Columbia Center on Sustainable Investment

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GLOSSARY

A

Alternative Investment Market (AIM)

The AIM is a sub-market of the London Stock Exchange, allowing smaller companies to float shares with a more flexible regulatory system than is applicable to the main market.

Source: AIM website

Arbitration

Arbitration is a private form of binding dispute resolution conducted before an independent tribunal. An arbitration hearing typically involves the use of an individual arbitrator or a panel of three arbitrators, referred to as a tribunal. The tribunal is the equivalent of a judge in a court hearing. However, the arbitrators are selected by the parties, either directly or through a third party or institution. The tribunal's powers and duties are fixed by the terms of the parties' agreement (including any arbitration rules which have been adopted) and the national laws which apply to some of the procedural aspects in each case.

Investment contracts often contain an arbitration clause for arbitration in a neutral location (forum) outside of the host country rather than dispute resolution by the local courts.

Source: Guide to International Arbitration

International arbitrations can be either ad hoc or institutional.

In ad hoc arbitrations the parties execute their own particular arrangement without reference to institutional rules to govern the arbitration. The most popular rules for ad hoc arbitrations are the ("UNCITRAL Rules"). UNCITRAL stands for the United Nations Commission on Trade Law. It should however be noted that it is possible to have an institutional arbitration center be the appointing institution when using any ad hoc arbitration rules such as the UNCITRAL Rules.

In institutional or administered arbitrations there is a supervising institution which exerts administrative control over the arbitral process in terms of procedure.
For a list of some of the major arbitration centers, see here.
For a comparative chart of some of the major arbitration rules, see here.
The decisions of an arbitrator or arbitral tribunal are recognized and enforceable in States that are signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Arbitration Convention).

Arms' Length Transaction

Where two parties enter into a transaction freely and independently of each other, without having some special relationship, such as being a relative, or part of the same corporate group.

It is important for a transaction to be at arms' length to show that the price, conditions and other requirements of the transaction are fair and representative of transactions of a similar type in the market.

Associated Gas
Refers to natural gas that is found with oil reserves.

Asymmetry of Information
In the context of the negotiation of large-scale investment projects, an asymmetry of information arises where the private investors are better informed on the technical and commercial aspects of the project than the host government, which places them in a better bargaining position.

B

Back-in-Right
"A feature of oil and gas contracts that allows a party, often a government [or NOC], to acquire an equity participation once the commercial discovery has been made without carrying the risk of exploration."

Source: Oil Contracts - How to Read and Understand Them

Beneficiation
The process by which ore is refined to a higher value product. This is done by separating the valuable material of an ore from the waste material by a range of techniques including crushing, grinding, magnetic separation, and flotation.

Benefit Sharing Agreement
See “Community Development Agreement”.

Bilateral Investment Treaties
A bilateral investment agreement (or BIT) is an International Investment Agreement between two states.

Brent Crude
“The leading global benchmark for Atlantic basin crudes, it is used to price two thirds of the world's internationally traded crude supply. Brent is a light, sweet crude produced in the North Sea, which usually trades within a few dollars of the West Texas Intermediate (WTI) benchmark.”

Source: Oil Contracts - How to Read Them and Understand Them

Build-Operate-Transfer Agreement
A Build-Operate-Transfer (BOT) Agreement is an agreement pursuant to which an investor agrees to construct, finance the construction of, and operate and maintain a particular infrastructure asset (e.g. an airport, port, power plant, water supply system etc.) for a

certain period of time before transferring the infrastructure asset to the government. The term of such an agreement is usually long enough for the investor to recoup the investment costs of constructing the infrastructure, by charging a tariff or user fee during the period it is operating the infrastructure.

Source: IIED Briefing 4: Investment Contracts (2007)

In addition to BOT projects, infrastructure projects are also carried out in a number of other structures and contractual arrangements. For more information on PPP arrangements, see the World Bank, PPIAF and IFC Infrastructure Resource Center on Laws, Contracts and Regulations.

C

Capital Expenditure

Capital expenditure or capex is the money invested by a company to buy or upgrade fixed assets such as buildings or equipment to create benefits that will extend beyond the tax year.

Also see: Operational Expenditure

Community Development Agreement

A Community Development Agreement or CDA is an agreement between an investor and a community that provides a mechanism through which the benefits of an investment project can be shared directly with local communities and other project-affected stakeholders. CDAs are also sometimes known as benefit sharing agreements.

Source: LSE Investment and Human Rights Project

For more resources on CDAs, see the Sustainable Development Strategies Group's CDA library.

Concession Agreement

An agreement made between a host government and an investor, usually through a locally-incorporated entity, which allows for the construction, development, and operation of a particular investment project.

D

Downstream

The oil and gas industry is divided broadly into upstream and downstream sectors. Downstream refers to the refining and sale of hydrocarbon products after the production phase, through to the point of sale. Participants in the downstream sector include refineries (to refine crude oil), petrochemical plants, retail outlets and gas distribution companies.

Also see: Upstream

E

Environmental Impact Assessment

An Environmental Impact Assessment (EIA) is an assessment and evaluation of the environmental impact of a proposed investment project.

An EIA "aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers."

Source: Convention on Biological Diversity: What is Impact Assessment

See the Environmental Impact Assessment Open Education Resource for more information on EIAs.

Also see the EIA Law Matrix which analyzes more than 50 aspects of EIA laws around the world.

EPC Contract

An engineering, procurement and construction (EPC) contract is the most common form of contract used to undertake construction works by the private sector on large-scale and complex infrastructure projects. Under an EPC Contract, a contractor is required to deliver a complete contract for a fixed price by a fixed date.
An EPC Contract is sometimes referred to as a "turnkey" construction contract because a contractor is required to deliver a complete facility so that the recipient only needs to turn a key to start operating the facility.

For more information on EPC Contracts, particularly in the power sector, see here.
For an explanation of the differences between EPC and EPCM Contracts, see here.

Exploration

An extractive industries term to describe the search to identify areas that may warrant examination for oil and gas or mineral discoveries, including geological, geophysical and topographical surveys and drilling exploratory or prospective wells. The aim of exploration is the discovery of commercial deposits.

Expropriation

The compulsory seizure of private property by, or compulsory surrender of private property to, a government authority, ostensibly for the public benefit.

Extractive Industries Transparency Initiative (EITI)

The EITI is a voluntary global standard to promote and support improved governance in resource-rich countries through the full publication and verification of payments by companies and revenues to governments from the oil, gas and mining sectors.

See: http://eiti.org/

F

Feasibility Study

The compulsory seizure of private property by, or compulsory surrender of private property to, a government authority, ostensibly for the public benefit.

First come, first served

A term used to refer to a rights application process where the first investor to apply for a license/permit to develop a particular asset/ petroleum bloc/ land tract and has also passed any requisite regulatory requirements, is awarded a contract.

Foreign Direct Investment

The direct investment by an individual, company, or entity of one country into a business, company, or entity in another country where the investor owns at least 10% of the voting power of the business, company, or entity and exercises a significant degree of influence over its management.

Foreign direct investments differ from indirect investments such as portfolio flows, where foreign entities invest in equities or shares listed on a country's stock exchange and exert no control over the management of that company.

Free, Prior and Informed Consent

The right of a group of people, usually an indigenous community, to be consulted with and to provide or withhold their consent, prior to the establishment of any project that stands to directly affect their access to lands, territories or resources that they have traditionally owned, occupied or used. Obtaining a community's FPIC involves governments or companies engaging with local communities to agree together on how, or whether, projects are implemented. It is also a crucial part of gaining a social license to operate.

A government must also obtain the FPIC of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.

Any consent obtained is to be 'free', occurring without coercion, intimidation or manipulation; it must be obtained sufficiently 'prior' to the commencement of the project or policy; and it should be given after the group is sufficiently 'informed' about all aspects of the project, including potentially adverse effects, through the provision of information in an accessible and culturally appropriate format.

Resources:

ICMM: Good Practice Guide: Indigenous Peoples and Mining

RSPO: Free, Prior and Informed Consent and Oil Palm Plantations: a guide for companies

Oxfam: FPIC Guide

UN-REDD: Guidelines on Free, Prior and Informed Consent

United Nations Declaration on the Rights of Indigenous Peoples

G

Grievance mechanism

A grievance mechanism is a routinized process through which an individual or group of people can bring complaints concerning any aspect of an investment and seek a remedy. Grievance mechanisms can be operated by the State, or by other entities, such as investor companies or financiers, and can be judicial or non-judicial in nature.

Source: UN guiding Principles on Human Rights

H

Host State

The state into which an investment is made.

Human Rights Impact Assessment

A human rights impact assessment (HRIA) is a "process to measure the gap between the human rights commitments of the state and the actual enjoyment of these rights by rights-holders. By calling on the participation of all stakeholders involved in the investment project, the [HRIA] seeks to identify the rights that are not respected, or indications that they might not be respected in the future, so that satisfactory solutions can be found."

Source: Rights & Democracy: Getting it Right: Human Rights Impact Assessment Guide.

HRIAs are increasingly used to measure the potential or actual impacts of business operations on the human rights of local communities and other stakeholders, though they are by no means common. Similar to environmental and social impact assessments, HRIAs are distinguished by their grounding in international human rights law, and thus their ability to measure a project's operations against universally recognized and legally codified standards. Ex ante HRIAs, undertaken before operations commence, are particularly useful in identifying potential human rights risks, thereby fulfilling the role of human rights due diligence promoted in the UN Guiding Principles on Business and Human Rights. Such assessments serve a preventative function, assisting companies or governments in detecting problematic aspects of a potential project that should be addressed before a deal is signed or implemented.

Hydraulic Fracturing

"Also known as fracking, it involves shooting water, sand and other compounds at rock structures at such high velocity that they produce small fractures through which crude oil and natural gas can then be extracted."
Fracking is a water-intensive process, the environmental impact of which is still being assessed.

I

International Investment Agreement

An International Investment Agreement (IIA) is a treaty concluded between states that requires the state parties to provide foreign investors and investments certain standards of treatment and protections. IIAs commonly also enable foreign investors to sue the state in which they are making the investment directly in international arbitration for breach of the treaty.

Source: CCSI: The Impact of Investment Treaties on Governance of Private Investment in Infrastructure (2014)

See UNCTAD's glossary for a list of key terms in IIAs.

International Oil Company (IOC)

A private sector oil company with operations in many countries.

Investment Contract

For the purposes of this website, foreign investment contracts are agreements between a foreign investor (or a local subsidiary of a foreign investor) and a state (or a state-owned entity). They set the terms and conditions for an investment project in the territory of that state. Foreign investment contracts include concession agreements, Mining Development Agreements and Production-Sharing Contracts.

Source: IIED Briefing 4: Foreign Investment Contracts (2007)

Investment Incentives

Non-market benefits used to influence the behavior of an economic actor. Investment incentives can range widely in form and may be, for example, a requirement on purchasers to buy goods or services at above-market prices; full or partial exemptions or deferrals of tax charges; and the freedom from having to comply with certain laws and regulations.

Source: CCSI Background Paper for the Eighth Columbia International Investment Conference on Investment Incentives (November 2013).

Investment Treaties

See International Investment Agreement

L

Local Content

Refers to measures that require foreign inventors to use a certain proportion of local resources when producing goods or providing services. It includes local ownership requirements, local employment, skills training requirements, local procurement requirements, and technology transfer requirements. Local content measures are a type of performance requirements.

For guidance on designing and implementing local content initiatives in the oil, gas and mining sectors to ensure economic sustainability within producing regions, see the Natural Resource Governance Institute's: Local Content Initiatives: Enhancing the Subnational Benefits of the Oil, Gas and Mining Sectors (2013).

London Metals Exchange

The "world center for industrial metals trading and price-risk management. More than 80% of global non-ferrous business is conducted here. Its prices are used as the global be nchmark."

Source: The London Metals Exchange website

M

Mining Development Agreement

A type of a concession agreement. A contract that governs the relationship between the government and a licence holder for the exploration of a certain area of land for minerals or for the mining of minerals in a certain area in exchange for royalties, taxes and other obligations.

See: Mining Contracts: How to read and understand them (2013)

Multi-Stakeholder Initiative

Multi-Stakeholder Initiatives (MSIs) can take many forms. In the context of investment, MSIs tend to host processes in which companies, civil society organizations and potentially other stakeholder groups, such as governments, universities or international organizations, interact to make business processes more socially and/or environmentally sustainable, and more compliant with human rights.

Source: SOMO: Multi-stakeholder initiatives: A strategic guide for civil society organizations

N

National Oil Company (NOC)

A state-owned oil exploration and production company.

Net Present Value

"A method used in evaluating investments, whereby the net present value of all cash outflows (such as the cost of the investment) and cash flows (returns) is calculated using a given a discount rate, usually the required rate of return. An investment is acceptable if the NPV is positive. In capital budgeting the discount rate used is called the hurdle rate and is usually equal to the incremental cost of capital."

The net present value of a project is essentially the value in today's terms of future incomes and expenditures.

Source: PPIAF cross-border infrastructure toolkit glossary

Non-associated Gas

Refers to gas reservoirs which only contain natural gas and no oil.

O

OPEC

The Organization of Petroleum Exporting Countries or OPEC is an intergovernmental organization comprising twelve oil-producing countries, predominantly from the Middle

East and South America, who currently control around 79 percent of global crude oil reserves. It aims to control the supply of oil in an effort to stabilize the price of oil on the world, giving regard to the interests of producing nations. It is considered a cartel that exercises considerable control over world oil production and prices. However, its ability to determine the price of oil has relatively diminished, due to discovery and development of large oil reserves in Alaska, the North Sea, Canada, the Gulf of Mexico and Russia.

See: OPEC website

Operational Expenditure

Operational expenditure of opex is the cost of operating a fixed asset. For example, the cost of running a mine or a power plant once it has been constructed.

Also see: Capital expenditure

P

Performance Requirements

"Performance requirements are measures in law, regulation, or contract that require investors to meet specified goals when entering, operating or expanding in, or leaving a host country."

Source: UNCTAD: Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries (2003).

Periodic Review clause

A term in an investment contract which provides the circumstances under which the parties to the contract can revisit the terms of the deal.

For sample periodic review clauses in a mining contract, see the MMDA's model periodic review clause.

Petroleum

A term generally used to refer to both oil and gas, as both are hydrocarbon compounds and both are often found in the same location.

Production

"The commercial exploitation of oil and gas found in an authorized contract area, specifically the operation that brings hydrocarbons to the surface and prepares them for processing, but more generally may be considered to include all incidental activities, including the design, construction, installation, operation and maintenance of any plant and infrastructure and the processing, stockpiling, transportation, export and sale of products. This phase may also be referred to as exploitation or development."
Source: A&O Guide to Extractive Industries Documents – Oil & Gas

Production-Sharing Agreement

Contracts commonly used in the petroleum sector between an investor and the host state or a national oil company, which entitle the host state to a share of the physical quantities of the petroleum produced. Such an agreement typically allocates the resources as reimbursements on production costs, then splits the control over the remaining "profit" oil or gas between the operating group of companies and the government/ NOC. The government/NOC either sells its portion on its own, or takes cash payment from the operating companies in lieu of physical delivery of the commodity.

Source: Natural Resource Governance Institute: Oil, gas & mining fiscal terms

For a walk through an oil contract see: Oil Contracts: How to read and understand them

Proven Reserve

In the oil & gas sector, a proven reserve is a reserve that "has a reasonable certainty (generally at least 90 percent certainty) of being recoverable under existing technical and economic conditions. Also known as '1p'".

Source: Oil Contracts - How to Read Them and Understand Them

Public-Private Partnership

A public-private partnership (PPP) is, broadly speaking, an arrangement between the public and private sectors, whereby some public sector services are provided by the private sector with clear agreement on the shared objectives for delivery of the public infrastructure or public services.

Such an arrangement usually requires the private sector party to design, finance, build or rehabilitate, operate, and maintain the infrastructure required to provide the public service.

Source: PPIAF: Overview of PPPs

Click here for a brief presentation on PPPs.

For more information on PPP arrangements, see the World Bank, PPIAF and IFC: Infrastructure Resource Center on Laws, Contracts and Regulations.

R

Ratification

Typically the approval from the legislative branch of a government for an agreement entered into by the government.

Rent

Rents in the context of the extractive industries is the difference between revenues and the cost of extraction. In the extractive industries the concept is particularly important given the sharply varying costs of production of a commodity that is sold at a set market price. Rents should be collected by government institutions and channeled through the budgetary process so that they can into productive public assets and contribute to sustainable development. However, this is often not the case in the extractive industries where there can be a large difference between rent and a normal rate of return on capital, or profit, which leads to rent-seeking behavior.

Source: World Bank: Rent to Riches: The Political Economy of Natural Resource-Led Development (2012).

Resource for Infrastructure Deals

"Resource for infrastructure" deals are a new source of financing infrastructure development in resource rich countries. The transaction involves a package where "(i) the government grants a resource development and production license to a private developer, and (ii) the government receives infrastructure pursuant to a financing mechanism linked to a resource activity."

Under a resource financed infrastructure arrangement a loan for to finance the infrastructure is secured against the net present value of a future revenue stream from oil or mineral extraction, adjusted for risk. Loan disbursements for the financing of the infrastructure construction usually start shortly after the investment contract for the resource for infrastructure deal is signed, and are paid directly to the construction company to cover construction costs. The revenues for paying down the loan, which are disbursed directly from the oil or mining company to the financier, often begin a decade or more later, after initial capital investments for the extractive projects have been recovered. The grace period for the infrastructure loan therefore depends on how long it takes to develop the mine or oil field, the size of the initial investment and on the rate of return.

Source: World Bank Guide on Resource Financed Infrastructure (2014)

Right-of-Way

A right-of-way or servitude is a type of interest in land required for the purpose of constructing, maintaining and operating a road, railway, or telecommunication (ICT), power, or water line, or an easement for similar transportation purposes.

Royalties

Payments made to the host government to compensate it for the right to extract (and purchase) a non-renewable natural resource. Most royalties are either ad valorem (based on a percentage of the value of output, e.g., 10% of the value of the minerals produced) or per unit (based on a fixed amount, e.g., $10 per ton).

Royalties should be assessed, not only on the basis of their percentage or per-unit value, but also on the basis of the market price and value of the resource.

Source: Natural Resource Governance Institute Oil, gas & mining fiscal terms

S

Social Impact Assessment

A Social Impact Assessment (SIA) "includes the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment."

Source: Social Impact Assessment International Principles

Sometimes, social impact assessments are carried out as part of an environmental impact assessment, which may then be called an environmental and social impact assessment (ESIA).

Sovereign Immunity

The legal doctrine that a state cannot be sued without its consent. The extent a state is immune within its own jurisdiction varies according to country, while principles of international law exempt states from legal proceedings in another country. However, if states are acting as contracting bodies, sovereign immunity may not be available in an international or foreign court. In addition, a state may elect to waive this immunity when negotiating a contract.

Stabilization Clause

A clause in a contract between an investor and a host state that addresses changes in law in the host state during the life of the project. There are three broad categories of stabilization clauses:

Freezing clauses — that specify that the law that is in effect on the day that a contract is signed will apply to the project for the life of the project notwithstanding any subsequent changes in law.

Economic equilibrium clauses that require an investor to comply with new laws, but to be compensated by the host state for doing so. Compensation can be in the form of rebates, adjusted tariffs, an extension of the term of the project, or tax reductions, for example.

Hybrid clauses which are a combination of freezing clauses and economic equilibrium clauses (IFC Study).

Stabilization clauses are widely used across industries and regions of the world.
The purpose of a stabilization clause is to offer investors – and their lenders – some assurance that the investment will not be subject to unpredictable and costly changes in law – for example, in relation to the level of taxation applicable to a project. However, they may also have negative impacts on the host country by, for example, reducing its ability to maintain flexibility to changing economic and political circumstances. Stabilization clauses should therefore be narrowly drafted and limited in scope and time, particularly in relation to major revenue streams such as royalties, taxes, duties, and major fees. Stabilization clauses should also not freeze environmental, labor or other similar rules.

For more information on Stabilization Clauses, see the Natural Resource Charter's level 3 explanation of its Precept 4: Fiscal Regulation and Contract terms under heading 6: "Stabilization, Renegotiation and Fiscal Modeling".

See also the IFC's study on Stabilization Clauses and Human Rights (2009).

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Sustainable Development

Refers to development that balances economic growth with social development and environmental protection.

Source: IIED: Foreign Investment, Law and Sustainable Development (2014)
For more resources on what sustainable development is about, see the Sustainable Development Strategies Group link here.

T

Transfer Pricing

Transfer pricing refers to the mechanism by which cross-border, intra-firm transactions are priced. It occurs, for example, where a locally-incorporated mining company operating in a host country procures goods or services from another company in the same multinational group.
Transfer pricing per say is not illegal. What is illegal, or abusive, is where the intra-company provision of goods or services is not conducted at a fair (or market price) value, and is thereby used as a means for a company to lower its tax burden in the host state.

For more information on transfer pricing see the Tax Justice Network on transfer pricing and the United Nations Practical Manual on Transfer Pricing.

U

Unsolicited Proposals

"Unsolicited proposals are not requested by a government and usually originate within the private sector. These proposals typically come from companies with ties to a particular industry—such as developers, suppliers, and financiers—that spend their own money to develop basic project specifications, then directly approach governments to get the required official approvals."

Source: PPIAF's working paper on Unsolicited Infrastructure Proposals

Upstream

The oil and gas industry is divided broadly into upstream and downstream sectors. Upstream refers to the exploration, recovery and production of hydrocarbon products in the oil and gas industry. It includes the search for potential reservoirs and drilling and operating exploratory wells as well as the extraction of oil and/or gas once the reserves for such a resource have been proven.

Also see: Downstream

W

Withholding Tax

Income tax deductions on dividends and salaries. Withholding taxes are collected at the point of income disbursement and are paid directly to the State by the collecting entity.