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The International Comparative Legal Guide to:
Oil & Gas Regulation 2014
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A practical cross-border insight into oil and gas regulation work

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Welcome to the ninth edition of The International Comparative Legal Guide to: Oil & Gas Regulation.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of the oil and gas sectors.

It is divided into two main sections:

Eight general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting oil and gas regulation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in oil and gas regulation in 36 jurisdictions.

All chapters are written by leading energy lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Geoffrey Picton-Turbervill, of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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Chapter 4

East Africa – Realising the Potential

Andrews Kurth

1.1 Introduction

Oil and gas in East Africa has long been overshadowed by the successes enjoyed by north and west African states. Anadarko’s gas discoveries of between 35 to 65 Tcf of recoverable gas in Mozambique and Tullow’s discovery of 1.7 billion barrels of recoverable oil in Lake Victoria, Uganda, however, have made East Africa one of the most exciting new provinces for oil and gas exploration and development. Those discoveries have attracted majors such as Exxon, Statoil and Total, large NOCs like CNOOC as well as catapulting some of the independent oil and gas players like Cove Energy and Ophir Energy into the major league.

The discovery of world class sized reserves in East Africa has resulted in increased deal activity. This is both as a result of new licensing rounds, such as the launch of the 4th licensing round in Tanzania in October 2013, and as a result of greater M&A activity as existing participants in East Africa look for new partners, such as Ophir Energy’s 2013 farm-down to Pavilion Energy in Tanzania, and independents like Cove Energy, which was acquired by PTTEP in 2012, become acquisition targets.

The oil and gas bonanza has also triggered a flurry of legislative changes in East African states. Outdated legislation and inadequate regulatory frameworks are rapidly being revised by governments anxious both to attract and to retain investment by international oil companies with the financial and technical capabilities to commercialise major discoveries.

New entrants to, and existing participants in, the rapidly evolving East African gas market will want to identify and mitigate the risks of doing transactions against this changing legal and political backdrop. The uncertainty caused by the upcoming Scottish referendum on independence highlights that many of the risks faced in East Africa are no different to those found in any oil and gas market. However the scale of change in East Africa does mean they may be more pronounced than elsewhere. This chapter seeks to examine some of those particular challenges and risks in the context of four East African countries: Kenya, Mozambique, Tanzania, and Uganda.

1.2 Political Risk Assessment

The Multilateral Investment Guarantee Agency (“MIGA”) of the World Bank defines political risk broadly as:

“the probability of disruption of the operations of companies by political forces and events, whether they occur in host countries or result from changes in the international environment”.

Political risk caused by the action or inaction of the government can take many different forms: war; terrorism; civil unrest; expropriation; breach of contract; transfer restrictions; currency inconvertibility; and non-honouring of sovereign financial obligations. The recent legislative uncertainty in Kenya is a case in point. In the summer of 2013, the Kenyan government announced its intention to overhaul its energy laws. In response to this there was a noticeable dampering of investor confidence in the country. Furthermore, the anticipated slow progress of the energy bill through parliament is now expected to delay the country’s ability to hold a licensing round until 2014 at the earliest.

For investors, many political risks can be mitigated through detailed risk analysis combined with a strategy of early engagement with key government stakeholders. However, political risks can change dramatically over a very short period and it may not be possible to anticipate them all. At the outset of the year there was widespread concern that the Kenyan national elections would result in civil unrest following the violent elections Kenya suffered in 2007. In fact, the March election passed with little incident and the perceived upswell of unrest had minimal impact on Kenya. Instead, it was the reputed Islamic terrorist attack on a shopping mall in Nairobi in September 2013 which garnered global headlines for Kenya and resulted in an increased political risk perception in the country.

Whether an entity is an existing participant in East Africa looking to exit the region or diversify its portfolio or a potential new entrant to the market, a prudent investor will look to inform itself of the unique country dynamics which, together, form the basis of any investment risk assessment.

1.3 Regulatory Risk

The rapid growth of the oil and gas industry in East African jurisdictions has been a game changer for many governments. The petroleum legislation in these jurisdictions, which historically had no, or very little, oil and gas industry, is understandably outdated and often inadequate to address the complexities of hydrocarbon production from such large discoveries.

A prime example of this is Mozambique. Although hydrocarbon exploration in Mozambique dates back to as early as 1904, it has been the 2012 offshore discoveries of Eni, Anadarko and their partners that has transformed Mozambique into a major new gas province. The authorities recognised that the 2001 Petroleum Law failed to regulate suitably this blossoming gas market and in 2012 issued a new draft petroleum law. This draft is anticipated to become law following parliamentary approval by the end of 2013. The revised legislation is expected to address a number of deficiencies in the existing law, in particular:

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creating a separate regime for LNG infrastructure;
- the creation of a more transparent system (importing a competitive tender process for the award of new blocks and tightening the consent process for transfers of concession interests); and
- increased investor obligations in respect of environmental protections and local content commitments.

Mozambique is by no means alone in this process. A number of other East African countries are also instigating a process of reviewing and supplementing their own regulatory frameworks for oil and gas.

For an investor this can be a double-edged sword. On the one hand, the revision and clarification of the regulatory environment is often welcomed for the certainty it brings to a project. Statoil, for example, first started operating in Tanzania in 2007 following the signature of the Block 2 production sharing agreement with the Tanzania Petroleum Development Corporation (“TPDC”). The inadequacies of the country’s wider regulatory framework however, have made it difficult for Statoil to monetise the discoveries it has made in Tanzania. The progression of its asset from the exploration phase to a proposed development phase proved the trigger for Statoil’s chief executive, Helge Lund, to call publicly for ‘stable framework conditions’ in Tanzania in order to enable Statoil to make a final investment decision on its proposed LNG project in Tanzania. The issues on which Statoil needs clarity are not insubstantial. They include such fundamental project issues as the pricing of domestic gas, TPDC’s participation rights and confirmation of the overall Tanzanian government take from the project.

On the other hand, the promulgation of new legislation and new model form concessions is often a vehicle for tightening the terms of those concessions. In November 2013, Tanzania launched the 4th Tanzanian offshore licensing round and issued the 2013 model production sharing agreement which saw a toughening of fiscal and other terms previously enjoyed by investors in the country:

- a new royalty structure which increases the deepwater royalty rate from 5 per cent. to 7.5 per cent. and provides for royalties to be extracted by the government before, rather than after, cost recovery;
- clarification that any transfer or assignment of an interest in a production sharing agreement will be subject to capital gains tax;
- introduction of a minimum signature bonus level of $2.5 million and a minimum production bonus level of $7.5 million; and
- new, more detailed, rules on local content requirements.

Whether an investor is looking to commercialise an existing discovery (such as Statoil’s Block 2 gas discoveries in Tanzania) or thinking of selling all or part of its interest, including, continuing and diversifying participants alike will wish to avoid any uncertainties that could have a material impact on project development. Clearly defined regulatory frameworks will play an important part in creating this assurance.

1.4 Compliance Risk

Investment in any jurisdiction will require an assessment of the potential corruption risks associated with that jurisdiction. Although Africa has seen significant improvements in recent years, bribery and corruption does remain a serious challenge for investors in the region. Compliance risks exist both at the top end, with interference from country elites, and at the lower end of the scale, with endemic corruption issues typically encountered by investors looking to secure permits or work with local suppliers and employees.

All four of the countries referred to in this chapter are ranked below 40 in Transparency International’s 2012 Corruption Perception Index (0 being a perception that the country is “highly corrupt” and 100 representing a “lack of corruption”). The Kenyan authorities’ recent revocation of all prospecting and mining licences granted by one of its ministries in the first five months of the year is a typical example. The announcement of the cancellation of the contracts came in response to the concerns raised by the International Monetary Fund (“IMF”) around the transparency of the contract awards process.

The intense level of scrutiny of authorities in many investors’ home states means that bribery and corruption assessments have assumed a much higher degree of importance in transaction analysis. This has been driven primarily by two pieces of legislation: the UK Bribery Act 2010; and the US Foreign Corrupt Practices Act 1977 and, in the latter case, the discernible increase in the scale of enforcement activity undertaken in recent years.

Corruption risk can be managed and reduced by investors in a number of different ways, these will include:

- **knowledge**: understanding the regulatory regimes that apply to a particular investor or investment, including regulations imposed not only by domestic and host states but also other states who exercise jurisdiction over an investor;
- **compliance programmes**: the development and maintenance of compliance programmes combined with ongoing monitoring, audit processes as well as continuous training of staff; and
- **due diligence**: extensive pre-deal and post-deal due diligence into individuals, contracts, and working practices associated with an investment.

Where an M&A transaction is involved, an incoming party may also seek to include contractual protections in the acquisition agreement, including warranty protection and, if necessary, specific indemnity rights.

1.5 Financing Risk

The scale of some of the development projects being considered in East Africa will require huge amounts of investment. Eni’s proposed LNG facility in Mozambique is estimated to cost up to $50 billion alone. Such long-term, large-scale investments will almost certainly require external financing either from public sector multilateral partners like the World Bank group or from private sector involvement, often using long-term debt through a project finance structure.

Where project finance or other sources of external financing are involved, the emphasis for any developer will be to ensure that the project has a ‘bankable’ structure i.e., a structure that carries an appropriate level of risk for those lending to that project. Project risks are manifold and include not only political or country risks (as outlined in this chapter) but also project-specific risks such as construction, operation, market and production risks. A major mitigant of some of these risks for lenders will be the security package they take over the project assets.

In East African jurisdictions, as in many other African countries, it may be difficult for lenders to take an effective security package. In Mozambique, for example, land is the property of the state and cannot be sold, transferred, mortgaged or charged; a foreign developer must apply to the state for a right to use the land. This prevents a project developer from granting a mortgage over the land on which project infrastructure is situated (although it may be...
possible for the developer to mortgage the immovable assets which it has constructed on the land). An appreciation of the local law restrictions and limitations in granting a comprehensive security package will therefore be required at an early stage of any project structuring process.

The involvement of multilateral agencies such as the World Bank or the African Development Bank may also be needed in a project structure. Multilaterals may be able to provide financing or credit support where it is not available from the private market but can also act as a powerful tool to reduce political risk. As many African countries rely heavily on development aid from such multilaterals there is a general perception that the governments of such countries will be reluctant to adversely interfere in a project in which a multilateral is involved in case this jeopardises existing or future aid from that agency.

1.6 Currency and Repatriation Risks

Investors will be concerned to fully understand any barriers or delays to repatriation of profits that exist under local law. Uganda is typical of many jurisdictions in imposing an additional tax (15 per cent. in Uganda’s case) on profits repatriated to head office. Repatriation issues will be of particular concern where exploration assets are moving into development and production phases and becoming revenue generators. Proper structuring at the outset of the transaction should be supplemented with detailed diligence into the applicable restrictions and procedures to be followed to enable the repatriation of profits. For example, in Mozambique, exchange controls apply and although transactions no longer require central bank approval, prior registration with the central bank is required. Where such exposures affect the economics of a development or are a pre-condition of financing, investors may need to look to the state to provide assurances and, if necessary, appropriate derogations from exchange control restrictions.

1.7 The Concession

The concession forms the basis on which the investor will derive its entitlement to explore for, develop and produce oil and gas from a region. Whether an investor acquires its interests at the outset of a concession – by acquiring the concession rights directly from the state (either through direct application or as part of a licensing round) – enters the concession part way through its lifecycle via a farm-in or corporate acquisition or is looking to dispose of all or a portion of its existing interest in a particular region, a detailed understanding of the rights and obligations created by the underlying concession will be a vital part of any such analysis.

(a) State participation

State participation in an asset can take various different forms. In East Africa, most of the countries have established a concession structure based on production sharing arrangements where the state’s entitlement consists of a cost oil/gas element, a profit oil/gas element plus taxation and royalties.

The involvement of the state in any asset will also likely include the participation of the state or a state-owned enterprise in the concession itself. Direct state participation not only allows the state to receive a greater proportion of revenues but also allows it to share in the ‘upside’ scenario if a project succeeds. It is also common for the participation rights of a state to be carried by investors, typically through the exploration phase but also, less commonly, through the development phase too. This is the case in Uganda where the state is entitled to take a carried share of up to 20 per cent. in a development. The investor is then able to recoup those carried costs through the cost recovery mechanism under the production sharing agreement.

The direct participation of a state or a state-owned enterprise may not be welcomed by an investor as it reduces the equity available to paying participants in the project. However, from a project risk perspective, the involvement and lobbying power of a state entity may be seen as a useful addition to the project. Furthermore, although the participation of a state-owned entity in a development may be financially burdensome, the initial certainty gained from enshrining the obligation to carry state party through development in the concession agreement itself allows an investor to make an early decision on the economic viability of a project – where development costs are high or a project is marginal, the carried participation rights through development could also make the difference between an economic and an uneconomic project for an investor. A defined carry also brings with it greater comfort that a financially stretched government entity will not hinder the investor’s development plans by failing to deliver its share of development costs once the project is underway and may reduce the likelihood of subsequent expropriation by the state.

(b) Local content

An emerging theme in the legislative changes in East Africa is the growing level of local content obligations that are being imposed on investors. The aim of local content obligations is to build a skilled local in-country workforce and create a competitive local supplier base. Local content obligations typically require an investor to develop local skills and increase technology transfer often by spending an agreed amount on training or investment in the sector as well as to use local manpower and local manufacturing in petroleum operations.

In East Africa, Uganda is leading the way in calling for the high-level commitments in its production sharing agreements, which require investors to ‘give preference to’ Ugandan goods and services to be supplemented with bespoke legislation similar to that contemplated in Ghana. Ghana’s Local Content Policy has not yet been enacted in law but could require up to 90 per cent. of particular aspects of petroleum operations to be provided by local companies and for a specified percentage of management positions and employees to be filled by Ghanaians. Tanzania’s Natural Gas Policy, published in November 2013, makes similar statements around Tanzania’s commitment to develop its local workforce and supply base.

While the oil and gas industry will provide a stimulus for local economies, many East African countries have extremely limited local capacity and capabilities. In most countries the oil and gas industry has developed so rapidly that it has outstripped the locally available skills and infrastructure. Until these local market shortages are resolved, investors may be in the unenviable position of deciding whether to observe their concession-based obligations to meet local content requirements or their overriding obligations to ensure petroleum operations are conducted in accordance with good industry practice.

(c) Property ownership

For a new entrant in East Africa, the structuring of its asset ownership will be vital both to ensure the investor obtains and maintains valid title to assets and to minimise the tax consequences of any investment. Structuring will include such basics as ensuring the proper form of entity is incorporated to own the investment. For example, in Kenya the Petroleum (Exploration and Production) Act requires entities to be either incorporated in Kenya or a Kenyan registered company in order to enter into a petroleum agreement with the government. By contrast, in Mozambique entities incorporated
outside of Mozambique are entitled to hold a licence interest, however Mozambican legal entities and foreign legal entities associated with Mozambican legal entities (where more than 50 per cent. of that company’s share capital is held by a Mozambican legal entity) will receive preferential treatment in the award of rights to conduct petroleum operations. As noted previously, Mozambique also imposes restrictions on the ability of investors to hold land.

(d) Transfers
In order to effect any proposed acquisition or disposal the parties will need to comply with the process for transfer outlined in the concession and relevant law. Typically, this will require notice to be given to the relevant state authority before the transfer is completed.

The extent to which the relevant state authority has the power to prevent a proposed transfer will vary from jurisdiction to jurisdiction. Where a state authority has consent rights over a transfer, it is common for these to be absolute, without any requirement imposed on the authority to act reasonably. Such notification and consent rights may well apply both to direct transfers and to indirect transfers. Indeed, the proposed revisions to the Petroleum Law in Mozambique are widely expected to clarify that indirect transfers will be subject to the transfer restrictions imposed by the government of Mozambique.

As transfers can be time-consuming, often both the incoming party and the transferring entity will look to confirm as early as possible in the deal process that the relevant state authority will not hinder or reject the proposed transfer.

(e) Taxation
The increased deal flow in East Africa is triggering changes in the taxation of transfers. There has been further clarification of when transfer taxes will be applied, a widening of the scope of the transactions caught and increases in the rate of taxation payable. The legislative changes currently being implemented in Mozambique are a case in point. The new petroleum legislation in Mozambique is widely expected to clarify transfers and to indirect transfers. Indeed, the proposed revisions to the Petroleum Law in Mozambique are widely expected to clarify that indirect transfers will be subject to the transfer restrictions imposed by the government of Mozambique.

1.8 Contractual Protection and Disputes

(a) Choice of law
It may seem like a statement of the obvious, but choice of law will have a significant impact on the negotiation and documentation of an investment. An investor should be fully aware of the consequences of choosing or agreeing to a certain governing law. The legal systems in Tanzania, Uganda and Kenya are each based on English common law and conceptually differ considerably from Mozambique’s legal system which derives very much from the Portuguese civil law tradition. Importantly, use of a civil law jurisdiction may also imply certain duties to act in good faith in pre-contractual dealings.

Choice of law will affect the extent and enforceability of the commercial arrangements under an agreement, influencing the interpretation of the agreement, the scope of the parties’ obligations and the consequence of breach. A stark example of this is in Tanzania where claims brought by, or on behalf of, the government are subject to a limitation period of 60 years. The maximum limitation period available to a non-government entity is 12 years but could be as short as three years for tort-based claims.

A foreign investor may wish to provide that its agreement is governed by the laws of an entirely different jurisdiction, either one with which it is more familiar or one which has an established body of law and offers a high measure of certainty and predictability around how the agreement might be interpreted in the event of a dispute. Where project financing is being considered, the use of English or New York law may be a pre-requisite to funding. However, this may not be achievable where the investor is contracting with state entities or where local law or the provisions of the underlying concession stipulate that the investor must contract under local law. In such instances, choice of law may come down to a matter of negotiation between the investor and government.

(b) Contracting with states
Where a counterparty is a sovereign state or a state-owned enterprise, an investor will be concerned about the right of those entities to claim sovereign immunity.

The general doctrine of sovereign immunity comprises two limbs:

- **immunity from jurisdiction** – the courts or arbitral bodies of one state have no jurisdiction to determine a claim brought against another state or a state-owned enterprise; and
- **immunity from enforcement** – no enforcement measures may be taken by the courts or arbitral bodies of one state against the assets of another state or its state-owned enterprises.

Most countries, however, create a distinction between the acts of government, which will retain this sovereign immunity, and the commercial acts of a government, which will not benefit from any such immunity. This is the “restrictive theory” of sovereign immunity.

An investor will need to look to the laws applicable to the agreement to determine how the doctrine of state immunity is applied as the application can be quite different from one jurisdiction to the next, particularly in respect of a party’s ability to execute the enforcement of an arbitration award or court judgment against a state or state-owned enterprise’s assets. In Tanzania, for example, certain key agencies such as the Port Authority and the Tanzania Tax Authority are immune from execution or attachment. Where local law permits, a state can expressly waive immunity from jurisdiction and from enforcement by prior written agreement.

When contracting with states, investors will typically look to include such a waiver of sovereign immunity provision in the agreement. Care should be taken to ensure that any such waiver is properly drafted to deal with both limbs of sovereign immunity and that the investor understands the enforceability and extent of any such waiver.

(c) Stabilisation
The long-term nature of many oil and gas agreements as well as the significant upfront capital that investors commit to such projects means that the risk of change in law or unilateral termination or modification of such agreements is an ever present concern for...
investors. The purpose of a stabilisation clause is to protect the relevant agreement from adverse legislative and administrative acts of government. They can act as a means by which an investor can manage political risk.

Stabilisation provisions can take a number of different forms but the most common are:

- **freezing clauses** – these fix or “freeze” the laws applicable to an agreement to those in effect on the day it becomes effective for the life of the agreement. Where any change in legislation occurs during the life of the agreement, those changes will either not apply to the agreement to the extent they are inconsistent with the terms of the agreement or apply only with the agreement of the investor; or

- **economic equilibrium clauses** – these do not disapply the effect of future legislative changes but stabilise the economic position of the investor under an agreement. The government’s ability to effect legislative changes is preserved but the government is required to consult with the investor to determine the economic impact of any such legislative changes and agree an appropriate adjustment to the terms of the agreement to mitigate such impact.

The value of a properly drafted stabilisation provision will be of particular importance to investors in East African jurisdictions given the legislative changes (both underway and anticipated) across the region. Equally, many African states are increasingly resisting the inclusion of stabilisation provisions in their contracts on the grounds that they offend principles of state sovereignty. Indeed, Tullow Oil fought a public battle in Uganda in 2012 to insert stabilisation provisions in the revised production sharing agreements it entered into in respect of its Lake Victoria blocks. A key issue for investors acquiring interests or looking to develop discoveries is the legal enforceability of that stabilisation provision. In many common law jurisdictions it is not possible to fetter the executive powers of the state by contract with a private entity. This will be a matter of interpretation under the relevant local laws. It has, however, led to a growing preference from investors for “economic equilibrium” provisions which are perceived to be more compatible with the notion of the legislative freedom of the state because they do not seek to prevent the application of new laws to the agreement, rather they provide a mechanism by which the consequences of that change can be mitigated.

**(d) International arbitration and investment protection**

**(i) International arbitration**

International arbitration will often be the dispute resolution procedure of choice for investors in African states. Many investors will be reluctant to expose themselves to proceedings in local courts with which they are unfamiliar and in respect of which there is a perception that there may be delays, protracted appeal and enforcement processes, and a judiciary that is unfamiliar or ill-equipped to deal with complex international transactions.

In East African countries, unlike some other countries in Africa, there is a general acceptance that disputes can be resolved by arbitration. The model production sharing agreements in Kenya and Uganda provide for arbitration under the United Nations Commission on International Trade Law (“UNCITRAL”) rules, in Tanzania the International Chamber of Commerce (“ICC”) rules and in Mozambique the International Centre for Settlement of Investment Disputes (“ICSID”) resolution. Only the Ugandan production sharing agreement, however, permits offshore arbitration, with the seat of the arbitration proceedings stated to be in London. Where onshore arbitration is required, this raises concerns around whether local legislation and the judiciary are adequate to support the arbitration. For example, the Arbitration Act in Tanzania is one of the oldest pieces of legislation, originally enacted in 1931 and has not been amended since 1971, as such it needs substantial modification to bring it into line with recent developments in arbitration law.

One of the stated advantages of arbitration over court proceedings is that it offers investors a greater ability to enforce an award. The New York Convention requires the courts of all signatory states (which includes each of Kenya, Mozambique, Tanzania and Uganda) to give effect to arbitration agreements and to recognise and enforce arbitral awards subject to only limited exceptions available under Article V of the convention. In general, therefore, foreign awards are readily enforceable in such signatory states. There is always the possibility that local courts may interpret the Article V exceptions more broadly than in other jurisdictions, particularly the public policy defence to enforcement. Local law advice at the outset of an investment will therefore be essential to understand the extent to which the local courts may resist enforcement.

**(ii) Bi-lateral investment treaties**

In addition to the contractual arbitration agreements entered into by an investor, bi-lateral investment treaties (“BITs”) offer another layer of investment protection to investors. BITs are agreements entered into between states which are binding under international law. They contain reciprocal undertakings for the protection of non-sovereign investors of one state in the territory of the other state. The rights and protections granted to investors under a BIT will vary from one treaty to the next but typically will include:

- prompt and adequate compensation in the event of direct or indirect expropriation;
- fair and equitable treatment of investments; and
- most favoured nation status.

Most importantly, BITs offer foreign investors effective recourse to submit claims for breach of the BIT to neutral forums such as UNCITRAL or ICSID, the arbitral arm of the World Bank group rather than to local courts. As BITs operate on an extra-contractual basis, this right is available to the investor notwithstanding the fact that the underlying agreement makes no reference to the BIT or the arbitral process proscribed under it. This means that BITs can be a particularly useful tool to provide added investment assurance as well as further negotiation leverage in the event of a dispute, particularly where an investor’s scope to negotiate the terms of a concession or agreement with a state or state-owned enterprise is limited.

The criteria for qualifying as an investor will vary from one BIT to another, requiring the details of the relevant treaty to be examined in detail as part of the due diligence process. Generally an investor may be able to take advantage of terms in BITs between the host state where it is making its investment and other states through corporate structuring (incorporating either the asset holder itself or an intermediary entity in the state with a BIT with the host state). Kenya has negotiated BITs with France, Germany, Italy, the Netherlands, Switzerland and the United Kingdom.

### 1.9 Conclusion

The first step for any investor in mitigating risks is to understand them and how they may change over the life of the asset. Regulatory, compliance and currency risks will change over the life of a project both as a result of factors extrinsic to the project but also in response to the changing nature of the investment itself. During the exploration phase of an asset, the cash flows generated are negative and will remain so even in the early stages of production.
At this point, the level of risk and consequently the protections needed by an investor will likely be much lower than once production is fully underway. Investors should be alive to this changing dynamic over the lifecycle of an asset.

Once the risks have been identified, proper structuring of a project may help to reduce the risk of government interference and the ability of governments to change the regulatory landscape over time. No one form of risk mitigation can provide absolute protection for an investor but the layering of different types of mitigants in a project structure whether those be project financing techniques, the involvement of multilateral agencies, contractual protections such as those afforded by stabilisation provisions and recourse to international arbitration or extra-contractual protections like BITs and political risk insurance products, the combination of these different mitigants can be powerful tools to reduce and share risk.

Investors in East Africa and elsewhere will never be able to eradicate political risk entirely. However, where the opportunities are so great, the risk can managed and reduced.

Endnote

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities & Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Patents
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- Pharmaceutical Advertising
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- Product Liability
- Project Finance
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