A developer's risk management program for an international power project comprises many elements, the most familiar of which are obtaining the various types of commercial and political risk insurance available, currency risk hedging and country risk analysis. In some projects, there will be no question that the host-country government will guarantee the obligations of utility offtaker under the project agreements and the developers and lenders' analysis in this case will be mostly one of sovereign risk. This paper will not focus on projects where there is a full sovereign guarantee of performance. In projects without sovereign guarantees, the terms of the project agreements themselves take on even greater importance in the ultimate willingness of the developers to invest and the lenders to lend.

Further, there are certain project risks that cannot necessarily be insured against or are on too operational a level to be part of a risk-management program. In these cases, the provisions of the basic project agreements will be the developer's bulwark against risk.

In view of the above, this paper will identify a certain number of risks that customarily need to be addressed and guarded against in the project agreements and will focus on the contractual terms that will afford the developers and the lenders the greatest measure of protection.

The following discussion of course assumes that the project agreements will be enforceable. While this seems like an obvious point, it is not always so clear to the developers and project lenders how agreements will be enforced in projects that are being built and operated in emerging countries with sometimes very undeveloped legal systems and which involve players on the development and financing side from numerous countries. To use the example of the largest deal I have worked on, which was the Jorf Lasfar project in Morocco, the developers were affiliates of ABB, which is Swiss and Swedish, and CMS Generation, an American company. The offtaker counterparty to the project agreements was the Moroccan state-owned utility. Parts of the new units were being built in Switzerland, Italy and the United States and then of course assembled in Morocco. As a result, the export credit agencies of those three countries were involved in the financing. There were three co-arranging banks for the commercial loans, which were based in the Netherlands, France and Switzerland (though working through their U.S. branches). After the commercial loans were put in place, they were syndicated to banks from all over the world. There were also World Bank tranches in the financing in two different currencies (U.S. dollars and Deutsche Marks) and Moroccan government counter-guarantees to the World Bank. There was also political risk insurance from OPIC and MIGA.

Given all of these players from all of these countries looking to the project agreements for the assurance that they can participate in the project, how can counsel ensure that a dispute that deteriorates into litigation will be resolved and that the decision resulting from the dispute
resolution process can be enforced? While some countries require that disputes relating to power production be resolved in host country courts or administrative tribunals usually the answer is some form of international arbitration in a forum with which the developers and the international lending community is comfortable. The terms of the arbitration clause and the considerations involved in picking a forum and rules are very complex and technical, however. The main concerns will be addressed at the end of this article on the section of arbitration. For purposes of the following discussion, it will be assumed that the provisions described can actually be enforced the way they are written.

The Power Purchase Agreement (PPA) is generally the document that contains the most important contractual provisions in an international power project. Other typical project documents include a concession or other form of land use agreement, a engineering, procurement and construction (EPC) contract, fuel supply agreements and an operations and maintenance (O&M) Agreement. Normally the parties to the project agreements are the host-country project company that has been set up by the developers and the power purchaser as counterparty. The project agreements are often governed by the law of the country in which the project is located, which usually is a civil law system, often unfamiliar to U.S. and English counsel.

Since those familiar with how IPPS are documented know that these documents tend to be very lengthy and contain many complex provisions, only the broadest and most important legal risk management provisions can be touched on in the amount of space allocated for the Power-Gen International '99 presentations.

**FUNDAMENTAL PRINCIPLE OF THE PPA - PAYMENT FOR MAKING CAPACITY AVAILABLE**

Regarding the PPA, it is well to bear in mind one very fundamental conceptual aspect that sometimes gets lost in the shuffle of negotiating the more detailed provisions and which is an important one in the way the document allocates risk - that is, that the offtaker pays the power producer for "making capacity available". This is quite different, of course, from requiring payment only for power actually delivered or actually capable of being accepted by the offtaker. State-owned utilities and some other offtakers will have difficulty, especially if their countries are new to private power production, in accepting the idea that they have to pay for capacity, whether or not they are able to accept power. Or they can understand the "take-or-pay" aspect of a PPA from their own experience with fuel supply or other commercial contracts, but have real trouble with the idea that they have to pay even if their inability to accept energy is caused by an event of force majeure.

**CENTRAL IMPORTANCE OF FORCE MAJEURE CLAUSES IN ALLOCATING RISK**

For this and other reasons, the force majeure clause has a central importance in PPA risk allocation, particularly with respect to force majeure events that cannot be insured against, and the clause is often the subject of elaborate negotiation. Unfortunately for many developers,
though, the force majeure clause is long, dense and chock full of legalese. To make matters murkier, there are important differences in the law of force majeure in legal systems based on the Anglo-American common law model and those based on the Napoleonic code civil law model, the legal system prevailing in all of Latin America (except maybe Belize or British Guyana) and French speaking Africa, important parts of the Middle East (such as Turkey) and some countries in Asia (Indonesia is the most important example).

**Basic Terms of the Force Majeure Clause**

Force Majeure clauses basically provide that if a party to a contract is unable to perform an obligation for reasons beyond its control, it is relieved of the duty to perform that obligation. In civil law systems, an event can only be considered to be force majeure if it meets the civil code criteria of being unforeseeable, unavoidable and insurmountable. In fact, force majeure as an excuse is available to a party whether or not there is a clause in the contract relating to force majeure because it is provided by law.

On the other hand, if an agreement is governed by English or American law, or some related common law system, there is no mandatory application of force majeure. Under a doctrine known as commercial impracticability, the allocation of risk in a contract cannot be altered unless an unforseen event has a very drastic effect on the affected party's ability to perform, making performance an extreme hardship. Courts are very reluctant to find such circumstances because it disturbs the parties' contractual allocation of risk. However, if the parties define in their agreement what constitutes an event of force majeure and provide that the occurrence of such a defined event will excuse the affected party's performance, the courts will generally enforce it. As a result, lawyers from England and the U.S. have a tendency to draft very elaborate force majeure clauses containing every sort of imaginable catastrophe.

In fact, it is often difficult for common law attorneys to break themselves of the habit of desiring elaborate force majeure clauses and will insist in a PPA governed by foreign law that there be a long list of events that will be considered force majeure. For purposes of foreign law, this has an illustrative value only. In other words, one can think up and list every conceivable type of catastrophe in a contract, but in most civil law systems, an event will only be force majeure if it meets the legal definition, i.e. that it is unforeseeable, beyond the parties' control and insurmountable. Usually there is some case law to help counsel determine if an event meets the legal definition, but more often than not it is spotty and not necessarily consistent. In fact, some foreign lawyers are so uncomfortable with the laundry-list approach and since they cannot say definitely whether or not some event will fit the definition of force majeure, that the term "force majeure" will be abandoned and the parties will define a term such as "relief event" and provide that the party affected by such an event will be relieved of its performance obligations. This technique takes advantage of another key principle of civil law jurisdictions, namely that the contract is the law between the parties, absent provisions that are contrary to mandatory provisions of law or public order - so if the parties say that something is a "relief event" and local
counsel can opine that the contract is enforceable as written, developer's and the bank's common law counsel will feel more comfortable knowing that certain defined events will in fact relieve performance, rather than relying on a legal interpretation as to whether an event meets certain statutory criteria in a foreign legal system.

**Force Majeure Affecting Suppliers**

One other thing to watch out for in a force majeure clause and in the law of force majeure of the law governing the contract is whether events of force majeure affecting the power producer's suppliers and contractors will be considered force majeure as between the power producer and the offtaker. This is not always the case, so a well-drafted force majeure clause should include a provision that says that an event affecting power producer's suppliers and contractors, which itself fits the criteria of force majeure in the contract, should be considered force majeure as between the power producer and the offtaker. So if the developer's EPC contractor drops the turbine off a loading dock and cracks it, there won't be any unpleasant surprises when the power producer gives notice to the offtaker that the delivery date of the plant will be delayed and it's not the power producer's fault.

**Insurability of Force Majeure Events**

Once the terms of the force majeure clause are defined, developers will want to focus on whether such events are insurable. Many of the weather and natural disaster types of force majeure directly affecting the plant site can be insured against. Also, loss of equipment en route due to shipping accidents is a normal part of a project owner's insurance package. Certain types of political events can be covered by political risk insurance. These typically include expropriation and host-country government harassment and inconvertibility of currency, among other things. However, there is a certain category of event that falls through the cracks of the project owner's insurance package - the feared uninsurable force majeure. These include certain types of political events like insurrections and civil strife and disturbances which occur outside of the boundaries of the site but which disrupt the flow of supplies or workers to the site or the export of energy from the site. These risks resulting from uninsurable events of force majeure have to be identified by the parties and then allocated contractually.

**Allocation of Risk for Uninsurable Events of Force Majeure**

One method of contractual allocation of risk is to provide that certain events will result in the Plant's being deemed available; in other words, that the power producer will be paid as if the plant is producing and exporting energy at some agreed level. This means that the offtaker is assuming risk for certain uninsurable force majeure events. These events of deemed availability typically include:
plant downtime resulting from trips due to instability in the offtaker's grid system;

- the offtaker's not performing certain defined obligations, such as providing water and other utilities to the plant as agreed, whatever the reason behind it (drought, breakdowns in equipment, failures to perform of other government agencies etc.);

- changes in host country laws or regulations delaying the completion of a new plant beyond the time the lenders were expecting to receive revenue;

- sovereign acts (the classic uninsurable force majeure event) or omissions preventing the plant from operating at its rated capacity; and

- a general strike preventing workers, parts or supplies from arriving at the plant (general strikes being another classic uninsurable force majeure event)

One risk that offtakers may not want to assume is the risk of force majeure events affecting the transmission system - if high tension wires go down, even far away from the site, it can affect the ability of a plant to export energy and the offtaker will probably not want to assume the risk of it. One possible solution to this dilemma is to fix a certain number of days per year or rolling twelve-month period for which the offtaker won't be responsible for transmission system problems. Inability to receive capacity payments will then be the power producer's risk for that period of time, but at least the risk will be circumscribed and the lenders will probably be able to get comfortable if they know what their outside risk is and it isn't too long. Beyond those certain number of days, the plant should be deemed available.

**PAYMENT AND CREDIT ENHANCEMENT**

Developers are often confronted with the problem of offtakers having poor credit histories and being poor payment risks. The problem can be acute, since some PPAs require monthly payments to the power producers in the tens of millions of dollars. If the offtaker is a state-owned entity and the host-country government is giving a full performance guarantee, the payment risk of the offtaker automatically becomes sovereign risk. Without a host-country payment guaranty, the actual legal status of the offtaker has to be carefully examined as to the issue of whether the host-country government is required by law to make good on the debts of the utility. Many civil law countries have a type of hybrid legal entity based on the French model of an établissement public à caractère industriel et commercial for providers of public services which has the characteristics of a state-owned company for some purposes, such as inability of creditors to seize the assets of the company or otherwise disrupt the provision of a public service, but for other purposes is like a private company, meaning that it has the capacity to contract in its own name and that judgments can only be obtained against the particular entity and not the state in general. Much has been written by scholars about the legal status of these
entities from which it is impossible to extract a straight answer about whether the state really is obligated to pay the entity's debts or not. One therefore cannot assume from a risk management standpoint that a country's government must necessarily back-up the obligations of its public service utilities, meaning that other types of credit enhancement mechanisms must be devised. Of course, if the offtaker is a private company, the whole issue of state support is moot.

**Letters of Credit as Primary Payment Vehicle**

One way to mitigate payment risk on a very operational level is to require that the principal payment mechanism of the PPA be monthly draws on a letter of credit that the offtaker is required to establish and keep in place. An comfortable level for the face amount of the letter of credit would be twice the anticipated monthly capacity payments. In this way, the power producer is paid whenever it presents a certificate to a bank that a monthly invoice has been presented to the offtaker and it has not been disputed within a certain amount of time. If the amount is disputed, the undisputed amount can be drawn.

This payment technique of course shifts the payment risk analysis to the bank issuing the letter of credit. In many countries, the banking system is so illiquid that no single bank can issue a letter of credit for twice the anticipated monthly capacity charges in a PPA. In this case, the issuing bank can actually be the lead bank in a syndicate in which the major banks in a country can provide a part of the L/C support. This is a solution that has a number of practical and political benefits, in that all the major banking institutions of a country get a little piece of the action with the foreign developer and earn fees (make sure the PPA provides that the offtaker is responsible for the payment of these fees). It also has the benefit of smoothing out the offtaker's cash management. If its collection of payments from its customers is slow or has seasonal ebbs, payment to the power producer shouldn't be affected because the offtaker can draw on its credit lines with its bankers. Also, if the offtaker is having cash flow problems, it is a lot less embarrassing for it to go to its banks to see if its line of credit can be extended a little than to admit to the power producer and the international lenders that it can't make payments when they are due.

Regarding payment defaults, if a letter of credit is the principal payment mechanism, the PPA should provide that any failure to maintain or renew the letter of credit is an event of default.

**ESCROWING OF CUSTOMER PAYMENTS**

To guard against the possibility that the offtaker can't support or renew a letter of credit or, if there is no letter of credit, to provide general credit enhancement, a technique has developed in countries that don't have much history with independent power products whereby payments from the utility's largest and best customers go into an escrow account until the escrow account has been funded to a certain level. If the letter of credit has a face amount of twice the
Strategies for Risk Management in International IPPs: Frederick R. Fucci
Terms of the Project Documents December 1, 1999

anticipated monthly capacity charges, one month's worth of escrowed payments should suffice. The escrow account must remain funded throughout the term of the PPA in the event that payment cannot be made, in which case the power producer has the right to receive payment from the escrow account. In the strongest PPAs, there is then a provision that a large portion or all of the payments going to the utility from customers must go into a dedicated account or the escrow account itself until it is replenished after a draw or built up to a higher level in a default situation, so that the power producer can obtain payment from the escrow account on a going-forward basis. In this way, payments from the customers are tapped and the utility is actually bypassed.

While having some type of escrow account for payment security is something international lenders like to see, implementing the escrow arrangement can be complicated. An elaborate escrow agreement with many parties is needed in which all the cash flows and payment triggers must be carefully specified so that the normally cautious banks can know precisely what to do with the funds in the escrow account. Furthermore, it is difficult to meet the criteria for binding international arbitration in agreements with local banks relating to in-country escrow accounts. If there is a dispute over the disposition of the escrow fund, it is difficult for international counsel to prevent one of the local banks from moving for interim measures in the host-countries courts as to the disposition of the funds and if the local courts take jurisdiction, an important part of the lenders' security package could be ruled upon in a forum over which they have little control.

Thus an escrow arrangement is a tool that is available to provide payment support, but given the complications involved in putting one into place, developers must ask themselves if it really is needed to ease their payment concerns and to placate the lenders. Implementing an escrow arrangement implies considerable transaction costs.

ENVIRONMENTAL LIABILITIES

Developers rightly fear environmental liabilities because they can be considerable; in some cases large enough to ruin a project. From the contractual standpoint, the analysis is much different depending on whether you are considering the take-over phase, the construction phase or the operational phase.

Take-Over Phase

The take-over phase analysis is really not that tricky from a legal standpoint. In any project that has any international export agency or World Bank funding, the project must conform to the agency's environmental guidelines or the World Bank's guidelines. Even in projects that have private funding, the equity investors or the lenders will usually insist that the World Bank guidelines be followed in the event the investors want to sell down their interest at a
later point or the lenders want to syndicate the loan, which is usually the case.

If a project has been operating and is in the process of being privatized, there really is no grounds on which the state or the current owner can argue that it is not responsible for any clean-up required to make the project and the site conform to international standards. The international developer will normally want its own environmental consultants and contractors to carry out the assessment and do the remediation work, but for the account of the owner. The only question that has to be treated carefully is the issue of apparent versus latent site conditions. The environmental report will set out all apparent site conditions pre take-over and serve as a base case for determining who is responsible for environmental problems after closing. However, it may be that environmental consultants, even acting diligently, are unable to discover latent site problems or pollution. The document setting out the takeover conditions should make it clear that the owner or state is responsible for latent conditions that could not have been discovered by the project company and its consultants with reasonable diligence. This basically tracks the New York law on the subject, but since the project documents are not likely to be subject to New York law, they should be explicit about allocating responsibility for both apparent and latent site conditions and on how long the previous owner is liable for latent site conditions discovered after closing.

**Construction Phase - Subsurface Conditions**

Subsurface conditions are also a considerable concern in construction contracts. Here again, New York law basically holds the Owner responsible for latent site conditions that could not have been discovered by the contractor with reasonable diligence by entitling the contractor to a change order with price and schedule relief. Owners sometimes try to shift all site risk to the developers and EPC contractors, however, and developers’ counsel should examine the site provisions of the EPC contract very carefully to make sure that the developer or EPC contractor is not certifying the suitability of the site or otherwise forfeiting its right to a change order for latent site problems.

**Operating Phase**

During the operational period, the risk of environmental contamination is on the Operator. Since the Operator is often a special purpose company with limited liability formed under the laws of the host country, the key issues with respect to environmental liability are how much of it the Operator can bear before it is in default and whether the Operator has the resources and the insurance coverage to make the Project Company whole if there is environmental damage caused by the operation of the Plant.

To some extent, the answer to these questions depends the reasons behind environmental contamination. Perhaps a certain level of environmental contamination necessarily results from the operation of the plant; or perhaps the contamination results from the Operator's negligence;
or the Operator may be grossly negligent or in deliberate breach of its contractual obligations or the applicable laws and guidelines. In the case of Operator's simple negligence, the costs of clean-up will most likely be covered by insurance. A certain level of insurable remediation costs may be defined in the O&M Agreement as being acceptable and thus not an event of default. If, however, the Operator is grossly negligent or in deliberate breach, it is likely that the required insurance will not cover the Operator's acts and the project company or developer will need to look to a responsible party in the Operator's chain of ownership for a guarantee.

Parent guarantees of O&M obligations can be severe bones of contention in IPPs, since the Operator can be subject to potentially huge environmental liabilities. Some parent companies have a policy of not giving such guarantees at all. Others will only give them if the environmental liabilities are circumscribed in some way. In one project, an innovative series of provisions were negotiated in the O&M Agreement according to which if the project company incurred a certain level of uninsured environmental liability as a result of the Operator's actions, then the project company would have the right to terminate the Operator. The termination level of environmental liability was equal to the amount of liability the parent company was willing to cover in its guarantee. In this situation, however, the project company would also have the option of giving notice to the Operator that it did not intend to terminate the agreement if it perceived the environmental liability as being inevitable and wanted to keep the Operator in place. If this option were to be exercised, the amount of liability subject to the Operator's parent guaranty would increase. This would have meant, however, that the Operator would potentially have to remain in a project in which it was incurring ever-mounting environmental liabilities guaranteed by its parent and not be able to get out. So therefore, if the threshold level of uninsured environmental liability was reached and the project company gave notice of its desire to have the Operator remain in place, the Operator would also have the opportunity to say that it did not wish to remain as Operator and incur the additional liability. In this way, the project company and the lenders were able to obtain some parent company coverage for uninsured environmental liabilities, while the guarantor would be certain as to what its outside exposure would be and both parties retained flexibility as to whether the Operator could be terminated or forced to stay in place.

**Default and Step-In**

One problem that must be confronted in many projects is how the lenders can step in and take over the project assets if the project company has defaulted or is on the verge of default. In the U.S., there is a highly developed body of law on the subject which gives secured creditors rights over the project assets. The regulations governing electricity production and sales also allow the secured creditors who control the assets to sell power to a party other than a non-paying power purchaser in order for the project to generate revenue.

In international projects, the law of default and bankruptcy of the host-country is often not at all well developed and it may or may not be the case that the lenders, once they have
stepped in, are in a position to sell power to anyone other than the original offtaker. Furthermore, there is a serious question in many civil law jurisdictions as to whether lenders even have the right to step in since the assets may actually belong to the State or the provision of electricity is considered a public service which cannot be interrupted. In the latter case, a state-owned offtaker will almost always assert the right to step in and take over the project itself on the foundation of the legal principle of "continuity of public service" or something similar. In addition, in many civil law countries, power producing assets or the other assets of the utility are not subject to attachment and seizure.

**Direct Agreements between Lenders and Offtakers**

How then to deal with the project lenders' need to be able to react in a timely way to preserve the ability of the project to produce cash for debt service in countries where power producing assets cannot be attached or seized? The solution is to have a so-called "Direct Agreement" between the utility offtaker and the project lenders. The Direct Agreement will provide that if an event of default is about to occur or has occurred under the financing agreements due to the failure of the developers to build the project on schedule or to operate the project adequately, the lenders will have the ability to appoint a substitute contractor or operator so that the ability of the project to generate cash flow for debt service is preserved. It probably will be necessary for the Direct Agreement to provide that the offtaker utility consent to the substitution. In this way, it will be able to justify itself politically that it is not abdicating its public service obligations to foreign lenders; rather that it is agreeing to appoint another party to exercise its public service rights as an emergency measure. Conversely, the offtaker utility will have to agree not to exercise any of its extraordinary rights in the event of a project company default without the consent of the lenders.

If the project company defaults are as a result of the offtaker's not making capacity payments on time, then the problem is more acute. In this case, the payment security provisions referred to above will kick in. If the payment security is exhausted and there either is no escrow arrangement or it is not working properly, then there will be a full-blown default and termination. In this case, how the project assets will be disposed of is tied to the payment of the termination amount in the relevant project agreement. If the termination is due to the default of the offtaker, the Direct Agreement should provide that it will not have the right to take over the project assets until it has paid a termination amount that makes both the lenders and equity investors whole. If the termination is due to the project company's default, the offtaker will only have to prepay the project lenders in order to regain control of the assets.

Of course these contractual niceties are never enough to prevent the host-country from marching the army in and taking over the plant, but this is what political risk insurance is for, the classic political risk coverage being expropriation.

**Dispute Resolution**
Since the most carefully drafted project agreements will all be for naught if they are not capable of being enforced, perhaps the gravest task counsel has in reviewing and negotiating the documentation is making sure that there is a method of resolving disputes that works and results in an enforceable judgment or award. In most cases, this will mean some form of international arbitration, but choosing the right forum and drafting the correct provisions require expert understanding of international arbitration rules and conventions and close analysis of the laws of the host country and its treaty obligations.

There are certain situations in which the developer will have no choice, in which case the risk analysis will be restricted to whether the required forum provides some reasonable assurance of security. For instance, Brazilian utilities are very hostile to arbitration and even though it would be technically possible to draft an international arbitration clause that worked in Brazil, as a matter of practice Brazilian courts are the required forum. Fortunately, the courts of Brasilia in particular aren’t so bad and a number of developers have accepted this as the PPA dispute forum. In other cases like China, there is no deal unless the Chinese Arbitration Institution is specified for resolving disputes. In Turkey, the Constitution has a provision requiring disputes involving the provision of a public service to be brought before administrative courts, and this has been a serious drag on the development of the market there.

**Rules of Arbitration Available**

When there is the choice, the most popular rules of arbitration are those of the International Chamber of Commerce, based in Paris, which also for a fee provides supervision of the arbitration process and review of the award by the ICC Arbitral Tribunal. Ad hoc arbitration, during which the parties do not rely on an institution but on the arbitrators appointed to manage the case is also possible. The most popular rules for ad hoc arbitration are those of United Nations Commission on Trade Law, known as "UNCITRAL". In addition, when the off-taker is state-owned and the building of the project is considered to be an "investment", which is almost always is, then the parties can choose the International Centre for the Settlement of Investment Disputes and its rules to settle their disputes.

**Key Goals of the Arbitration Clause**

When arbitration is allowed, the following are the basic principles of how international arbitration should work in an IPP, sort of a developer's bill of legal rights.

- it must be very clear that all disputes arising under the Project Agreements that cannot be settled amicably between the parties must be resolved by international arbitration (unless otherwise specified in the agreements, such as special procedures for resolving technical disputes);
no party can have any possibility of avoiding the jurisdiction of the arbitral tribunal and the jurisdiction of the tribunal must be exclusive;

the members of the arbitral panel chosen by the parties to the dispute and the chairman must be impartial and decide all disputes on their merits in strict conformity with the terms of the Project Agreements and applicable law;

the panel should be convened in a neutral place;

the arbitral process must be efficient and, if the parties desire, can be made subject to specific deadlines for the various procedural steps such that neither party can unduly delay the outcome;

the final award must be binding upon the parties and enforceable in accordance with its terms against the losing party.

**Arbitrability of IPP Disputes**

In making sure this developer's bill of rights can be in fact realized, the first thing counsel has to look out for is whether the dispute is in fact arbitrable under the laws of the host country, which are the laws that normally govern the project agreements. This is an extremely important point, since if the dispute is not arbitrable under the law governing the project agreements, this is a defense to enforcement of the award once it is rendered and presented for enforcement to the courts of a country where the losing party might have assets (see below). What is meant by "arbitrable"? In many countries with civil law legal systems, disputes between private parties and state agencies cannot be the subject of arbitration or disputes relating to acts or assets subject to a regime of public law. If the developer has a concession for the project site or assets or the project is a BOT or some variation thereof, the developer will be building an asset that is either owned by the state from the outset or will be owned by the state at some future point. This is a classic case in the civil laws system of legal rights that must be submitted to administrative law principles and resolved in local administrative tribunals.

Another thing to watch out for is that the laws of some countries do not permit "international" arbitration in disputes between two local law entities. This problem is not uncommon, since in a limited recourse project financing developers will almost always organize a local law project company to be the owner of the project, which is in turn the contracting party with the offtaker.

The solution to the first problem concerning inability to arbitrate disputes with state entities probably has to be choosing ICSID and its rules for arbitration, since it is only available
for disputes between foreign investors and state entities. The document that establishes the basic legal framework for ICSID arbitration is actually a convention, or an international treaty, to which most countries that are members of the World Bank are party. Thus, the ICSID Convention has the force of an international treaty for countries that have ratified it. In most countries' legal systems, the provisions of international treaties prevail over contrary provisions of domestic law, which is not the case for the ICC Rules of Arbitration or the rules of private arbitral institutions. These have no force of law at all. Furthermore, the ICSID Convention per its Article 25(c) requires that the host-country government gives its approval to ICSID of the consent of the state-owned entity to arbitration under the auspices of ICSID. If the host-country offtaker is designated to ICSID by the government as being eligible for arbitration, and given the force of law that the treaty holds, there can be no argument once a dispute arises that the subject matter of the dispute is not arbitrable. On the contrary, the ICSID Convention is meant for disputes between private investors and state-owned entities in projects involving infrastructure investment. Finally, there can be no argument that the jurisdiction of ICSID is non-exclusive, meaning that the dispute could either be resolved by international arbitration or administrative tribunals, since there is an explicit provision in the ICSID Convention (Article 26), which provides that "[c]onsent of the parties to arbitration under the Convention, shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

On the point of the international nature of the dispute, the ICSID Convention addresses this point basically by defining a project company organized under the host country's laws but controlled by foreign persons as a national of a contracting state other than the host state. Thus, by definition, the dispute is "international" in character, i.e. a dispute between a foreign company and the host-country state agency.

If the power purchaser is not owned or controlled by the government, the ICSID Convention and its rules are not available. To some extent the non-public nature of the power purchaser alleviates the problem of mandatory submission of disputes to administrative tribunals, since the contractual relations between power producer and power purchaser are more likely to be considered a commercial agreement than an administrative contract.

If the alternative to ICSI D is the ICC Rules of Arbitration, the problem of the international character of the dispute is still present, however. This problem was more acute under the old ICC Rules, which in Article 1 provided that the "function of the court [of Arbitration] is to provide for the settlement by arbitration of business disputes of an international character in accordance with these rules." The new ICC Rules in effect since January 1, 1998 retain the notion of the international character of the dispute, but also explicitly provide that "[i]f so empowered by an arbitration agreement, the Court [of Arbitration] shall also provide for the

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1. Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1966, known as the "Washington Convention".
settlement by arbitration in accordance with these rules of business disputes not of an international character". Counsel has to examine very carefully then whether the law governing the agreements allows for the settlement of disputes between two legal entities organized in the host country and under what circumstances, because even the expansion in the ICC Rules throws one back to the statement "if so empowered by an arbitration agreement", which simply states the question of whether the agreement to arbitrate is valid in a different way. In some countries, disputes between two local law entities can be resolved by international arbitration if there are enough elements of "externality" to the transaction. In these cases, counsel can perhaps get comfortable on a reasoned basis that the agreement to arbitrate is valid if enough external elements are present.

If counsel cannot get comfortable with the externality of the transaction, then resort can be made to ad hoc arbitration under for instance the UNCITRAL rules within the host country. The only thing that is required to submit a dispute to arbitration under the UNCITRAL rules is that the parties to a contract agree in writing that disputes in relation to that contract be referred to arbitration under the UNCITRAL Rules. The question of the arbitrability of the dispute is still relevant, in that the UNCITRAL Rules also refer to the fact that they will not govern the arbitration in any of them are "in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate".

One further consideration when the arbitration is not international, but in-country, is that Counsel has to be sure in this scenario that if an award is rendered in the host country, it can be enforced in other places. Normally this is a question of whether a country is a party to the New York Convention (see below) or some other convention such as the Inter-American Convention on the recognition and enforcement of arbitral awards, which contain provisions that awards rendered in one country that is party to the convention can be enforced in others, but there also may be provisions of host country law that are relevant.

Exclusivity of the Arbitration Procedure and Resort to Provisional Measures

One point that has been a particular concern of mine in the projects I have worked on is trying to prevent the host country power producer from having recourse to local courts or tribunals for provisional measures while the arbitration procedure is starting up. While this is impossible to prevent in an absolute sense, the first line of defense is an arbitration clause that makes recourse to arbitration the exclusive means of resolving disputes, including for interim and provisional measures.

The ICC Rules, per Article 23, allow the ICC Arbitral Tribunal to order any interim or conservatory measure the Tribunal deems appropriate if one of the parties requests it. On the other hand, the second paragraph of Article 23 also allows the parties to apply to any competent judicial authority for interim or conservatory measures before the file is transmitted to the Arbitral Tribunal and "in appropriate circumstances, even thereafter". While such an application
does not invalidate the agreement to arbitrate, there may be circumstances in which the ultimate arbitral award is moot or in contradiction to the interim measures ordered. If this is of concern to the parties, the arbitration clause should be explicit in saying that the provisions of Article 23 allowing application for interim measures do not apply. If would then be up to the local court or administrative tribunal hearing the application for provisional measures to defer to the Arbitral Tribunal.

The UNCITRAL Rules are similar to the ICC Rules in that they allow, per Article 26, the arbitral tribunal to "take any interim measures it deems necessary in respect of the subject matter of the dispute". Interim measures may be established in the form of an interim award. However, paragraph 3 of Article 26 provides that "a request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement", meaning that the arbitral proceedings may continue to a final award even if a court has ordered interim measures, but there is no guarantee that the final award will be consistent with the interim measures.

The provisions of the ICSID Convention on interim measures are much more forceful. As mentioned above, Article 26 of the ICSID Convention sets forth the fundamental principle that consent of the parties to arbitration under the Conventions shall be deemed to be consent to such arbitration to the exclusion of any other remedy. Once such consent is given, Article 26(b)(1) provides that no party may withdraw its consent unilaterally.

So long as such consent exists, there are only three jurisdictional grounds (all specified in the text of the Convention) upon which ICSID can decline to adjudicate the merits:

1. one or both the parties are not either a State party or a national of another State party (art. 25(1)).

2. the dispute does not concern an investment (art. 25(1)); and

3. there is no State party consent to ICSID arbitration on behalf of a State party instrumentality (art. 25(3)).

If none of these three grounds exists, then no national court of a State party can make any determination concerning the merits of the dispute.

Prior to the determination of the merits, the ICSID Convention and its Arbitration Rules contemplate only two areas of potential activity by national courts. First, Article 26 allows a State to "require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." Such a requirement must be set forth at or prior to the time of the making of the particular ICSID arbitration agreement, and cannot prevent the non-State party from resorting to ICSID arbitration as the ultimate and exclusive binding
Strategies for Risk Management in International IPPs: Frederick R. Fucci
Terms of the Project Documents December 1, 1999

adjudication.

Second, since 1984, ICSID Arbitration Rule 39(5) allows for recourse to national courts to obtain provisional measures for preservation of a party's rights and interests, but only if the parties have so stipulated in their arbitration agreement. Thus, if the developer does not wish the power producer to have recourse to its national courts for provisional measures, its counsel must make certain that there is no such provision in agreement to arbitrate naming ICSID arbitration.

Thus, absent a reservation by the Contracting State to the Convention or a provision in the arbitration agreement that recourse can be made to local courts, Article 26's exclusivity provision means, in the words of ICSID's First Secretary-General, that "a claimant may not choose to proceed in a national court in lieu of arbitration, and a respondent may not proceed in a national court to contest the claimant's right to have recourse to arbitration."  

Further, national courts with which such a claim or objection is lodged are obligated under the ICSID Convention to decline to exercise jurisdiction, on the ground that ICSID has sole authority to determine whether a given dispute falls within its jurisdiction.

If provisional measures are required to preserve the rights of the parties pending the final resolution of a dispute, the ICSID tribunal has exclusive jurisdiction per Article 47 of the ICSID Convention to decide the merits of provisional measures unless the parties agree to the contrary.

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

If the ICSID Convention has the force of law in the host-country, all judicial and administrative instances in the host-country would be required by treaty to decline jurisdiction for the purpose of taking interim measures and enforce whatever appropriate measures are

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ordered by the ICSID tribunal.

Thus, when it is otherwise possible to use ICSID arbitration, the ICSID Convention and rules provide a much higher level of comfort than the ICC and UNCITRAL Rules that the parties' desire that recourse to arbitration be the sole method of resolving disputes arising under the Project Agreements will be respected.

**Enforcement of Arbitral Awards**

A final award rendered by the ICC Court of International Arbitration (or any other international arbitral tribunal or ad hoc body) is enforced in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, known as the "New York Convention". If a country (such as Brazil) is not party to the New York Convention, then there may be another regional convention which is relevant (in the case of Brazil it is the Inter-American Convention on the Recognition and Enforcement of Arbitral Awards). Article 11(1) of the New York Convention contains the basic obligation of recognition and enforcement:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article V of the New York Convention sets forth the reasons why the courts of a country in which enforcement is sought may refuse to recognize the award. The most prominent reason is set forth in Paragraph 1(a) of this Article V.

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it...

Thus, as mentioned at the outset of this discussion of arbitration, a Contracting State is not required to enforce an arbitral award if it concerns a subject matter not capable of settlement by arbitration or the agreement is not valid under the law to which the parties have subjected it, which, in the case of most IPPs, is the law of the host country.

As far as enforcing an arbitral award in the United States is concerned, the legislation
implementing the New York Convention is the American Arbitration Act, 9 U.S.C. 1 et seq. Under this law, the party seeking enforcement must make an application to a Federal District Court in the United States and the party against whom enforcement is sought is entitled to object on the basis of the Act, which contains basically the same grounds as Article V of the New York Convention. Appeal from the determination of the District Court is also possible.

Again, if the transaction and the parties meet ICSID's jurisdictional requirements, the ICSID Convention provides a basic advantage in enforcement of awards in that the courts of the country in which an award is presented for enforcement do not have to review the decision in the same way required under the New York Convention. Instead, an award rendered under the ICSID Convention is treated like a domestic judgment of the enforcing state.

Article 54(1) of the ICSID Convention sets forth the basic rule regarding the enforcement of ICSID awards in the territories of all Contracting States.

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in the State.

Article 54(3) further provides that execution of the award "shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

Thus, if the enforcement of an ICSID award is sought in any Contracting State, by the terms of Article 54 of the ICSID Convention, which has the force of law in all Contracting States, that ICSID award will be considered to be exactly the same as a judgment of a court in that State. U.S. courts and the courts of other countries have held that State parties to the ICSID Convention waive entirely any domestic law requirements otherwise applicable to registration and confirmation of arbitral awards.5

Article 52(1) of the ICSID Convention sets forth the grounds on which a party may request annulment of an ICSID award.

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(b) that the Tribunal was not properly constituted;

(c) that the Tribunal has manifestly exceeded its powers;

(d) that there was corruption on the part of a member of the Tribunal;

(e) that there has been a serious departure from a fundamental rule of procedure; or

(f) that the award has failed to state the reasons on which it is based.

The significance of the foregoing provisions of the ICSID Convention is that, once consent to ICSID arbitration is properly given by a government with respect to the contracting state entity, such consent is approved by the competent authorities in that country and an ICSID tribunal is properly constituted, there is little possibility for either party to the agreement to arbitrate to argue that the subject matter was not capable of settlement by arbitration or that the agreement to arbitrate is invalid.