiation of arbitration in those circumstances constituted an abuse of rights, rendering the claims inadmissible.

[115] Law on Investment, Law No. 198, art. 23 (Kyrg.) (Aug. 12, 2025).

[116] Law on Investment, Law No. 66, art. 18 (Kyrg.) (Mar. 2003).

investment, by the legal framework in force at the time the contract is concluded.[117] Such commitments may extend to fiscal, tax, commercial, environmental, and financial regulation; and have long been common features of large-scale energy investment agreements.[118] These clauses are intended by the investor to furnish "a form of guarantee against the political risks connected to investing in host States rich in natural resources."[119] While these clauses do not restrict a state's sovereign power to legislate, they expressly limit the application of subsequent legal changes to the specific investment.[120] Though countries often assert that these clauses infringe on national sovereignty, courts and arbitrators have strongly rejected that argument.[121] As one tribunal forcefully put the point, in entering into a concession contract with a foreign investor containing a reference of disputes to arbitration, the state "did not *alienate* but *exercised* its sovereignty."[122]

Contemporary scholarship suggests that stabilization clauses are unlikely to disappear, but rather will evolve from rigid models toward more flexible mechanisms.[123] It is possible that an arbitrator will decline to order specific performance against a public entity, whether due to lack or authority, respect for sovereignty, or the realization that the state will not honor any such order. In those cases, the focus will be on the measure of damages. Damages for breach of a stabilization clause can either be lost profits plus unrecovered investment or be limited to the invested funds. Careful drafting of stabilization clauses can incorporate revision mechanisms and predefined damages calculations preserving the economic equilibrium of the contract over time. A breach of a stabilization clause constitutes a contractual violation giving rise to a claim seeking full reparation, including compensation for all losses suffered.[124]

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[117] Darya Shirokova, *Definition and Characteristics of State Contracts, in The Fiction of 'State Contract' in the Energy Industry: The Empirical Gap Between the Intentions of the Parties and the Interpretation of Contracts by Arbitral Tribunals* 71–72 (Int'l Arb. L. Libr., vol. 76, 2025) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/KLI-KA-Shirokova-2025-Ch03.

[118] Int'l Energy Charter, *Handbook on General Provisions Applicable to Investment Agreements in the Energy Sector* 33 (2017).

[119] Fabio Núñez del Prado, José Ignacio García Cueto & others, *Intimate Enemies: Are Stabilization Clauses and Human Rights Compatible under International Law?*, in Gloria M. Alvarez, Melanie Riofrio Piché & others (eds), *Int'l Arbitration in Latin America: Energy and Natural Resources Disputes* 353 (2021) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/kli-ka-alvarez-2021-ch15.

[120] "[W]hereas a State may modify its tax regime, it must honor stabilization clauses and the specific privileges that it grants to investors." *Oxus Gold plc v. Republic of Uzbekistan, State Comm. of Uzbek. for Geology & Mineral Res. & Navoi Mining & Metallurgical Kombinat,* Final Award, ¶ 824 (Dec. 17, 2015).

[121] *See, e.g.,* Revere Copper & Brass v. OPEC, 17 I.L.M. 1321, 1342 (1978); AGIP v. Popular Republic of Congo, 21 I.L.M. 726, 735 (1982); Kuwait v. Aminoil, 21 I.L.M. 976, 1021-22 (1982).

[122] *Texas Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v. The Government of the Libyan Arab Republic*, 53 I.L.R. 389, 482 (1979) (emphasis added).

[123] Peter D. Cameron, *Stabilization Clauses: Do They Have a Future?*, in Nassib G. Ziadé (ed), *BCDR Int'l Arb. Rev.*, vol. 7, no. 1, 130–31 (2020) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-biar-0701005.

[124] Irmgard Marboe, *Valuation Standards and Criteria*, in *Calculation of Compensation and Damages in International Investment Law* ¶ 3.80 (2d ed. 2017) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/KLI-KA-Marboe-2020-Ch03.

[b] Prohibition of Expropriation

Contracting around potential nationalization is inherently challenging, as customary international law recognizes the sovereign right of states to expropriate foreign-owned property, provided certain conditions are met: the measure must serve a public purpose, be non-discriminatory, observe due process, and be accompanied by prompt, adequate, and effective compensation.[125] Courts and arbitral tribunals are generally reluctant to condemn nationalizations where these criteria are respected.[126] Most international investment agreements protect against expropriations; however, it remains unsettled whether stabilization clauses in a contract can effectively bind a state to refrain from expropriation.[127]

Some drafters require an indemnity from the government, or from a separate agency or instrumentality than the entity entering into the investment contract, indemnifying the foreign investor against any loss or liability resulting from an expropriation or breach of the stabilization clause. Some companies and lawyers believe that such a commercial indemnity, often set forth in a separate document from the investment contract and potentially from a different contractual counterparty, provides independent protection in the event that the host government seeks to repudiate the stabilization clause itself. If the project company is organized under local law or has local co-owners, it may not enjoy the full benefit of international arbitration and conventions facilitating enforcement. Under those conditions a separate indemnification agreement in favor of a wholly foreign parent company may afford incremental protection.

We emphasize the importance of documenting the parties' expectations with considerable detail in the body of the initial investment contract. The details of the assumed protection should not be spelled out for the first time only in the briefs filed after a dispute has erupted. The more clearly a contract demonstrates the state's intent to enter into a binding commitment, particularly one that limits its sovereign powers, the more likely the investor is to recover for a violation.[128]

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[125] Johanne Cox, *The Concept of Expropriation in Investment Treaty Arbitration*, in *Expropriation in Investment Treaty Arbitration* 42, 58–87 (2019) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/kli-ka-cox-2019-ch04.

[126] *See, e.g., Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, ¶¶ 297–306 (Oct. 9, 2014). (The tribunal rejected the claimant's unlawful expropriation claim on the basis that the nationalization was carried out lawfully in accordance with the applicable treaty requirements. It found that the measures were adopted for a public purpose, followed due process through legislation and negotiations, and were not contrary to specific undertakings given to the claimant, and that the claimant had failed to prove that the compensation offers made by the State were inconsistent with the standard of just compensation.) *See also Id.* Annulment Decision, ¶ 196 (Mar. 9, 2017) (annulling award for the Cerro Negro Project). The reasoning of paragraphs 297–306 of the original award was not annulled or affected. *See also Id.* Decision on Resubmission of the Claim, ¶ 291 (July 10, 2023).

[127] Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment* 17 (Transnat'l Econ. Law Research Ctr., Mar. 2017), https://opendata.uni-halle.de/bitstream/1981185920/78725/1/BeitraegeTWR_143.pdf.

[128] *See, e.g., Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5,* Decision on Liability, ¶ 403 (Dec. 14, 2012) (The tribunal held that a tax imposed in violation of a tax stabilization or similar clause constituted a breach of contract; however, for such a measure to qualify as expropriation, the tribunal concluded that there must be a substantial deprivation of the investment as a whole.)

[c] Renegotiation

Renegotiation clauses endeavor to create the stabilization effect without restricting the state's legislative powers. These clauses typically require the parties to enter into negotiations, following a change in law, to restore the contract's original economic equilibrium.[129] They can be narrowly tailored to a specific identified change in law risk (e.g., change in tax law or royalty rate), or more broadly drafted to apply to any change in law that fundamentally alters the economics of the transaction.

The obligations arising under a renegotiation clause may be understood as imposing a duty on the parties to conduct negotiations in good faith. This duty includes adherence to the procedural framework established by the clause; respect for the remaining contractual provisions and prior contractual practice; a genuine and sustained effort to reach agreement, including consideration of the other party's interests; the timely exchange of relevant information; and the formulation of concrete, reasoned, and realistic proposals for contractual adjustment. It further requires flexibility in negotiations, recourse to expert advice where appropriate, prompt engagement with counterproposals, and the pursuit of solutions that preserve the contractual equilibrium without conferring an unfair advantage on either party.[130]

In light of a state's inherent right to regulate,[131] renegotiation clauses may offer a practical mechanism for addressing changes in the host state's laws. While an investor may seek to preserve contractual protections, in practice a host state can often compel renegotiation by leveraging its regulatory powers, including through the threat of expropriation, the withdrawal of necessary cooperation, the imposition of additional burdens, or other measures that undermine the recovery of sunk investments and anticipated returns. In addition, the renegotiation provision often goes both ways—opening up discussions if either the investor *or the state* has been adversely impacted by the triggering event. This bilateral approach can both facilitate negotiations as well as position the investor more favorably in the event those negotiations are ultimately not successful.

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[129] David R. Hesse, *Investment Contracts*, in *Bus. Guide to Trade & Inv.—Vol. 2: Int'l Inv.* 60 (Int'l Chamber of Com. 2018).

[130] Klaus Peter Berger, *The Dispute*, in *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* 52–53 (3d ed. 2015) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/KLI-KA-Berger-Vol2-SC002.

[131] Yulia Levashova, *International Investment Agreements and the Right to Regulate: An Introduction*, in *The Right of States to Regulate in Int'l Inv. L.: The Search for Balance Between Pub. Int. & Fair & Equitable Treatment* § 2.03 (Int'l Arb. L. Libr., vol. 50, 2019) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-levashova-2019-ch02; Divya Kesar, *In Pursuit of Sustainable Development: Safeguarding the Right to Regulate*, in Stavros Brekoulakis (ed), *Arbitration: Int'l J. Arb., Mediation & Disp. Mgmt.*, vol. 90, no. 3, § 2 (2024) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-amdm-900302.

[d] Governing Law

Absent binding provisions to the contrary, investment agreements between a foreign investor and a host state are generally governed by the national law of the host state.[132] However, other financing, construction, supply and offtake arrangements frequently are governed by laws other than that of the host state. Where the application of a law other than that of the host state is both feasible and desirable, the investor can seek to designate its home country's governing law. The U.S. recently effectively mandated this approach for U.S. investment when it issued General License No. 46A and 48, authorizing transactions involving the purchase of Venezuelan oil and gas production or the provision of services for the production of oil or gas in Venezuela on the express condition that such contract specify that the laws of the United States (or any jurisdiction within the United States) will govern the contract and that any dispute resolution will occur in the United States.[133] Alternatively, the parties could expressly select the law of a neutral third country to enhance legal certainty and perceived impartiality.[134]

[e] Sovereign Immunity Waiver

Sovereign immunity means neither a state nor its instrumentalities may be subjected to the jurisdiction of the courts or tribunals of another state without their express consent. This principle has been extended to prohibit the authorities of one state from taking measures of constraint against the property of another state to satisfy creditor claims arising from court judgments, arbitral awards, or similar instruments.[135]

Although certain decisions suggest that a state's consent to arbitration may imply a waiver of immunity from execution,[136] the prevailing view is that such immunity is not waived

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[132] Stephan W. Schill, Loretta Malintoppi & others, *ICSID Convention, Article 42 [Applicable Law]*, in *Schreuer's Commentary on the ICSID Convention* ¶ 35 (3d ed. 2022) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-schill-2022-art42.

[133] Venezuela Sanctions Regulations 31 C.F.R. part 591, General License No. 46A (Department of the Treasury, Office of Foreign Assets Control, February 10, 2026) (replacing prior General License No. 46 issued on January 29, 2026); Venezuela Sanctions Regulations 31 C.F.R. part 591, General License No. 48 (Department of the Treasury, Office of Foreign Assets Control, February 10, 2026).

[134] Stephan W. Schill, Loretta Malintoppi & others, *ICSID Convention, Article 42 [Applicable Law]*, in *Schreuer's Commentary on the ICSID Convention* ¶ 62, 75 (3d ed. 2022) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-schill-2022-art42.

[135] "The concept of state immunity (also known as sovereign immunity) is generally recognized in international law as well as in national laws. It takes account of the special role of the state by limiting the exercise of all sorts of sovereign power by a foreign state. In principle, no state should curtail the sovereignty of another state party by means of its courts or other state entities exercising sovereign power unless and to the extent that another state party has consented to it. Immunity exists for all types of adjudication as well as for all measures of execution on the property of a state party. Consequently, the courts of one state should neither exercise jurisdiction over another state (immunity from jurisdiction) nor execute against the property of another state (immunity from execution)." Stefan M. Kröll, *Enforcement Against States and State Entities*, in *Cambridge Compendium of Int'l Com. & Inv. Arb.* § 50.1 (Stefan M. Kröll, Andrea Kay Bjorklund et al. eds., 2023) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-kroll-2023-art50

[136] *See*, *e.g.*, CC/Devas (Mauritius) Ltd., Devas Emps. Mauritius Priv. Ltd. & Telcom Devas Mauritius Ltd. v. Republic of India, PCA Case No. 2013-09, Judgment, 2022 QCCS 4785, ¶¶ 170–175 (Que. Sup. Ct. Dec. 23, 2022).

absent clear and specific evidence of the state's intent.[137] Accordingly, dispute resolution provisions should include an explicit and comprehensive waiver of sovereign immunity, covering not only jurisdiction and arbitration proceedings but also the enforcement of any resulting judgments or arbitral awards. The absence of such express waivers may result in protracted enforcement litigation before domestic courts.[138] To mitigate these risks, any waiver should be clearly stated and should extend to all relevant state-owned or state-affiliated entities involved in the transaction.

[f] Arbitration

Protection clauses are of limited value if they are not capable of effective enforcement. The inclusion of arbitration clauses in contracts with states and state-owned entities is therefore largely motivated by the investor's need for a neutral dispute resolution forum and the facilitation of cross-border enforcement. Unlike judgments of domestic courts, arbitral awards benefit from the streamlined enforcement regime established by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 ("the New York Convention"). In this respect, an arbitration clause may be understood as a mechanism that separates the dispute arising from the contract from the domestic legal order of the contracting sovereign.[139]

Drafting an effective arbitration clause in international contracts is relevant to avoid jurisdictional disputes, delay and unenforceability. The principal elements that require deliberate consideration are the governing law, seat and language of arbitration, applicable rules, constitution of the tribunal, confidentiality, interim measures, and issues of state immunity. "Pathological" clauses should be avoided by avoiding ambiguity or over-engineering.[140] In transactions involving the investment agreement and series of implementing agreements, consideration should be given to including the same arbitration clause across the suite of agreements and expressly allowing for consolidation of proceedings in appropriate circumstances.

In practice, parties tend to favor institutional arbitration over *ad hoc* procedures, as institutional rules provide a comprehensive procedural framework and reduce the risk of drafting gaps that may complicate future disputes. Consequently, parties frequently incorporate by reference the rules of established arbitral institutions such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), or the Arbitration

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[137] W. Michael Reisman, James Crawford & others (eds.), *Investment Contracts and Key Clauses*, in *Foreign Investment Disputes: Cases, Materials and Commentary* 278 (2d ed. 2014) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-bishop-2014-ch03.

[138] *See, e.g.,* Toby Fisher, *Zimbabwe Mining Creditor Turns to US Supreme Court*, Global Arbitration Review (Dec. 18, 2025) https://globalarbitrationreview.com/article/zimbabwe-mining-creditor-turns-us-supreme-court.

[139] Shirokova, *supra* note 117 at 81.

[140] Jan Paulsson, Nigel Rawding & others (eds.), *Drafting the Arbitration Clause*, in *The Freshfields Guide to Arbitration Clauses in International Contracts* 121–130 (3d ed. 2010) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-kcc-1103313-n; *see also* Gary B. Born, *Drafting International Arbitration Agreements*, in *International Arbitration and Forum Selection Agreements, Drafting and Enforcing* § A (7th ed. 2025) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-born-2025-ch03.

Institute of the Stockholm Chamber of Commerce (SCC), or alternatively the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). These forms of arbitration are traditionally classified as commercial arbitration and are distinct from arbitration under the ICSID Convention, which is generally grounded in international treaty obligations.[141]

Scholars have drawn a distinction between commercial and investment arbitrations. While a commercial arbitration clause typically requires, in addition, a denationalized choice-of-law provision for a state contract to attain an internationalized character, the inclusion of an arbitration clause under the ICSID Convention is in itself sufficient to internationalize the contractual relationship.[142]

[g] Conduct of Arbitration and Enforcement of Awards

The conduct of investor–state arbitration is largely determined by the applicable procedural rules, which govern the composition and powers of the tribunal, the scope of evidence and document production, and case management and procedural timetable.[143] While tribunals ordinarily decide disputes in accordance with applicable law, some frameworks permit decisions *ex aequo et bono* where expressly authorized by the parties, reflecting the flexibility inherent in international investment arbitration.[144]

One-off enforcement of an arbitration award against a sovereign or public entity can be a formidable undertaking. The New York Convention has exceptions for public policy, and states regularly claim their conduct with respect to natural resources contracts implicates public policy principles.[145] In any event, courts everywhere may be reluctant to find or assert jurisdiction over

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[141] Shirokova, *supra* note 117 at 81–82.

[142] *Id*.

[143] *See e.g.,* ICSID, The 2022 Rules of Procedure for Arbitration Proceedings, available at https://jusmundi.com/en/document/rule/en-icsid-international-centre-for-settlement-of-investment-disputes-arbitration-rules-2022-icsid-arbitration-rules-2022-friday-1st-july-2022-4?su=%2Fen%2Fsearch%3Flang%3Den%26query%3DICSID%2BArbitration%2BRules&contents%5B0%5D=en; International Chamber of Commerce (ICC), 2021 Arbitration Rules, available at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-22; the London Court of International Arbitration (LCIA), 2020 Arbitration Rules, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx; the United Nations Commission On International Trade Law (UNCITRAL), Arbitration Rules, available at https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[144] *See, e.g.,* ICSID Convention, Article 42 (3).

[145] *See, e.g.*, *Red Eagle Exploration Limited v. Republic of Colombia,* ICSID Case No. ARB/18/12, Award, ¶¶ 63–65, 239–48, 316, 400–01, 404 (Feb. 28, 2024). Colombia argued that its denial of environmental licenses and regulatory measures affecting the gold mining project in the *páramo* ecosystem were legitimate exercises of its police powers to protect it. The tribunal accepted that Colombia's measures pursued a genuine public policy objective and held that, because the investor lacked vested rights to exploit the resource, there was no breach of the minimum standard of treatment or indirect expropriation.

national parties and assets absent clear waivers and procedures.[146] In some cases they may defer on grounds of customary international law to assist.[147]

Collective means of settling claims for expropriation and creeping nationalization may be established under the aegis of a home or host country or a multilateral convention or organization. Examples include the U.S. Foreign Claims Settlement Commission (FCSC) within the U.S. Department of Justice (Cuba, Vietnam, Eastern Europe), the United Nations Claims Commission (Iraq, Kuwait), and the *ad hoc* U.S.-Iranian Claims Tribunal (Iran).

Claims are not always resolved by attachment and execution of assets that have a cash value on judgment sale. Particularly in the collective settlement arena, a better value—or any value at all—may be realized through deferred cash, restitution of certain assets, and commercial sales or purchases of products, services or technology at prices that reflect some consideration to the claimant for its claim. Particularly intriguing are voucher programs, where the claim or some portion is credited against a commitment to expend new money in the jurisdiction (likely when it is under a new government or form of government). Such vouchers provide value to the claimant and afford the possibility of increased investment in a reformed political situation that leads to incremental infrastructure, production of wealth, transfer of technology, and local employment and contracting opportunities.

[h] Venezuela

Venezuela's evolving political and economic environment, combined with signals from the current U.S. and Venezuelan administrations favoring increased engagement, has revived the prospect of renewed foreign investment, particularly in the oil and gas sector.[148] Cautious foreign investor response to date has been measured, and contractual protection mechanisms are likely to have renewed significance. Stabilization clauses remain relevant but are unlikely to operate as rigid shields against regulatory change; instead, carefully drafted renegotiation clauses may offer

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[146] *See, e.g.*, *Amaplat Mauritius Ltd. v. Zimbabwe Mining Dev. Corp.,* 143 F.4th 496, 503–05 (D.C. Cir. 2025). The court held that Zimbabwe and the state-owned Zimbabwe Mining Development Corporation had not waived sovereign immunity by the country's signing of the New York Convention. For the court, even if signing the Convention indicated that a state wished to waive immunity from actions to enforce foreign awards, there was nothing to suggest that it would wish to waive immunity from actions to enforce foreign judgments. *See also* Fisher, *supra* note 139.

[147] *See, e.g.*, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* 99, ¶¶ 52–108. The Court held that Italy breached international law by allowing civil claims against Germany, stressing that the case concerned jurisdiction rather than the legality of Nazi-era atrocities. It explained that even serious violations of human rights or humanitarian law do not remove a state's immunity, as rules on immunity address whether courts may exercise jurisdiction, not whether the underlying conduct was lawful, and it rejected the argument that immunity depends on the availability of alternative remedies for victims.

[148] *Venezuela's Proposed Oil Reform to Give Autonomy to Companies to Operate, Cash Proceeds*, REUTERS (Jan. 22, 2026) https://www.msn.com/en-us/money/companies/venezuelas-proposed-oil-reform-to-give-autonomy-to-companies-to-operate-cash-proceeds/ar-AA1ULarL?ocid=BingNewsSerp; *see also* Josh Boak and Aamer Madhani, *Trump promises oil executives 'total safety' if they invest in Venezuela after Maduro ouster,* AP NEWS (Jan. 9, 2026) https://apnews.com/article/trump-venezuela-oil-chevron-exxonmobil-conocophillips-0e0619a991e92fd546504f1a613161e7.

a more realistic means of preserving contractual equilibrium in a legal system still characterized by volatility and reform-in-progress.

At the same time, Venezuela's past experience underscores the critical importance of neutral governing law provisions, explicit waivers of sovereign immunity, and robust arbitration clauses. In a context where the state seeks to attract foreign capital while retaining regulatory flexibility, the credibility of these contractual safeguards will be central to restoring investor confidence.

[6] Bilateral Investment Treaties

Bilateral investment treaties (BITs) are negotiated between two states to protect and promote investments by investors of one party in the territory of the other party.[149] Core protections found in BITs include provisions dealing with fair and equitable treatment, national treatment, most-favored-nation treatment, expropriation and compensation, transfers of payments, and dispute settlement, both between contracting parties and between a contracting party and an investor.[150]

For example, the 2012 U.S. Model BIT provides that fair and equitable treatment includes adherence to due process and the prohibition of denial of justice in civil, criminal, or administrative proceedings. It also requires each party to accord national treatment—i.e., treatment no less favorable than that given to its own investors—and most-favored-nation treatment, meaning treatment no less favorable than that accorded to investors from any third country, in like circumstances and across all phases of the investment, including establishment, operation, and disposition. It also ensures the free and timely transfer of all payments related to covered investments. Additionally, it prohibits expropriation or nationalization, whether direct or indirect, unless the measure is taken for a public purpose, in a non-discriminatory manner, in accordance with due process, and upon payment of prompt, adequate, and effective compensation.[151]

Currently, the U.S. has 39 BITs in force, while Venezuela has 25 in force.[152] BITs are often enforceable in a variety of forums, including the ICSID and arbitral systems to which the parties may have committed in the investment protection agreement.

[7] Multilateral Investment Treaties

Another source of foreign investor protection comes from multilateral investment treaties (MITs). While BITs are entered into by two states, MITs are entered into by three or more states.

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[149] Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Preferential Trade Agreements: Recent Developments in Investment Rule-Making*, in Katia Yannaca-Small (ed), *Arbitration Under Int'l Investment Agreements: A Guide to the Key Issues* 3 (2d ed. 2018) (ebook via Kluwer Arbitration), https://www.kluwerarbitration.com/document/kli-ka-yannaca-small-2018-ch01.

[150] *Id.* at 6.

[151] U.S. Model Bilateral Investment Treaty (2012) (UNCTAD Investment Policy Hub treaty file), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download.

[152] International Investment Agreements in Force by Economy, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited Jan. 28, 2026).

MITs can be regional such as the 2020 United-States-Mexico-Canada Agreement (USMCA) (which replaced the North American Free Trade Agreement (NAFTA)) or sectoral like the 1994 Energy Charter Treaty.[153]

Chapter 14 of the USMCA governs investment protection and claims, offering investors safeguards against national treatment denial, most-favored-nation treatment denial, unlawful expropriation, and violations of the minimum standard of treatment, though in a more limited form than under NAFTA. The agreement eliminates investor–state arbitration between Canada and the other parties and narrows access to such arbitration for U.S. and Mexican investors in Mexico and the U.S., respectively. Except for certain sectors like oil, gas, transportation, and telecommunications, investor claims are largely restricted to post-establishment discrimination and direct expropriation.[154]

For its part, the 1994 Energy Charter Treaty (ECT) provides substantive protections against expropriation, unfair and inequitable treatment and similar governmental conduct, as well as a choice of dispute resolution mechanisms; no additional, separate consent is required for investors to submit disputes to arbitration against a signatory state.[155] Most European states and a number of Central Asian states, as well as the European Union, ratified the ECT, but a number of states have subsequently withdrawn their accessions.[156] Other countries such as China, Saudi Arabia, and the United States are observers in the Energy Charter Conference established under the ECT. Several Latin American states, including Colombia, Chile, and Guatemala, also hold observer status by virtue of their signature of the related International Energy Charter of 2015.[157] There are other multilateral treaties that provide protections for certain covered investors.[158]

[8] Documenting Investment Undertakings

In any remedial setting, the court or arbitrator will examine the degree to which the sovereign has interfered with reasonable investment-backed expectations. An investor should be able to show that its investment was based on bargained-for assumptions that did not contemplate the new regulations. Evidence of the contents of the bargain allows courts and

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[153] Gary B. Born, *Investor-State and State-to-State Arbitration*, in *International Arbitration: Law and Practice* 524 (4th ed. 2025) (ebook via Kluwer Arbitration) https://www.kluwerarbitration.com/document/kli-ka-born-ia-2025-ch18.

[154] *Id.* at 526–27.

[155] *Id.* at 528.

[156] Italy, France, Germany, Poland, Luxembourg, Slovenia, Portugal, Spain, the United Kingdom, Netherlands, the EU and Euratom have officially withdrawn from the ECT, with Denmark to follow suit in September 2025. *See* Energy Charter Treaty (Dec. 17, 1994), UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5212/the-energy-charter-treaty-1994- (last visited Jan. 28, 2026).

[157] For a complete list of current member and observer states, visit https://www.energycharter.org/who-we-are/members-observers/.

[158] *See, e.g.*, ASEAN Comprehensive Investment Agreement (Feb. 26, 2009), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3273/asean-comprehensive-investment-agreement-2009- (last visited Jan. 28, 2026).

arbitrators to reconcile contract stability with sovereignty.[159] Expectations are more likely to be held to be reasonable when the government, through contracts, licenses, permits, or other permissions or laws, has expressly created or sanctioned them. Finding ways to make the agreements evidence this intent is part of the art of creating a durable contract.

The utility of spelling out the government undertakings and assurances cannot be overemphasized. The more explicit a state's commitment not to interfere with an investment, the more likely it is that subsequent adverse regulation will be characterized as an impermissible interference or, at a minimum, as a compensable indirect expropriation. As has been stated when analyzing a claim of expropriation:

> As a matter of principle, general regulations, even if having negative effect on an investor's property, are not to be considered as expropriatory… This general principle has, of course, exceptions and a general regulation can be expropriatory if it is unreasonable or if it violates specific commitments given by the State to the investor.[160]

§ 1.08. Conclusion

The discussion of memorializing the parties' bargain brings us full circle. In an integrated approach, the entirety of the project—from selection through structuring, drafting, negotiation and administration—considers, balances and evidences the commitments that the investor and host country are making and the benefits that the investor and the host country will derive from respecting the integrity of that bargain. The investment, financing and commercial agreements can not only supply legal remedies and other mandatory terms but also articulate the incentives for successful long-term cooperation. Allocating the risks and documenting the rewards of the bargain to both sides will enhance the value of the investment, and hence its stability for the host state, the investor, and other key stakeholders.

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[159] *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law* 20 ICSID REV. 1 (2005).

[160] *Oxus Gold plc,* at ¶¶ 741, 744; *see also Philip Morris Brand SARL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 298 (July 8, 2016).