THE BUSINESS CONTEXT

- World class assets
- Physical security, health and safety
- Uncertainty
- Large capital investments
- Long wait for returns
- Downward pressure on share price
- Desire to renegotiate terms
- Strict force majeure language
THE QUESTIONS ASKED

- Who is in charge and who should we deal with?
- What will happen to our contracts?
- Can we still rely on investment protection treaties?
- What claims could we bring under investment treaties?

WHO IS IN CHARGE?

- Business negotiations with government/NOC ceased
- But uncertainty as to standing of NTC; foreign investors face delicate questions in dealing with insurgent factions
- Recognition of foreign governments is essentially political
- Legal effect of recognition may differ depending on forum
- UK position with regard to Libya and the NTC
  - 27 July 2011, UK Government recognised NTC as Government of Libya
  - 4 August 2011, UK Government allowed NTC Representative to act as ambassador of Libya to the UK
WHO CAN I DO BUSINESS WITH?

- UN Security Council Resolutions
- EU and US sanctions
- Unilateral sanctions
- Difficulties in application
  - preservation and security of assets
  - liabilities to local employees and secondees (e.g. wages)
  - liabilities to third party service providers (liabilities of IOC cf. liabilities of sanctioned operating company)

WHAT WILL HAPPEN TO OUR CONTRACTS?

- The standard view is that contracts signed with previous regimes bind future governments
- International law does not recognise a “doctrine of the new government”
  - Incoming governments cannot avoid contracts of predecessors
  - Efforts to persuade NTC to renegotiate
- Distinction between change in regime and state succession
  - The implications of state succession for private law rights are ambiguous
  - In the absence of an express agreement or declaration, full subrogation of contractual rights not widely admitted, but nor is complete repudiation common
CAN WE STILL RELY ON TREATY PROTECTION?

- Question as to continuing application of treaties
- Principal of continuity of states
  - Changes in the government or the international policy of a state do not as a rule affect its position in international law
- Distinction between “government succession” and “state succession”
  - In a case of government succession (Egypt) – treaty obligations continue to be binding
  - In a case of state succession (South Sudan) – treaty obligations continue to bind the predecessor (Sudan) but may not bind the successor state

POTENTIAL INVESTMENT TREATY CLAIMS

- Claim against state for acts (and omissions) attributable to the state
  - attribution of conduct of non-governmental actors
  - responsibility for omissions of State
- Full protection and security
  - due diligence standard
- Compensation for damage in event of civil unrest
  - benchmark for compensation for losses
  - national and most favoured nation standard
- Expropriation (including expropriation of contractual rights)
  - distinction between breach/termination and expropriation
Questions