



Managing Upstream Risks

A Vietnamese Law Perspective

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Agenda

- General
- Key Upstream Risks
- Model PSC
- PVN's Restructuring

Section 1 - General

Vietnam's Energy Security

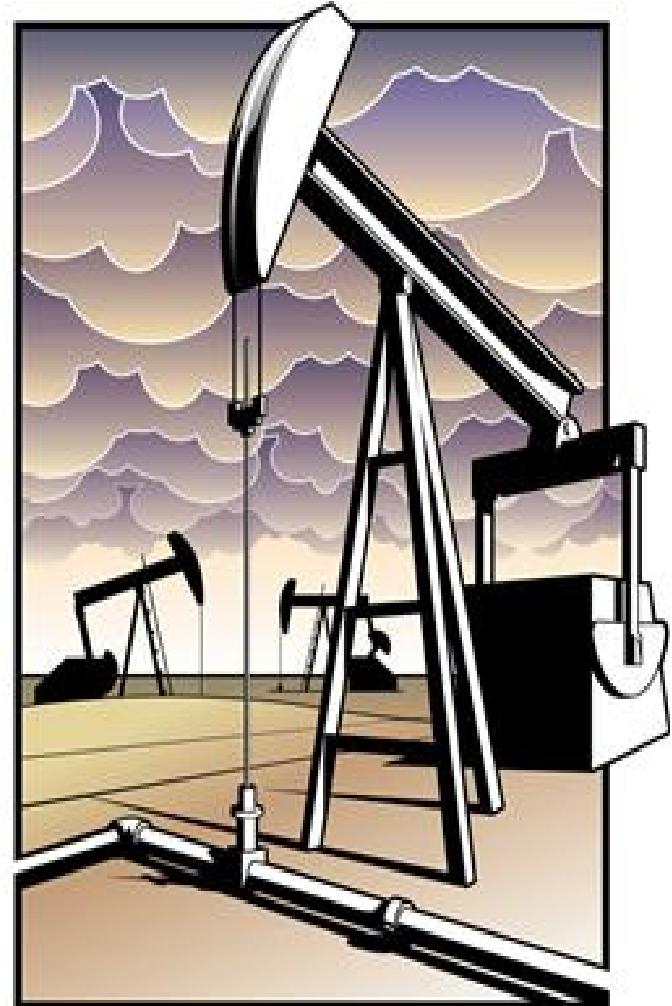
- Historical dependence on oil product imports
- Export sales of crude oil
- Major driver for economic growth
- Growth in energy demand
- Declining production in mature oil fields
- Relatively under-explored offshore areas
- Limited State funds



- Challenges in the security of energy supply
- Further domestic E&P operations
- International licensing rounds
- Acquisition of foreign oil and gas assets
- LNG imports
- Project based, oil-linked natural gas pricing
- Long-term gas supplies
- Insufficiently coordinated gas and power planning
- Long-term energy strategy
- Gas markets deregulation and liberalisation

IOC's Objectives

- Discover Hydrocarbons
- Monetize Discoveries according to agreed upon Terms
 - appraisal plan
 - commerciality
 - development plan
 - produce
 - transport/export
 - market



Key Investment Factors

- Geology
 - perceived prospectivity
- Geography
 - cost issue/market access
- Geopolitics
 - perceived political risk
 - resource nationalism
- Fiscal terms
 - royalty and tax incentives
 - competitive rate of return
- Legal framework for foreign investment
 - legal due diligence
 - sanctity of contracts



Risk Management Strategies

- Understand local expectations
- Manage corporate expectations and timelines
- Build alignment of interests with key stakeholders
 - PVN, PV Gas, PV Oil
 - MOIT, General Department of Energy
 - Office of Government
 - Local People's Committee(s)
 - MOF/local Tax Department
 - MPI, MONRE, SBV
- Evaluate and manage upstream project risks

Section 2 - Key Upstream Risks

Legal System

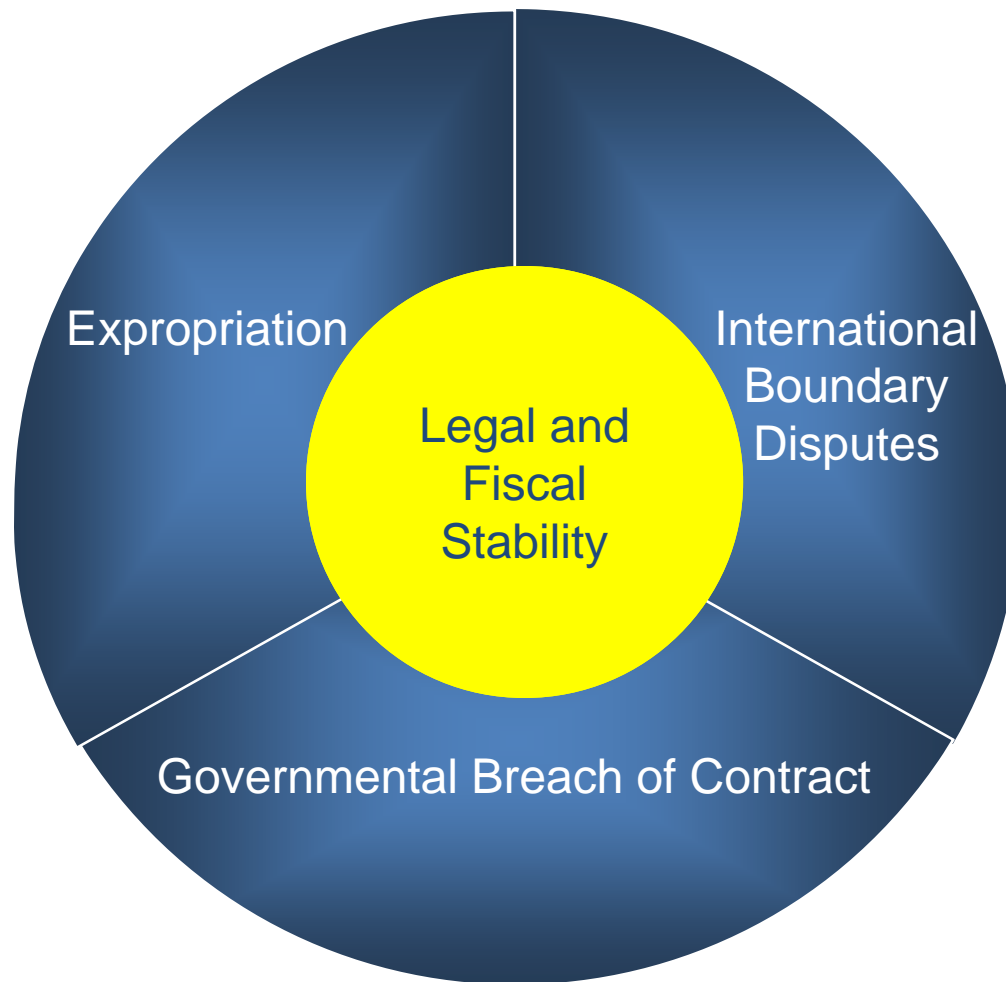
- Vietnam is a civil law jurisdiction
- Transitional, but has come a long way!
- Uncertainty in legislative interpretation
- No system of binding case law
 - court judgments not a source of law
 - not binding in subsequent cases
 - recognition and enforcement of legal rights
- Local courts have broad powers to imply fairness terms into contractual obligations
 - may be construed narrowly
- Enforcement of foreign judgments - reciprocal
- Choice of law and jurisdiction



Regulatory Approvals

- PM approvals required in various project phases:
 - bid tenders/direct negotiations for award of blocks
 - preliminary agreements (including fiscal incentives)
 - PSC execution and grant of investment certificate/amendments
 - extension of PSC term or exploration period
 - PSC suspension upon FM
 - reserves reporting
 - ODP/FDP
 - farm-ins and farm-outs, unitization
- Drilling approvals
- HSE permits
- Gas master planning
- MOIT approval of the decommissioning plan

Political Risk



State Sovereignty

- Sovereign power
 - exclusive and absolute
 - full control of its affairs within its territory
 - can lawfully expropriate the investments
 - can change laws and regulations ('creeping expropriation')
- State's exercise of sovereign authority in the public interest
- Recognition of State sovereignty over natural resources
 - permanent
- Nature of ownership
 - natural resources is 'property of the People and managed by the State'
- Recognition of limitation of sovereignty
 - international law

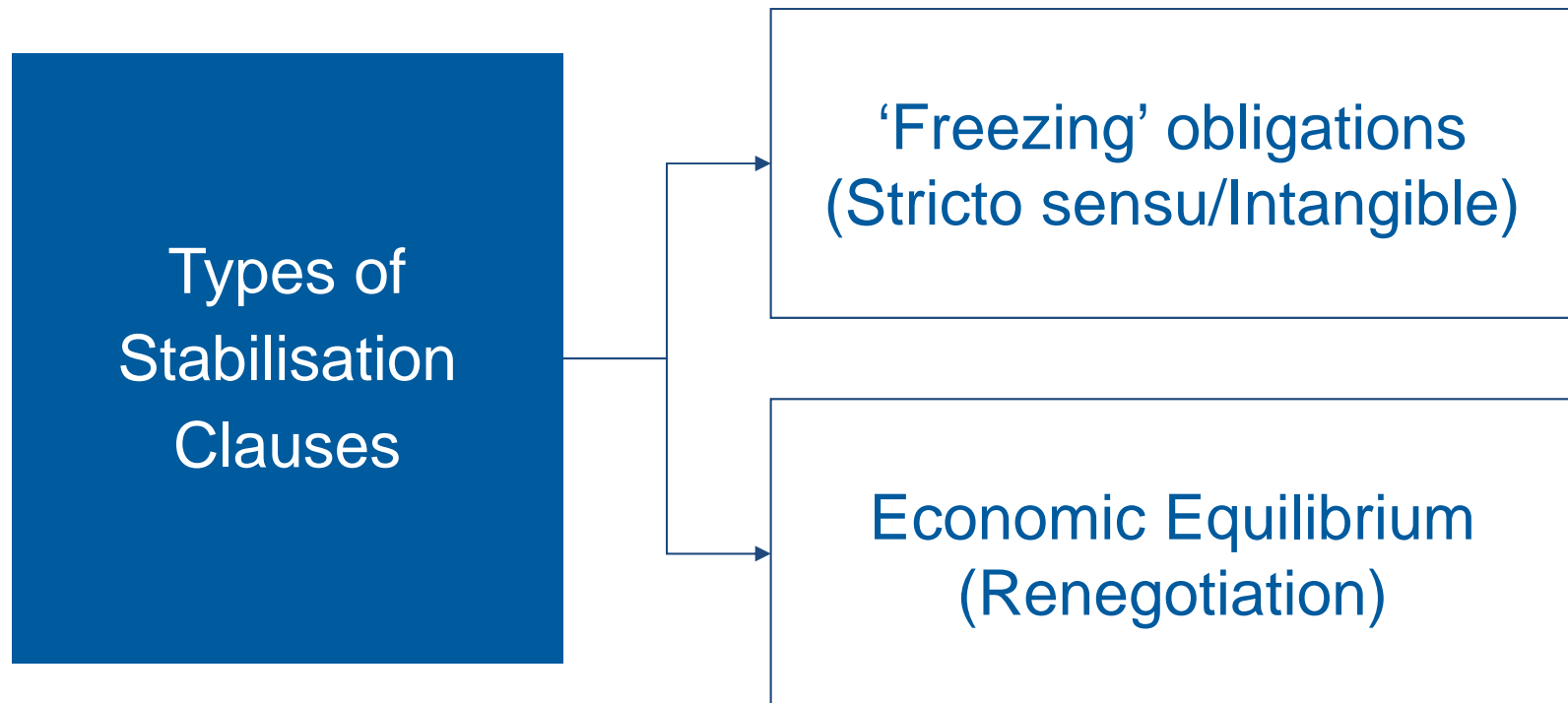
Sovereign Immunity

- A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State
- Execution and enforcement against ‘State property’
 - who benefits from immunity? SOEs?
 - what amounts to a State property?
 - local courts may refuse to take enforcement against State property
 - engages in a commercial transaction
- Waiver of sovereign immunity from suit/execution
 - effectiveness of an express contractual waiver
 - ‘United Nations Convention on Jurisdictional Immunities of States and Their Property’ (2004) (not yet in force)

Investment Protection

- Defences:
 - contractual remedies (stabilisation)
 - special legal stability agreements (GGU)
 - national investment laws
 - international investment treaties (BITs/MITs)
- Substantive protections in investment treaties:
 - national treatment
 - most-favoured-nation (MFN) treatment
 - fair and equitable (FET) treatment
 - adequate compensation for expropriation
 - dispute settlement
- Existing BITs/MITs
 - US-Vietnam TIFA (2007), BIT and TPP negotiations
 - ASEAN Comprehensive Investment Agreement (ACIA) (2009)
 - ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) (2009)

Stabilisation



Stabilisation

- Fiscal/contract stability - one of key defences
- Contractual assurances of negotiated terms to protect IOC's interest against unilateral State action
 - e.g. increased fiscal obligations or imposition of new taxes/royalties
- Highly sensitive area for investor-State relations
- Whether unilateral State action amounts to expropriation
- Multi-layered protection regime
- 'Economic rebalancing' provisions
 - payment of compensation
 - renegotiation/modification of contract terms
 - uncertainty on interpretation/trigger events
 - enforcement of 'MAC' clause largely untested
- Issues with Model PSC Article 18.1

Sovereign Guarantee

- GGU scope
 - legal and fiscal stability
 - payment obligations
 - performance obligations
 - currency risk
- Currency risk
 - denomination
 - convertibility
 - remittability
 - availability
- Vietnam's foreign exchange controls
- Implications of PM's Official Letter 1604/TTg-KTN



National Investment Laws

If a newly promulgated law or policy affects adversely the lawful benefits enjoyed by an investor prior to the date of effectiveness of such law or policy, the investor shall be guaranteed to enjoy the incentives provided for in the investment certificate or there shall be resolution by one or a number or all of the following methods:

- *continuation of enjoyment of benefits and incentives*
- *deduction of the loss from taxable income*
- *change of the operational objective of the project*
- *payment of compensation*

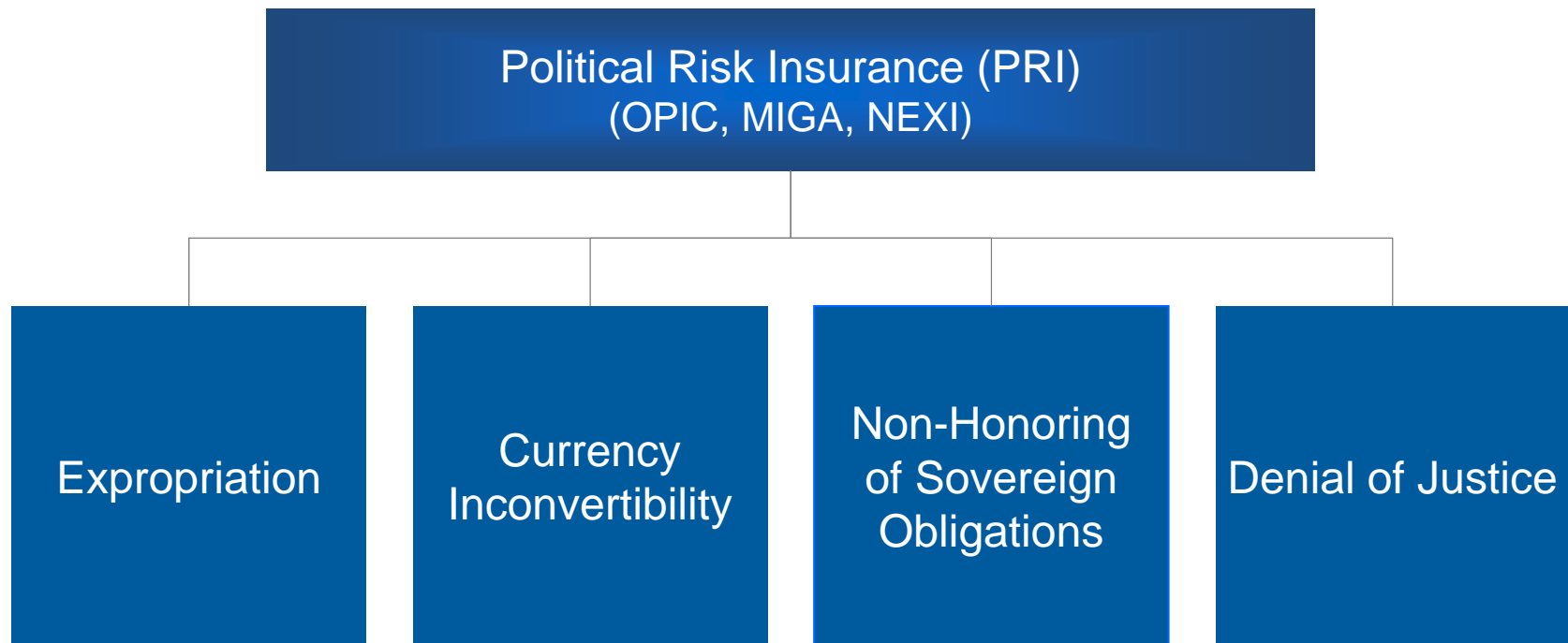
(Article 11.2 of the Investment Law)

National Investment Laws

The State of Vietnam protects ownership rights in respect of capital investment, assets and other legal rights of Vietnamese and foreign organizations and individuals conducting petroleum operations in Vietnam.

(Article 2 of the Petroleum Law)

Political Risk Insurance

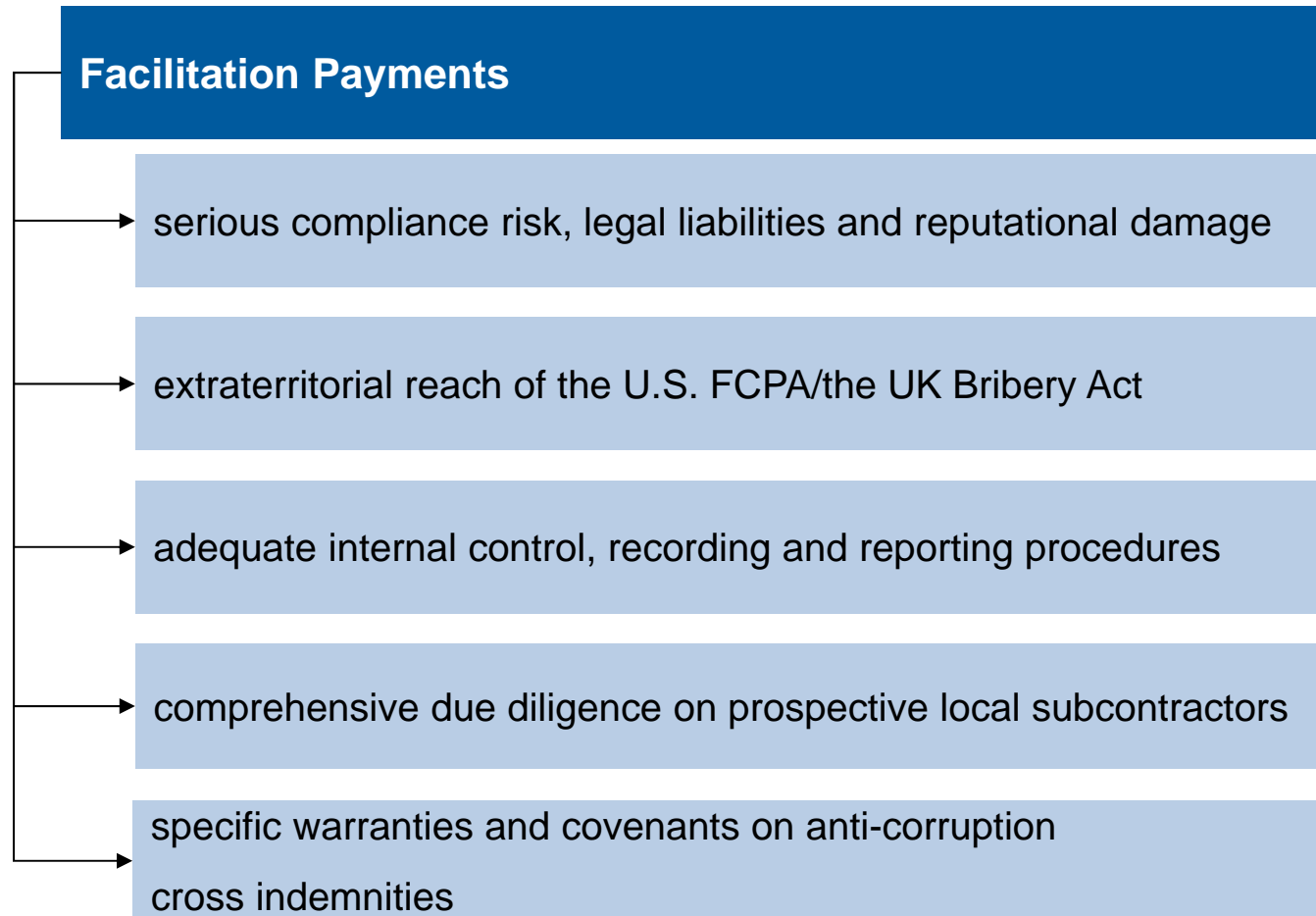


HSE Issues

- Environmental legislation
 - water pollution
 - air pollution
 - waste management (e.g. drilling mud)
- Environmental permits
 - undertaking
 - environmental impact assessments
- Environmental fee
- Indemnities and environmental insurance liabilities
- Climate change
 - Vietnam is a party to the Kyoto Protocol (entry into force on 16 Feb 2005)
- Safety management and emergency response plan



Ethical Issues



Liabilities and Indemnities

- Traditional MHH/KFK indemnity structure
 - ‘defend, indemnify and hold harmless’
 - unique to oil and gas industry
 - not an exclusion of liability
 - non-fault based
 - each party responsible for its own personnel, property and consequential loss irrespective of cause and supported by a contractual indemnity
 - extended to ‘Company Group’/ ‘Contractor Group’
- Contractor’s willful misconduct or gross negligence
- Third party liability
 - caused by contractor’s fault or negligence
 - liability cap on third party pollution damages (e.g. well blowout)
- Insurance strategies to manage legal and contractual liabilities

Dispute Resolution

- Governing law
- Arbitration vs local courts
- Tiered dispute resolution
 - negotiation
 - mediation
 - expert determination
 - arbitration
- International treaty claims



International Arbitration

- Arbitration agreement
- Institutional or ad hoc/neutral seat of arbitration
- Procedural rules
 - ICC, UNCITRAL
 - SIAC/HKIAC/KLRCA
 - LCIA/AAA
- Principles of public international law
- Joinder of disputes/court assistance
- Enforceability - New York Convention/Challenge of award
- ICSID jurisdiction
 - an international arbitration institution
 - investor-State investment disputes
 - automatic recognition and enforcement of monetary ICSID awards
 - Vietnam has not yet acceded to ICSID

Debt Finance

- Key bankability issues
 - availability and deliverability of reserves
 - adequacy and enforceability of rights under PSC
 - host country political risks and insurance
 - Operator performance failures
 - currency convertibility, repatriation, devaluation
 - decommissioning obligations
 - international boundary issues
- Lenders' legal due diligence
- Security
 - perfection and priority
 - security enforcement upon insolvency
 - assignment by way of security
- Direct agreement
- Limited sponsor support



Maritime Boundary Disputes

- Overlapping claims area/delimitation
- UNCLOS
 - sovereign rights
 - territorial sea
 - EEZ
 - continental shelf
- Multilateral approach
 - the 2002 ASEAN-China Declaration on the Conduct of Parties in the East Sea (non-binding)
 - toward a binding regional Code of Conduct
- Dispute resolution
 - ICJ, ITLOS or an arbitral tribunal constituted pursuant to UNCLOS
- Joint development
 - 1992 Malaysia-Vietnam JDA
 - JDA for disputed areas

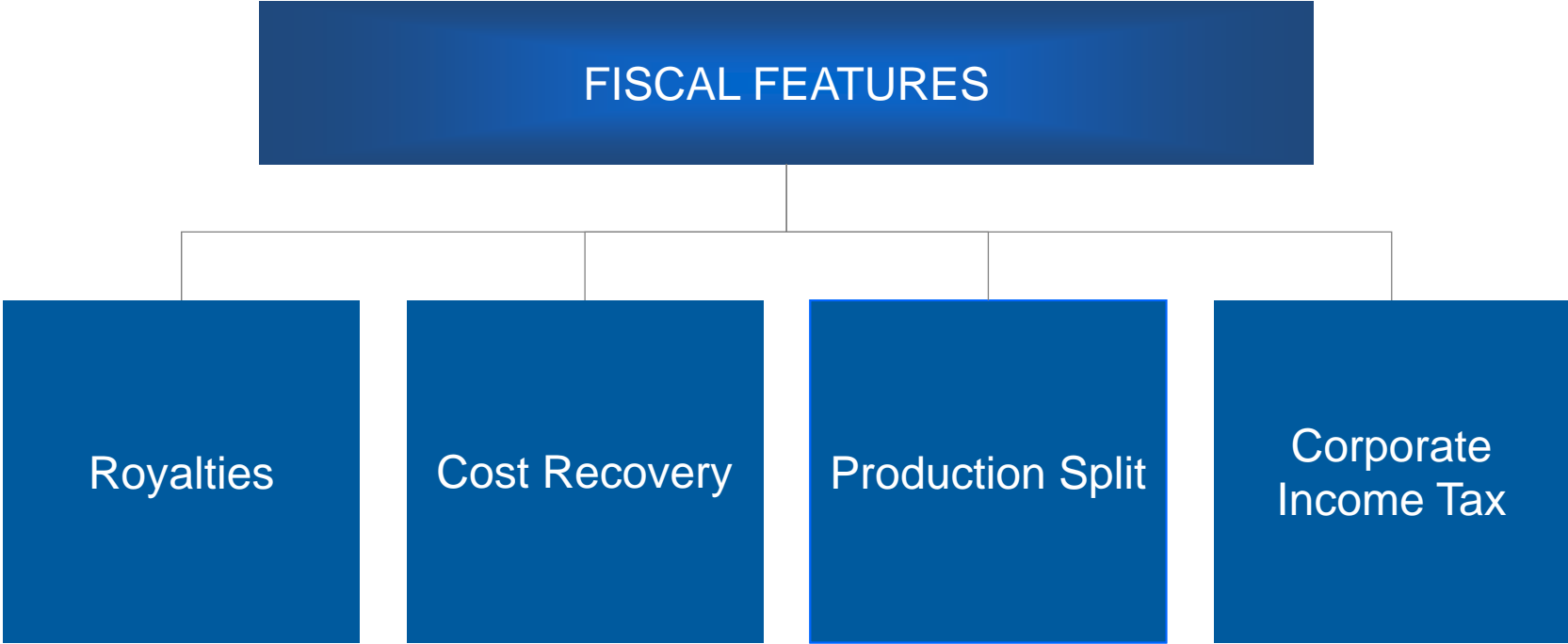
Section 3 - Model PSC

Model PSC

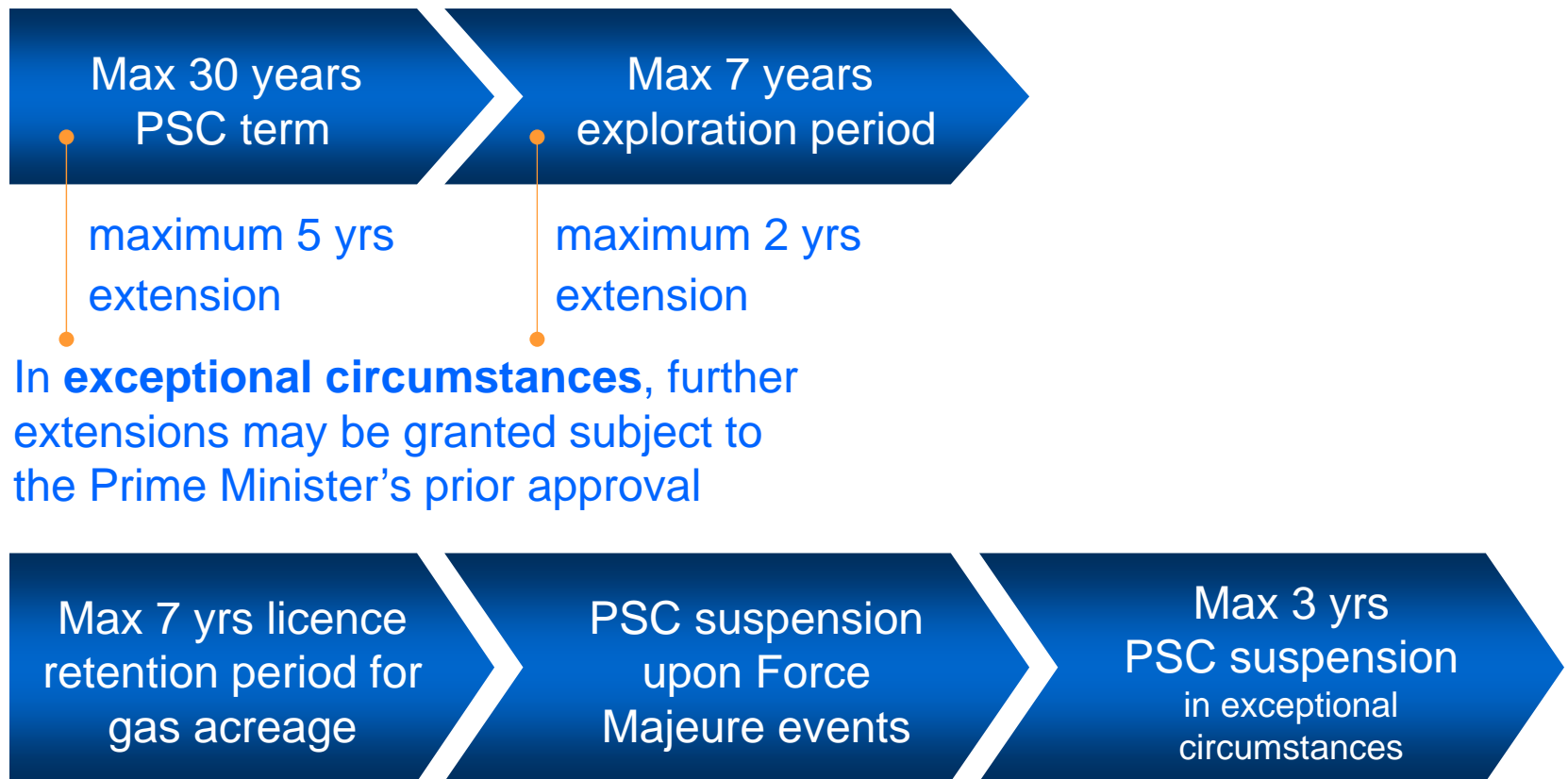
- PSC is not a transfer of a public law right to Contractor
- Contractor's contractual right to a share of petroleum produced
- Proposed changes to the Model PSC:
 - PM consent upon a change of control
 - PVN's pre-emption right
 - PCG provided to support a proposed farm-in
- Potential tax implications
- JOAs typically based on AIPN Model Form



Production Sharing Contract

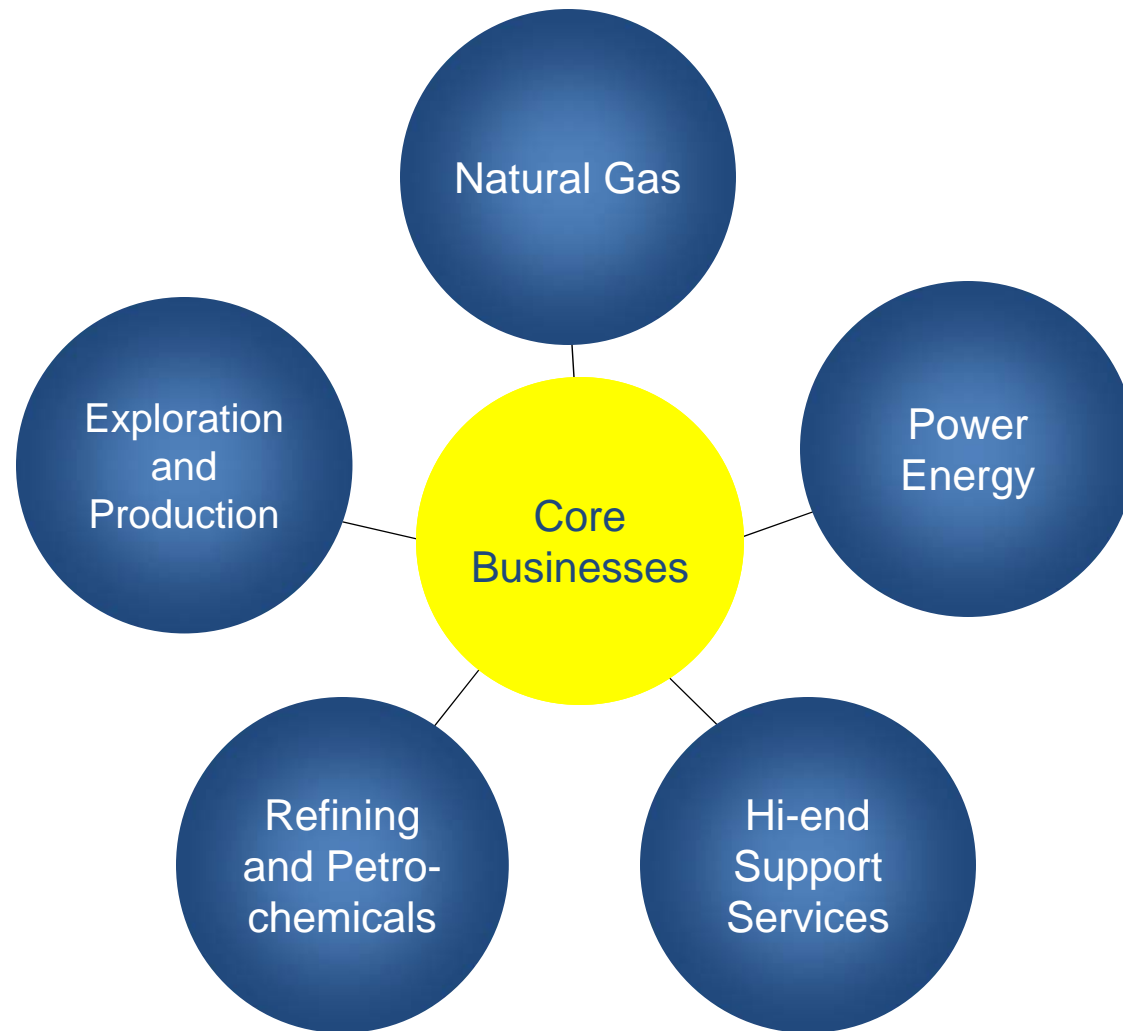


Key PSC Time Events



Section 4 - PVN's Restructuring

PVN's Proposed Restructuring



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