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Protecting Investments through Project Agreements with Governments
The Key Contractual Provisions to Consider

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1 Introduction

Investors in developing countries are faced with political sovereign risks that can jeopardize the viability of their projects through policy changes, civil unrest, or asset expropriation. To mitigate these risks, investors negotiate project implementation agreements or equivalent with host states that include stabilisation clauses, providing guarantees and protections. Additionally, investors may invest from countries with Bilateral Investment Treaties (BITs) with the host state for further protection against expropriation, nationalisation, or discriminatory treatment.

However, the effectiveness of these measures depends on contextual factors such as the availability of an international arbitration mechanism. Without one, the investment protection measures considered may have limited benefits, and investors may have to rely on unpredictable domestic courts and legal systems. This article provides an overview of important considerations that investors should keep in mind when evaluating investment protection in project agreements with governments in *developing countries*.

2. Choice of Law and Forum

Clear identification of the governing law and appropriate dispute resolution forum is essential in project implementation agreements. Using the law of the host state as the governing law is common practice, but parties may choose otherwise to avoid conflict of law principles that vary from country to country when the agreement does specify the choice of law to use.

In the absence of a clearly identified dispute resolution forum, legal proceedings may be initiated in any jurisdiction with a link to the contract, making it important to specify the appropriate forum. International arbitration has become a popular alternative to domestic courts for resolving disputes arising from project agreements between governments and investors.

3. Sovereign Immunity

Sovereign immunity presents a notable concern when entering into a contract with a host country. It is a defence acknowledged by international law, custom, and local law, which may preclude any section or counterclaim against the state, regardless of whether the tribunal is a court or arbitral body, domestic or foreign, and regardless of whether the claim is in contract or tort. Unless a recognized exception applies, sovereign immunity is likely to bar any legal action or counterclaim, thereby exposing private parties to significant risks.

To address this risk, private parties must always assume that the host state enjoys sovereign immunity from suit and the execution of a judgment of it's assets. The host state should expressly waive its sovereign immunity to mitigate this issue. A clear and unequivocal express waiver of sovereign immunity must cover essential aspects, such as the process of service, pre-award interim relief, the jurisdiction of the chosen forum to hear the dispute, the jurisdiction of any court to enforce an award or judgment, and post-award execution or attachment of assets. This will provide private parties with a level of legal protection in case of a dispute with the host state.

It is important to note though that the state will also be on the look out to exclude some critical assets and infrastructure "protected assets" when negotiating the Sovereign immunity clause such as those of a defence and security character, those used in the provision of public health, a public utility or any social service and property that is of particular cultural or historical significance and any property that would be protected by the State Immunity Act 1978 of the United Kingdom or the Foreign Sovereign Immunities, 1976 Act of the United States of America.

4. Arbitration

Investment agreements nowadays commonly incorporate arbitration as the preferred method of dispute resolution between government and investors. To ensure that the arbitral tribunal has the necessary authority to resolve any and all disputes arising from or relating to their agreement, the parties must include an unequivocal agreement to arbitrate in writing, clearly outlining the scope of the arbitration and whether a particular part of the arising dispute must be heard by a court or an arbitral tribunal.

Parties to a dispute have the flexibility to choose between two types of arbitration: ad hoc and institutional. Ad hoc arbitrations are suitable for resolving simple and short-term conflicts that are not expected to escalate into serious disputes. In contrast, institutional arbitrations, which feature pre-established rules and procedures, are better suited

for addressing more complex disputes that require a higher level of structure and organization. Ultimately, the appropriate arbitration type will depend on the specific context of the dispute and the preferences of the parties involved.

Therefore, a precisely drafted agreement to arbitrate is essential to eliminate ambiguity and grant the arbitral tribunal the power to resolve all disputes arising from or relating to the parties' agreement. The parties should define an arbitral institution, determine the number and selection process of arbitrators, and designate the situs of arbitration, considering tax treatment and associated fees. The selection of the appropriate arbitrator and the manner of their appointment should be specified in the agreement, along with the language to be used in the proceedings and the manner in which any awards will be rendered and enforced. The parties should also address the procedural rules and governing law of the arbitration, and outline the rules for confidentiality and disclosure of information during the proceedings.

5. Other Dispute Resolution Mechanisms

Complex project agreements often contain alternative dispute resolution mechanisms in addition to arbitration, as adversarial proceedings can be time-consuming and potentially harmful to ongoing business relationships. These mechanisms may include conciliation, mediation, negotiation, and expert determination, among others.

Disputes relating to technical aspects of a contract, such as the need for a specific test or service, or whether the specifications of a product have been met, as well as financial disputes or operational costs, are well-suited to expert determination. Expert determinations are made by a neutral third party possessing the requisite technical, scientific, or appraisal expertise to objectively assess the dispute. This may be preferable to resolving the matter through arbitrators who lack such expertise. Moreover, expert determinations can be faster and less expensive than arbitration.

6. Conclusion

In conclusion, investors must ensure that their project agreements with governments include essential contractual provisions that effectively safeguard their investments. Notably, the incorporation of dispute resolution mechanisms such as arbitration, which provide a neutral and efficient forum for resolving any disputes that may arise, is especially critical. Through strategic negotiations resulting in favourable contractual terms and the inclusion of these critical provisions in project agreements with governments, investors can successfully mitigate investment risks and optimize their returns on investment.

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At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

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From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

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Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

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