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# **A playbook for international risk mitigation: investor-state treaties and contractual protections**

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# Introduction: rebalancing states and energy investors' interests?

## Recent changes in:

- Investment treaty protections
- State approaches to investor-state and international arbitration
- Resource nationalization

# What protections have cross-border energy investors traditionally relied upon?

- **Investment treaties:**
  - Bilateral Investment Treaties (BITs), of which Canada has 38 in force
  - Multilateral investment treaties (such as the ECT)
- **Direct Host Government Agreements (HGAs)**, often containing important contractual protections for investors
- **Political risk insurance**

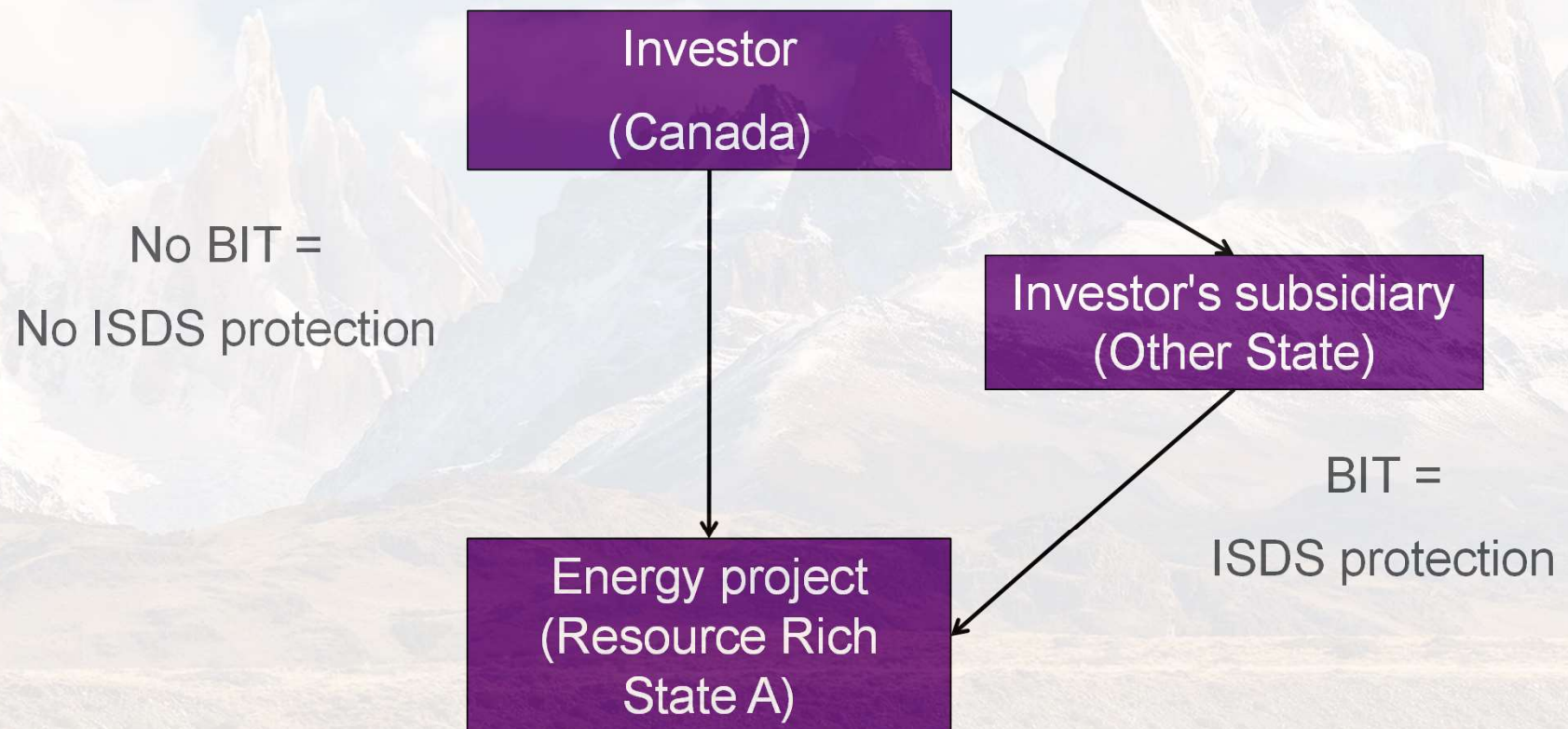
# What protections have cross-border energy investors traditionally relied upon?

Protections offered by treaties that may ground a claim include:

- National treatment
- Most favoured nation treatment
- Protection against expropriation without adequate compensation
- Fair and equitable treatment / minimum standard of treatment
- Full protection and security
- Free movement of capital in and out of the jurisdiction

Almost always have to be structured appropriately before a claim arises

## Structuring an energy investment: example of a *Canadian company investing in a concession*

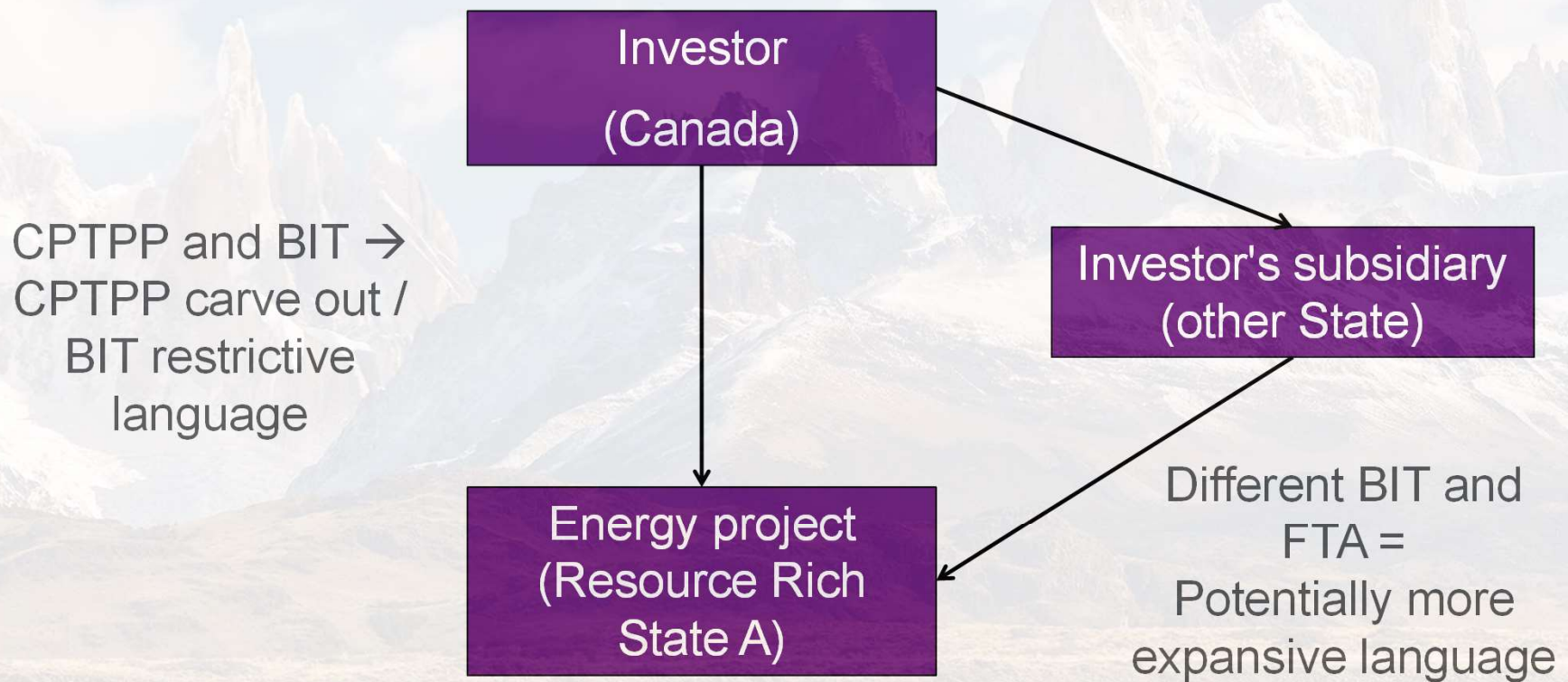


# Rebalancing states and energy investors' interests? Recent developments in Canada

## Modern treaties

- Canada-United States-Mexico Agreement (CUSMA)
  - No investment protection for Canadian entities
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
  - Investor and investment definition requirements, various side letters
- Canada's Model FIPA
  - New language around some protections
- Canada-European Comprehensive Economic and Trade Agreement (CETA)
  - Proposed investment court

## Structuring an energy investment: example of a *Canadian company investing in a concession*



# International developments and their impacts for Canadian investors

- Trend towards rebalancing rights and obligations similarly reflected in other States' BITs / FTAs, e.g. Netherlands Model BIT, with important structuring consequences.
- The Energy Charter Treaty (ECT)
  - The ECT – why is it relevant to Canadian investors?
  - The (stalled) modernization process
  - Successive withdrawals
  - What's next for energy investors in ECT states?
- End of intra-EU investor-state arbitration?
  - EU's position on investment disputes
  - Termination of intra-EU BITs
  - Conflicting decisions on enforcement of awards

# Strategic considerations for addressing disputes under investment treaties

- Key issues to consider:
  - Preserving government and local relationships?
  - Jurisdictional objections
  - Ancillary claims and counterclaims
  - Dispute funding?
  - Expert engagement
  - Timing of bringing a claim



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# Thank you

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