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**LAND DEAL
DILEMMAS:**

GRIEVANCES, HUMAN RIGHTS, AND INVESTOR PROTECTIONS

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EXECUTIVE SUMMARY

Land-based investments can create significant grievances for local individuals or communities, and host governments seeking to address those grievances must navigate a complicated landscape of legal obligations and pragmatic considerations. This report focuses on practical solutions for governments confronting grievances that arise from large-scale investments in agricultural or forestry projects.

These solutions are considered in the context of governments' legal obligations, particularly those imposed by international investment law, international human rights law, and investor-state contracts. Understanding the implications of legal obligations is particularly important in light of investors' growing recourse to international investment arbitration, which can expose a government to liability under an international investment treaty for actions that may be in the best interest of a country and its citizens. Indeed, governments have been sued under investment treaties for policy measures taken in response to public protests and petitions tied to investment projects. As a further complication, governments may be in breach of international human rights law when they permit, facilitate, or participate in investments that do not comply with legally protected human rights norms.

Apart from compliance with legal obligations, host governments and investors alike have good reasons to address "land grievances," which this report defines as concerns raised by local individuals or communities in response to the actual, perceived, or potential negative impacts of land-based investments. Land grievances often stem from serious impacts on lives and livelihoods. Given their severity, such grievances may trigger protests, legal cases, international advocacy campaigns, or violent conflict. Land grievances thus can increase operational costs and create reputational or legal risks for both the investor and the government. Addressing grievances as they arise can help mitigate, rather than exacerbate, their impacts.

This executive summary provides an overview of common land grievances, briefly describes governments' competing legal obligations that may constrain their actions vis-à-vis investors and those who are affected by investments, and summarizes various options that governments can take to address land grievances.

LAND GRIEVANCES

Land-based investments have given rise to scores of grievances around the world. While grievances are specific to the project and the community, certain issues are particularly likely to cause or exacerbate grievances in the context of such investments:

- › Displacement and related issues, such as: a lack of consultation or free, prior, and informed consent; a failure to provide sufficient (or any) compensation; forced evictions; and correlated negative impacts on livelihoods and wellbeing when displacement occurs;
- › Negative effects of projects on the environment or cultural sites;
- › Failure to realize expected or promised benefits from projects;
- › Violence, ranging from physical assaults to killings, as well as repression of protests and inappropriate detention or arrests; and
- › Corruption, non-compliance with legal requirements, or a lack of transparency.

Despite the strong reasons to address these and other grievances, however, government entities sometimes confront substantial obstacles in their pursuit of remedies. These include the frequent lack of clarity over the best solution; disagreements among government entities or opposition from an investor; and a complex web of legal obligations.

LEGAL FRAMEWORKS AND OBLIGATIONS

Legal obligations relevant to land-based investments can be found in international law, domestic law, and, when applicable, in investor-state contracts. With respect to international law, two bodies of law are especially relevant: international investment law and international human rights law.

International investment law, which arises from a network of more than 3,000 investment treaties, is a particularly powerful force regulating governments' treatment of foreign investors. Most investment treaties provide foreign investors with the right to sue their "host" governments in international investment arbitration. These treaties may be relevant even when not anticipated by a host government, as an investor can sometimes maneuver to gain protection of a treaty that would otherwise not apply. If an investment arbitration tribunal finds that the government violated the investment treaty, it typically orders the government to pay monetary damages to the investor, which may cover both past losses and lost future profits. Some awards have been for staggering sums. And even if a government ultimately prevails in an arbitration, it may expend significant time and resources in defending itself.

International investment treaties commonly impose a core set of obligations on governments. These include the obligations:

- › To not treat foreign investors less favorably than domestic investors (the national treatment" obligation) or less favorably than foreign investors from another country (the "most-favored nation" obligation);
- › To ensure any expropriation is both lawful and accompanied by payment of just compensation;
- › To provide foreign investors "fair and equitable treatment";
- › To provide foreign investors "full protection and security"; and
- › To adhere to any commitment entered into or owed to foreign investors (the "umbrella clause").

Each of these obligations has ramifications for governments' options for addressing land grievances. However, while understanding the risks that arise under investment treaties can help a government better assess its options, such risks should not dissuade a government from taking good faith actions designed to address land grievances or comply with its obligations under human rights law.

These human rights obligations will often create countervailing pressures for governments in the context of land-based investments. Like investment treaties, human rights treaties provide mechanisms for those whose rights are violated to seek redress from governments.

Governments have three types of obligations related to human rights: to respect human rights (by refraining from violating them), to protect human rights (by preventing third parties from violating them), and to fulfill human rights (by taking steps, when applicable, to progressively realize them). The human rights most commonly affected by land-based investments include:

- › The right to free, prior, and informed consent for indigenous peoples;
- › The right to property;
- › The right to housing and the prohibition of forced eviction;
- › The rights to food, water, health, and a healthy environment;

- › The rights to peaceful assembly and freedom of expression;
- › The right to liberty and security of person (including the prohibition of arbitrary arrest or detention), and the right not to be deprived arbitrarily of one's life; and
- › Rights related to labor and employment, such as the right to form trade unions and the right to just and favorable conditions of work.

In addition to international law, domestic laws and regulations are also relevant for host governments seeking to take action on land grievances. These domestic legal frameworks shape how land-based investments are undertaken and regulated, providing processes and rules to be followed. One distinction from international law is that domestic law frequently creates legal obligations for investors, rather than just for governments.

In countries where the government sells, leases, or otherwise grants an investor access to land for agricultural or forestry projects, legal obligations may also arise from the investor-state contracts entered into between the government and the investor. Among other obligations for both governments and investors, these contracts occasionally include a stabilization clause limiting the ability of the government to change laws or policies that would negatively affect the project, or requiring compensation in such cases. These contracts also frequently provide for arbitration under the same or similar rules that govern arbitration arising from investment treaties. While only an investor can bring a claim for breach of an investment treaty obligation, either the investor or the government can bring a claim in domestic courts or under commercial arbitration for breach of a contractual obligation, depending on the contract's dispute resolution provisions.

INTERACTION BETWEEN LEGAL OBLIGATIONS

Governments' obligations under these different legal frameworks and agreements interact in various and complex ways. They may, at times, also conflict.

Investor-state contracts, for example, are generally subordinate to domestic law. However, a stabilization clause in a contract may seek to shield the investor from having to comply with or incur the costs of changes in the domestic law. This may be acceptable in some jurisdictions, but may be unenforceable in others. Yet even if a domestic court deemed a stabilization clause invalid, an investment arbitration tribunal may adopt a different view, enforcing it under the umbrella clause and/or fair and equitable treatment obligation. (And even in the absence of a stabilization clause, some investment arbitration tribunals have determined that promises of legal stability can be implied in certain circumstances.)

An investment treaty can potentially protect an entire investor-state contract (or provisions in that contract) that might otherwise be illegal or unenforceable under domestic law—for example, if the government entity that signed the contract did not have the authority to do so under domestic law. Moreover, investment treaties have been interpreted in a way that effectively

creates new property rights that might not exist under domestic law; through the fair and equitable treatment standard, some investment arbitration tribunals have determined that investors' rights and mere "legitimate expectations" are protected against subsequent government interference, essentially turning these expectations into enforceable property rights.

Investor-state contracts and international investment law can also interact with international human rights law to create potentially conflicting obligations for host governments. For example, an investor-state contract granting a concession that would displace land users and violate their rights to food or housing would place the government's human rights obligations in conflict with its contractual obligations. Similarly, a broadly framed stabilization clause in an investor-state contract may be in tension with a government's human rights obligations to the extent that the clause limits the applicability to the underlying investment project of new laws or policies necessary to respect, protect, or fulfill human rights. An applicable investment treaty can create additional tensions between the government's obligations under the investment treaty and under relevant human rights treaties. To date, international courts and tribunals have not provided much assistance in resolving potential conflicts between treaty obligations, tending either to avoid finding that a conflict exists or to resolve a dispute based only on one set of legal obligations.

In some situations, a government's legal obligations are not easy to reconcile. Thus, governments seeking to redress land grievances should take into account the full range of their legal obligations, and how such obligations may reinforce or conflict with each other, as they consider the options at their disposal.

SPECIFIC OPTIONS FOR ADDRESSING GRIEVANCES

A government that hosts land-based investments may need to address distinct land grievances that have been triggered by a particular investment or investor. The following options are actions that a host government can take to do so; each has its own set of advantages, risks, and accompanying considerations.

REQUESTING INVESTOR ACTION

A government can ask an investor to modify its actual or planned operations to help address related grievances. When the investor is exercising rights given to it under a contract, license, or other authorization, such a request would be for voluntary action, but there are pragmatic reasons why an investor might comply. This type of request is likely permissible under international investment law, although investment arbitration tribunals have found governments liable for efforts to force or pressure investors into giving up their contractual rights. This strategy thus depends on agreement by the investor.

SHAPING OR RESHAPING CONCESSION BOUNDARIES

In limited contexts, a government may be bound by an investor-state contract that does not explicitly delineate the specific boundaries of

the land the investor will use. This opens up the possibility that the government can "shape" concession boundaries to minimize negative impacts on local communities and thus reduce grievances. Additionally, even when the concession boundaries have already been established, a government may seek to "reshape" the boundaries to address grievances over land allocation. This may require a full renegotiation of the investor-state contract, or could be documented through a side letter or a simple amendment to the contract. Efforts to shape or reshape boundaries should be undertaken in consultation with, and with the consent of, potentially affected individuals or communities. As with the option to request investor action, international investment law may constrain a government's ability to seek renegotiation, while overuse of this strategy may also create reputational risks.

FACILITATING DISPUTE RESOLUTION PROCESSES FOR AFFECTED INDIVIDUALS OR COMMUNITIES

A government can facilitate a range of efforts to resolve disputes, including through establishing, supporting, or helping affected individuals or communities to access dispute resolution processes. These include local courts and tribunals, as well as "non-judicial" mechanisms, which are not meant to replace domestic courts, but can provide additional ways to address concerns. While such processes come in many forms, four types are particularly relevant for land grievances: non-judicial public institutions; government-supported mediation and facilitation between communities and investors; project-level grievance mechanisms established by the investor, either voluntarily or in compliance with government requirements; and external grievance mechanisms, such as those provided by certification schemes or development finance institutions. While dispute resolution processes can help minimize conflict and foster solutions, they can also compound conflicts and grievances when not designed and implemented according to best practices.

RESTITUTING PROPERTY TO DISPLACED INDIVIDUALS OR COMMUNITIES

Grievances flowing from land-based investments are often related to displacement from land; in some cases, restitution of property to those who were displaced may be the best way to address grievances and comply with human rights obligations. However, restitution of land already allocated to an investor may not always be possible (for instance, if it has been irreversibly damaged), or may not be deemed appropriate (for example, when the land was considered to have been expropriated for a public purpose). Restitution of land previously given to an investor may also raise risks related to a government's legal obligations under a contract or an applicable investment treaty. A government seeking to take land from an investor and return it to displaced individuals or communities should thus first determine whether the investor has valid rights to the land, and, if so, follow requirements set by domestic and international law regarding expropriation of property.

COMPENSATING AFFECTED INDIVIDUALS OR COMMUNITIES

Compensating individuals or communities that have been or will be negatively affected by a land-based investment is another option for addressing land grievances. While compensation is often an insufficient remedy, at times it may be the most appropriate option available. When provided, compensation—which can include the provision of land, goods, services, and/or money—should be determined in consultation with those affected, and should seek to restore project-affected individuals or communities to a position that is as favorable as, or more favorable than, their position before the harm causing the grievance occurred. Where a community remains on the land and the grievance concerns future impacts of an investment, compensation will be less appropriate, unless the community has provided its free, prior, and informed consent. A government otherwise seeking to “resettle and compensate” may violate its legal obligations under human rights law, or risk inflaming community discontent that could lead to disruption of the investment project or other negative outcomes.

RENEGOTIATING WITH THE INVESTOR

When land grievances arise from the legal terms of the investor-state contract or the scope of the investor’s rights and obligations under that contract, a government might explore renegotiation of the investor-state contract. Renegotiations can be challenging, however, particularly if an investor is unwilling to give up rights previously secured or to take on new obligations. Efforts to understand the investor’s strategy and culture can be helpful for assessing whether it might agree to a renegotiation request. If a government tries to exercise political pressure and takes or threatens sovereign action to force renegotiation, however, this can raise the risk of liability under a contract or investment treaty. Because of this risk, a government seeking to renegotiate should try to do so using only the weight that a normal contracting party would use.

TERMINATING AN INVESTOR-STATE CONTRACT

Another option for addressing land grievances related to an investor-state contract is to terminate the contract. Typically, the terms of the contract and domestic law will specify the grounds on which one or both parties may or must terminate the contract, as well as any related remedies. Even if a government has concluded that it has valid rights to terminate the contract, the investor may nevertheless seek to challenge the termination through domestic courts, commercial arbitration, or investment arbitration. In addition, a government may occasionally decide that contract termination is in its best interests even when not permitted; in such a case, it may simply plan to terminate and then pay compensation and/or face legal actions.

REVOKING OR TERMINATING AUTHORIZATIONS NECESSARY FOR INVESTOR OPERATIONS

Similarly to terminating a contract, a government may decide to address land grievances in certain cases by revoking or terminating existing permits or other authorizations that are necessary for investor operations. While revoking authorizations can benefit a government and communities in some situations—for example, if the revocation was due to harms caused by the investor—such an action may pose legal, economic, and political challenges. At the domestic level, it may prompt negative reactions from stakeholders affected by the action. At the international level, a foreign investor’s home state may use diplomatic channels to seek reversal of the decision, or the investor may challenge it under an international investment treaty or the investor-state contract. If government officials complied with substantive and procedural legal requirements, revocations are more difficult to challenge. However, neither good faith nor compliance with domestic law will necessarily immunize permit revocations from successful challenges under investment treaties.

GENERAL OPTIONS FOR ADDRESSING GRIEVANCES

Host governments may also seek to improve their overarching approach to addressing land grievances by implementing more systemic change or by minimizing their general liability under investment treaties. Taking proactive and general steps can be advantageous at times, and a host government concerned about protecting its citizens from the negative impacts of investments may wish to consider the below steps either before or after problems arise.

DEVELOPING A NATIONAL STRATEGY FOR LEGAL AND POLICY REFORM

Land grievances will often center on issues that require comprehensive solutions, such as through law or policy reform. A government may develop a national strategy for reforming laws or policies to better protect against the negative impacts of investments or other business operations. National Action Plans on business and human rights (“NAPs”) are one example of a national policy strategy that can be undertaken. NAPs do not have any legal force, but are intended to guide legal and policy reform. They also can improve coordination among government departments, enhancing the government’s ability to regulate investments. In addition, the process of developing a national policy strategy may potentially help a government avoid or succeed in an investment dispute, by assisting the government in establishing that its reforms were reasonable, legitimate, and considered.

ADOPTING CHANGES IN THE LAW

Grievances regarding land-based investments may arise because of inadequate domestic laws that create, exacerbate, or fail to protect against harms. If so, changes to the legal framework, including to the constitution, to laws, or to regulations or administrative policies, may help to holistically address concerns. However, in addition to opposition from certain stakeholders and associated political hurdles, these changes may face legal challenges regarding their consistency with other legal norms and obligations. Contractual stabilization clauses and international investment treaties are two such potential sources of conflict: an investor benefiting from a stabilization clause may either be freed from, or be entitled to compensation for the costs of, having to comply with changes in the law, while an investment arbitration tribunal may find that promises of stability in the legal framework can be inferred even in the absence of such a clause.

REQUESTING AN ADVISORY OPINION FROM A HUMAN RIGHTS TRIBUNAL

A host government under the jurisdiction of either the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights could seek an advisory opinion on complying with its human rights obligations in the context of other legal obligations, such as those contained in international investment treaties. Advisory opinions are not binding, but their persuasive character render them important sources for clarifying international legal rights and corresponding government obligations. While an advisory opinion would generally focus on overarching issues, rather than on specific investments or grievances, and would not be binding on an investment arbitration tribunal, the existence of one may give pause to investors contemplating a claim.

INTERPRETING INVESTMENT TREATIES

A host government may wish to assess how its investment treaty obligations would be interpreted in any future disputes brought before an investment arbitration tribunal. Although a government cannot unilaterally change these obligations (except by pulling out of a treaty altogether), it can take steps to assist future tribunals in interpreting such obligations. Two mechanisms for doing so are through establishing “subsequent agreement” and “subsequent practice” on the meaning of its treaties. This includes using inter-state agreements and domestic practices to demonstrate its understanding of investment treaty obligations. Although subsequent agreements and subsequent practice do not generally bind tribunals, they provide governments with an important opportunity to help shape the interpretations given to a treaty. Taking such steps thus might be useful for governments that anticipate potential problems related to land-based investments,

and are concerned that their investment treaty obligations might be interpreted in a way that they do not intend.

DECLINING TO CONCLUDE NEW TREATIES, AND TERMINATING OR NOT RENEWING EXISTING TREATIES

Some governments concerned about the implications of international investment treaties on their ability to address land grievances may decide to review their treaty policies, place moratoria on the negotiation of new investment treaties, or terminate existing treaties. These actions can help reduce exposure to claims and liabilities for conduct that affects the rights or expectations of foreign investors. These strategies may not necessarily eliminate the costs of those treaties, however. For instance, even when an investment treaty has been terminated, it may have a survival clause that keeps it and its investment arbitration provisions in force for a set period of time. And even if a government decides not to conclude new treaties, it will still remain vulnerable to claims and liability under existing ones. This may be a significant limitation, given the ability of investors to structure their investments in order to gain protection of other investment treaties.

MOVING FORWARD

Dealing with grievances related to land-based investments can be complicated for host governments. The investor and project-affected communities will often have opposing perspectives on how to resolve grievances. Moreover, the complex web of legal obligations that bind a government can constrain its options, rendering it difficult to achieve optimal solutions in all cases.

In spite of these complications, host governments have at their disposal a range of options to address land grievances. Not all options are suitable for every situation, and some entail risks. The risk of doing nothing, however, will often be greater—for governments, investors, and affected individuals and communities.



INTRODUCTION

Governments that host foreign investments in agriculture or forestry often encounter grievances from persons adversely affected by such investments. While many governments regard land-based investments as potential vehicles for accelerating national development, governments are also finding it increasingly difficult to ignore the significant concerns raised by local individuals and communities. Yet seeking to mitigate the adverse effects of existing investments and address related grievances can place governments in confrontation with investors that are not open to altering their operations.

Such situations can be particularly precarious for governments that have signed international investment treaties providing investor protections. In this context, making a decision that is in the best interest of the country and its citizens may expose a government to potential liability under an investment treaty, and can lead to costly investor-state arbitration (also known as “investor-state dispute settlement” (ISDS)). Indeed, governments have been sued under investment treaties for policy measures taken in response to public protests and petitions tied to investment projects. As a further complication, governments may be in breach of international human rights law when they permit, facilitate, or participate in investments that do not comply with legally protected human rights norms.

On a pragmatic level, host governments and investors both have good reasons to address “land grievances,” which this report defines as concerns raised by local individuals or communities in response to the actual, perceived, or potential negative impacts of land-based investments. Land grievances can lead to conflict, increased operational costs, and reputational risks for both the investor and the government. They can also threaten the stability of the investment itself, leading to the risk that the expected benefits of the investment will not materialize.

There are various steps that host governments can take to address land grievances, but little guidance exists for doing so. Rather, more focus has been placed on the *ex ante* best practices that should be followed before investments are made. While there is no substitute for ensuring at the outset that investments are responsible and sustainable, the knowledge gap regarding what to do once investments have been undertaken is particularly concerning given the number of land deals that have been concluded since the turn of the twenty-first century¹ and the growing willingness of investors to have recourse to investor-state arbitration.² As host governments are increasingly encouraged to ensure

that land-based investments are responsible, they will more frequently confront the thorny question of how to deal with problems stemming from existing investments, particularly in light of their legal obligations.

This report provides practical solutions for host governments that have already granted or facilitated large-scale land-based investments for agricultural or forestry projects,³ and that subsequently seek to address land grievances arising from them. In particular, it aims to assist governments to resolve such grievances pragmatically while also fulfilling their legal obligations under human rights law and minimizing potential liability under international investment law and investor-state contracts. The report may also be of interest to other stakeholders; these include: bilateral aid agencies and multilateral organizations interested in sustainable investments, civil society groups and communities advocating for better protection of their rights, investors striving to resolve grievances and align with best practices, lawyers working with any of these stakeholders, arbitrators seeking to understand the wider context of investment disputes, and researchers focused on land-based investments.

The report is based on legal research, a survey of reported grievances arising from agricultural or forestry projects, and expert interviews.⁴ Part I provides an overview of land-based investments and the grievances that arise from them. Part II explores governments’ competing obligations under different legal frameworks that may constrain or influence their actions toward investors and those affected by investments: in particular, obligations arising from investment law, human rights law, and investor-state contracts. Part III describes various options that governments can take to address land grievances. These are grouped into two categories: specific actions to address distinct grievances related to a particular investment, and general steps to implement more systemic change or minimize potential liability under investment treaties more broadly.⁵



PART I. CONTEXT

LAND-BASED INVESTMENTS AND ASSOCIATED GRIEVANCES

Large-scale land-based investments for agricultural or forestry projects have been of sustained interest to a number of host governments, as well as investors. This is by no means a new phenomenon; some agricultural concession agreements still in operation in Liberia, for example, were signed in the 1950s. Yet a noticeable increase in international investments since the mid-2000s, and particularly after the 2007-2008 food price crisis, has led to what academics and advocates alike have described as a “global land rush.” Investors have been interested in such transactions primarily for commercial motives, although at times have been driven by other reasons, such as food security concerns. Certain governments, particularly in low- and middle-income countries, have sought such investment in order to increase capital flows, create jobs, enable technology transfer, or catalyze more productive agricultural operations.

Evidence suggests that the scale of these land-based investments is not as high as frequently described,⁶ and that their pace has slowed in recent years.⁷ Nuances have also been lost in reporting around these investments: the role of national investors and medium-scale investments, for example, has often been overlooked in favor of the international and the large-scale. Moreover, given the difficulties inherent in agricultural projects, some investments made during the past decade have already failed, while many others have never been implemented.

Whether the pace of land-based investments will pick up again is unclear, although the factors that drove previous interest continue to be in play. Growing populations with more resource-intensive diets and lifestyles, as well as the impact of climate variability on agricultural yields, will continue to exert demand for crops that provide food, fuel, and other products. Private sector interest (both international and domestic) persists, and some host governments continue to tout the agricultural sector as a prime investment opportunity. Land, and the water that comes with it to make it arable,⁸ are finite resources in a planet with a growing appetite.

Regardless of overall future prospects either at a global scale or in any specific country, many land-based investments have already been undertaken. Governments that host significant investment thus face the challenge of ensuring that expected benefits materialize while also addressing any negative consequences that occur. The choices they make to do so may, at times, render it difficult to comply with their relevant legal obligations, as this report explains. Part I provides context for the report by describing the grievances that can arise from land-based investments, the benefits for both governments and investors of addressing such grievances, and the difficulties that governments may encounter in doing so.

LAND GRIEVANCES

Land-based investments have given rise to scores of grievances around the world.⁹ The reasons for such grievances are varied, ranging from the failure of promised benefits to materialize to forced evictions, violence, and even killings. They have arisen when the transferred land was provided by the government, as well as when land was provided by the community or individuals. Grievances also emerge at various stages of the project cycle, from before a project has been implemented to after a project has ended. While land grievances are specific to the project and the community, the authors' review of 40 cases of grievances arising from agricultural or forestry projects, as well as interviews conducted with lawyers and advocates, provides insight into common types of grievances related to land-based investments, as well as various measures that governments, investors, and communities have taken in response.

DISPLACEMENT AND RELATED GRIEVANCES

Displacement from land, along with related issues, represents one of the most common grievances arising from land-based investments. This includes displacement from land on which individuals were living, as well as from land on which individuals had relied for farming, gathering of resources (such as for food, medicine, or building materials), or other activities upon which livelihoods depended. It covers physical displacement, for example, relocation, as well as economic displacement, such as losing access to assets necessary for livelihoods.¹⁰ Related issues include a lack of consultation or free, prior, and informed consent before displacement; a failure to provide sufficient (or any) compensation for such displacement; and forced evictions.

Given the significance of land for many people from an economic, social, political, cultural, and sometimes spiritual perspective, it is not

surprising that displacement from land constitutes a key grievance tied to land-based investments. While governments may consider certain land to be “available” for investment, this designation does not mean that the land is not used or relied on by communities and individuals, as evidenced by the resettlement provisions included in some investor-state contracts. And while much has been made of “underutilized” land ready for investment, research has shown that investments are likely to be made on densely or moderately populated and accessible land, including croplands, rangelands, and fallow agricultural land.¹²

Physical displacement due to a government's provision of land to an investor is sometimes accompanied by allegations of forced evictions, often without consent, consultation, or adequate compensation. The numbers can be staggering, with investments sometimes displacing thousands of individuals.¹³

The provision of land directly by communities or individuals, rather than the government, may also lead to grievances linked to the resulting displacement. An agreement reached between an investor and a community leader, for example, may not have been representative of all community members' interests. Some individuals, meanwhile, have claimed that they were intimidated into providing investors with rights to use their land, or had not properly understood the agreement they reached with an investor. And even when individuals have willingly provided land, they may subsequently regret this upon realizing that the payment or benefits they received were insufficient to compensate for the land they have given up. This, too, can engender grievances.

Other grievances linked to displacement from land or resources relate to the correlated negative impacts when such displacement occurs. Particularly when compensation is not adequate, displacement disrupts livelihoods and has a serious impact on wellbeing. Among other effects, such disruption can reduce food security for displaced individuals. Displacement may also decrease access to services, either physically or economically, with displaced individuals noting negative impacts on education and health. Even when displacement is accompanied by adequate compensation and access to services, it can disrupt social networks and patterns in ways that negatively affect displaced individuals and their communities.

BOX 1: INTERNATIONAL INVESTMENT VERSUS DOMESTIC INVESTMENT: A FALSE DICHOTOMY?

This report focuses primarily on foreign investments, as international investment treaties that protect foreign investors raise important considerations for governments seeking to address land grievances. However, many of the same issues and options are relevant in the case of domestic investments. Regardless of whether an investment is foreign or domestic, governments are still bound by a range of legal obligations arising from international human rights law, domestic law, and, when applicable, investor-state contracts. In instances where domestic investments give rise to land grievances, governments will still want to address them, including by using the solutions described in this report.

The lines between domestic investment and international investment are often blurred. Many international investors incorporate an entity in the jurisdiction in which they are investing in order to receive various benefits or meet certain requirements. A company that does this can likely still be considered a foreign investor for the purposes of any dispute related to the investment.¹¹ At the same time, domestic investors have in some cases managed to obtain investment treaty protection meant for foreign investors by establishing a corporate entity in a foreign country and then routing their investments through that entity and back to the host country.

BOX 2: MAJOR GAPS IN THE RECOGNITION OF COMMUNITY LAND

Many people are particularly vulnerable to displacement due to the limited formal recognition of community land across the globe. Researchers estimate that communities “hold as much as 65 percent of the world's land area through customary, community-based tenure systems,” but that “governments only recognize formal, legal rights of Indigenous Peoples and local communities to a fraction of these lands.”¹⁴ While some governments have begun to take steps to increase formal recognition of community land, the current gaps have likely facilitated the granting of concessions that cause individuals and communities to be displaced from the land and resources on which they rely.¹⁵ Moreover, adequate compensation for physical or economic displacement from communal land or resources may be less likely when the land has not been formally recognized by the government.¹⁶

NEGATIVE EFFECTS ON THE ENVIRONMENT OR CULTURAL SITES

Closely tied to displacement is the impact that investment operations may have on the environment or on cultural sites. Investment projects may harm the environment by their very design—for example, multiple communities have raised grievances related to the destruction of forests for palm oil projects—or as a result of inattention to environmental impacts and failure to mitigate related risks. Pollution or diversion of water resources is a particularly concerning impact, with some grievances stemming from a lack of safe drinking water due to an investment. Grievances also can arise when cultural sites, such as ancestral graves, are destroyed, or when access is restricted due to project operations.

FAILURE TO REALIZE BENEFITS FROM PROJECTS

Another recurrent set of grievances relates to project-affected individuals' or communities' belief that they have not received appropriate benefits from the project, or the benefits that had been promised. Some common benefits that communities expect relate to jobs, local infrastructure, provision of education or electricity, or local content, such as commitments to purchase certain supplies or services from the local community. These benefits may have been described by the government or by the investor. They are sometimes noted in a document, such as a Memorandum of Understanding, signed with the community or with individuals. More frequently, they may have been discussed orally. In places where oral contracts are a traditional way to make an agreement, grievances may be particularly high when oral promises are not fulfilled, leaving community members to feel they have been deceived.¹⁷

Grievances about jobs are two-fold. The first concern is often that there are simply not as many jobs as had been promised, or as may be needed to offset the loss of livelihoods resulting from the investment. In some cases, jobs are provided to workers from outside of the community, which may give rise to grievances when local communities expected to benefit from such jobs. In other cases, jobs may be provided to some subset of local workers to the detriment of others. The second concern relates to working conditions, as well as wages. Workers may find that the jobs that have materialized are not satisfactory—the wages may not be adequate to meet their needs, the hours may be difficult to combine with their own farming efforts, or the working conditions may be harsh, without the shoes, safety equipment, or other materials that were promised or are necessary.

VIOLENCE AND OTHER INFRINGEMENTS ON CIVIL AND POLITICAL RIGHTS

In some places, land-based investments have been associated with violence, ranging from physical assaults to killings. This may be coupled with intimidation, as well as other infringements on civil and political rights, including repression of protests and inappropriate detentions or arrests. These acts, which provoke grievances from individuals or communities, are often reactions to the expression of grievances. They are part of a downward spiral, whereby investments create grievances, individuals or communities raise these grievances through protest or other action, the investor or the government takes steps to clamp down on the resulting actions through arrests or violence, and these steps provoke even greater grievances on the part of the affected individuals or communities. At the most extreme, this negatively reinforcing

BOX 3: WHAT ABOUT ILLEGAL OR INVALID CONCESSIONS?

Concerns have been raised in multiple countries that certain land-based investments and their governing agreements fail to comply with domestic legal requirements. For example, in Cambodia, government officials have granted economic land concessions that have not met requisite pre-conditions, that exceed legal size limits, or that otherwise run contrary to applicable laws.¹⁸ In Papua New Guinea, a Commission of Inquiry investigating Special Agriculture & Business Leases found that multiple leases failed to comply with statutory requirements, and ultimately recommended replacing the entire system of leases due to serious abuses.¹⁹ When government entities have granted concessions that do not meet all legal requirements or that are otherwise invalid, another government entity—from the executive, legislative, or judicial branch—might subsequently determine that the concession is invalid under domestic law, and may cancel or modify it. While such steps can assist in ensuring compliance under domestic law, an investor might then raise a claim that such cancellation or modification breaches the government's obligations under an investment treaty.

cycle can lead to violence on both ends—from disaffected community members and from the investor, the government, or security forces controlled by either—and can result in a tragic loss of life,²⁰ including of innocent bystanders.²¹

ILLEGALITY, CORRUPTION, AND LACK OF TRANSPARENCY

Yet another set of grievances arising from land-based investments relate to concerns about whether an investment complies with relevant legal requirements, whether the investment was tainted by corruption or conflicts of interest, and the level of transparency around the investment. These issues may not be the proximate cause of concerns related to an investment—individuals or communities are more likely to first take issue with an investment because of the direct negative impacts on their lives—but they can engender significant additional frustration about a project. These issues may also be raised in advocacy against the investment, or in legal actions or non-judicial complaints procedures.

BENEFITS OF ADDRESSING LAND GRIEVANCES

Host governments and investors alike have good reasons to address grievances related to land-based investments. Land grievances often stem from serious impacts on lives and livelihoods. Given their significant implications, such grievances have triggered a number of actions by individuals and communities, including protests, legal cases, and international advocacy campaigns. In some cases, land grievances have also led to the destruction of property or have instigated violent conflict. These responses to grievances create risks for both the investor and the government that point to the practical benefits of addressing grievances as they arise in order to mitigate, rather than exacerbate, their impacts.

Indeed, while some host governments, or entities within host governments, may be driven to address grievances by genuine concern for the most vulnerable of their citizens, others may believe that the advantages associated with land-based investments are worth the trade-offs that they entail. Yet addressing grievances ultimately benefits the country as a whole. This includes providing economic benefits—for instance, minimizing potential conflict can make the country a more attractive destination for investors²²—as well as broader benefits, such as supporting greater democratic responsiveness.

Investors likewise have incentives to minimize the grievances that arise from an investment. First and foremost, grievances can harm the investor’s “social license to operate,” which is often as valuable as any regulatory license needed for operations.²³ Given the importance of this social license, as well as the potential reputational and legal risks tied to land grievances, investors can also benefit from addressing concerns, or facilitating the host government’s efforts to do so.

OBSTACLES IN ADDRESSING LAND GRIEVANCES

Even though, in theory, all stakeholders may have strong reasons to address land grievances, government entities can confront substantial obstacles in their pursuit of remedies. These include a lack of clarity over the best solution for any particular situation, opposition within or outside of the government, and legally enforceable commitments that are in tension with possible remedies that a government might implement.

Grievances that are easy to articulate may be hard to resolve. In some cases, there may be no way to fully remedy what has already occurred. The destruction of a sacred site, or razing of forested land that had provided important resources, for example, cannot be undone. In other cases, there may be disagreements within the aggrieved community regarding the remedies they seek. Some people, for instance, may be willing to receive in-kind compensation for their land, while others may refuse any shift in land access. The lack of clear solutions for a particular situation may increase community opposition to any proposed step to address grievances.

Opposition to government action can also come from within the government itself. Certain government entities may be more inclined to address the grievances arising from a land-based investment than others. National development strategies, for example, might conflict with the policies and priorities of local governments. Parliamentarians might have different opinions on the benefits of an investment than the executive branch, while the part of the executive branch mandated to protect the environment might view an investment quite differently from the part charged with attracting investment. A government entity thus may find itself constrained by other government actors in its attempts to address grievances.

A government might also confront an investor that is unwilling to change its operations to help mitigate related grievances. This may place the government in the unenviable position of trying to placate its citizens as well as the investor. In addition, home governments at times reinforce pressure on the host government to act favorably towards the investor, rendering efforts to address grievances at the expense of the investor even more difficult.

BOX 4: THE ROLE OF HOME GOVERNMENTS

Governments of countries from which outward investment flows (“home governments”) play a complicated role in the context of land-based investments and related grievances. Home governments often provide diplomatic, economic, or other support for investors that are based or headquartered in their country and undertaking outward investment. Some governments have proved willing to provide such support even in the face of alleged social or environmental harms caused by the investor.

Yet governments’ obligations under human rights law arguably have extraterritorial reach, which may require home governments to regulate outward investors to ensure that their actions do not negatively affect human rights.²⁴ Apart from legal obligations, home governments have other reasons for seeking to ensure that outward investments are implemented responsibly, including increasing policy coherency or complying with the UN Guiding Principles on Business and Human Rights.²⁵

Home government measures to promote more responsible investment can help prevent or mitigate land grievances arising from outward investment. Such measures include:

- › Regulating the actions of outward investors;²⁶
- › Conditioning diplomatic or financial support for outward investors on compliance with certain standards or processes; and
- › Establishing disclosure requirements for outward investment that encourage more responsible conduct by investors.

The legally enforceable commitments made by a host government to the investor also present an obstacle to redressing grievances. Through investor-state contracts, for example, host governments generally provide the investor with a set of rights that are legally enforceable. This can constrain options. Restitution of land, for instance, may be difficult when an investor with rights to the land in question opposes such a measure. In addition to the rights provided via contracts, licenses, or other domestic authorizations, governments also are bound by a web of international and domestic legal obligations, including obligations to protect human rights, and, for most governments, obligations to protect the rights of foreign investors. These legal obligations can also affect the options available to governments, as discussed in Parts II and III.



PART II

LEGAL FRAMEWORKS, OBLIGATIONS, AND CONSTRAINTS

Governments operate in the context of international and domestic laws, and are also bound by the contracts into which they enter. These legal frameworks and agreements generally create legally binding obligations. Such obligations are enforceable through different mechanisms and to varying degrees.²⁷ They constrain how governments can or should act, delineating remedies for when governments breach their corresponding duties. In the context of land grievances, the legal obligations incumbent on a host government may influence its actions vis-à-vis investors and those who are affected by investors' actions.

This Part provides a brief overview of these legal frameworks and obligations, and their relevance to the choices host governments make to address land grievances. The interaction between these legal obligations can be complex, and this discussion also highlights some of the ways in which obligations may affect or conflict with each other.

LAWS AND CONTRACTS

Governments are bound by an intricate web of legal obligations. These include obligations that arise from international investment law and international human rights law, as well as from domestic law and, when applicable, investor-state contracts.

When it comes to investments in agriculture or forestry, two bodies of international law are especially important for host governments. International investment law, established primarily through bilateral investment treaties and other trade and investment treaties, regulates a host government's treatment of foreign investors. Human rights law, codified in international instruments at the international or regional level, provides a set of rights that governments must seek to protect, respect, and fulfill. Traditionally, both investment law and human rights law create binding legal obligations for governments, but not for investors. In addition to international law, domestic law also creates legal obligations, generally for both governments and investors. When used, investor-state contracts are an additional source of legal obligations.

INTERNATIONAL INVESTMENT LAW

International investment law is a powerful force. Of the more than 3,000 existing international investment treaties, most provide foreign investors with a direct private right of action to sue their “host” governments in international arbitration, generally without having to exhaust domestic remedies (i.e., first seek remedies under national law in a domestic court). Investor-state arbitration provides a relatively easy path to bring a legal challenge. If the government is found to have violated an investment treaty, the investment arbitration panel established to hear the dispute (typically three arbitrators) usually awards monetary damages, which may cover both past losses and lost future profits. Some awards have been for staggering sums—in 2014, for example, the Russian government was ordered to pay over US\$50 billion in compensation. Even if a government ultimately prevails in an arbitration, it may be forced to expend significant time and resources in defending the claim.²⁸ Consequently, a government that is wary of arbitration claims may decline to address land grievances in a way that interferes with an investment, even in circumstances in which the public interest would justify or even require such interference.

International investment treaties may be relevant even when not anticipated by a host government, as corporations can sometimes maneuver to gain protection of an investment treaty that would otherwise not apply.²⁹ Some investment arbitration tribunals have even permitted nationals of the host state to obtain treaty protection by “roundtripping”—i.e., establishing a corporate entity in a foreign country and routing investments from the host state through the foreign entity back to the host state.³⁰ Complicating matters further, some tribunals have determined that even indirect and minority non-controlling shareholders can initiate arbitrations, potentially exposing the government to multiple suits arising out of the same underlying issue.³¹ Moreover, even if a company's management or majority shareholders settle or decide to not bring a claim, other arbitrations may still be brought by minority shareholders in the company.

International investment treaties commonly contain a core set of obligations regulating governments' conduct. These include:

- › Two non-discrimination provisions, **the national treatment obligation** and **the most-favored nation obligation**, which prohibit intentional discrimination against foreign investors on account of the investors' nationality. According to some tribunals, these obligations also prevent unintentional discrimination. Some treaties apply these obligations on a pre-establishment basis, meaning that governments commit to granting protected investors rights to establish investments on the same terms as domestic individuals and entities (or any other foreign individual or entity).

Government measures that could trigger investment arbitration claims under the non-discrimination obligations include:

- › The provision of subsidies to domestic but not foreign-owned firms (intentional discrimination)
- › A regulation preventing foreigners from purchasing land (intentional discrimination)
- › The provision of subsidies to farms under a certain size (resulting in unintentional discrimination).

In addition, using the **most-favored nation obligation**, tribunals have allowed investors covered by a treaty between its home state and the host state to “import” favorable protections and dispute settlement provisions from other treaties concluded by the host state. This allows the investor to select the most investor-friendly aspects of different treaties, and bring those different aspects together to create a new “super-treaty” to protect the investor's interests.

Importantly, some international investment treaties include exceptions to these non-discrimination obligations, which can be used for diverse policy aims. Such objectives might include preventing foreign ownership of certain investments and assets (for instance, land), or ensuring that governments can comply with other legal obligations (for example, permitting governments to accord special legal rights to indigenous peoples within their territories). Some governments have also included language in their international investment treaties clarifying that investors cannot use the most-favored nation obligation to “import” substantive standards from other investment treaties.

- › The **obligation to provide compensation for expropriations** of an investor's property.³² This has been interpreted to require governments to compensate for both direct expropriations, like outright seizure of property, and indirect expropriations, such as policy measures that destroy the economic value of an investment. While direct expropriations are relatively easy to identify, disputes often arise regarding whether a government regulation or other measure constitutes an “indirect” expropriation. Because it is difficult to distinguish between legitimate regulatory measures negatively affecting property rights and indirect expropriations, some more recent agreements have included additional text to guide tribunals on this point.

Government measures that could trigger claims under the expropriation provision include:

- » A regulation requiring that local communities be granted rights of transit across investors' land
 - » Measures restricting use of water
 - » A court order invalidating an investor-state concession contract
- › The **fair and equitable treatment (FET) obligation**, which is the standard upon which investors most frequently prevail. Government conduct that lacks the severity necessary to amount to an expropriation may still be deemed a violation of the FET obligation. Infamously vague, the FET obligation has been subject to a wide range of interpretations that can be broken into two general groups. Under one, FET is a minimum standard of treatment that governments must provide to foreign investors; under the other, FET imposes more extensive procedural and substantive obligations, including to not frustrate or interfere with investors' "legitimate expectations."

Although this appears innocuous, the ways in which the FET obligation has been applied raise significant concerns for governments, and can affect the nature and scope of investor rights. For instance, some tribunals have interpreted it to allow investors to rely on and enforce otherwise non-binding statements by government officials.³³ Government conduct that interferes with an investor's expectations generated by those non-binding statements can then result in liability. (Box 5 provides one example of how an investment arbitration tribunal found that the government violated the investors' "legitimate expectations" relating to their asserted property rights.)

Government measures that could trigger claims under the FET obligation include:

- » Most actions that would also give rise to claims of expropriation or violations of non-discrimination obligations
 - » A federal government representation that a land-based investment would be allowed, which later turned out to be untrue in light of local community opposition
- › The **full protection and security (FPS) obligation**, which provides foreign investors and investments a measure of protection against harms caused by non-governmental actors (and, according to some investment arbitration tribunals, government actors as well). Some tribunals have interpreted the FPS standard to protect against

any harm, including harm caused by changes in the host government's legal framework. Other tribunals have interpreted the obligation more narrowly to protect only against physical harm. According to this narrower interpretation, governments are only required to exercise due diligence in providing foreign investors and their investments a normal, non-discriminatory level of police protection. Some more modern model agreements and treaties have specified that FPS only refers to protection against physical harm.³⁴

Government measures that could trigger claims under the FPS standard include:

- » A failure to evict alleged trespassers or squatters from the investor's land
 - » A failure to stop protests interfering with the investor's operations
- › The **"umbrella clause,"** which is more common in older investment treaties³⁵ and varies in both its wording and interpretation. In some cases, and depending on the text and tribunal, umbrella clauses have been interpreted relatively narrowly, requiring a government to comply with written contractual obligations entered into with the foreign investor. In other cases, umbrella clauses have been interpreted more broadly, requiring a government to comply with any obligation it has assumed under domestic or international law that benefits the investor. According to some tribunals, an umbrella clause will only be breached if the government was acting in its "sovereign" capacity when it violated its obligation to the investor (for example, passing a law invalidating an underlying contract). The majority of tribunals, however, have found that a government can also breach the umbrella clause if it was acting as a normal contracting party (for example, failing to comply with its duty to make payments under the contract).

Government measures that could trigger claims under the umbrella clause include:

- » Efforts to seek renegotiation of an investor-state contract
- » A court decision that a stabilization clause in an investor-state contract is invalid
- » A government entity's breach of its contractual obligations to the investor

BOX 5: TURNING EXPECTATIONS INTO PROPERTY RIGHTS: THE *AWDI V. ROMANIA* CASE

Under the FET obligation, some investor-state arbitration tribunals have effectively allowed investors to transform their "legitimate expectations" into enforceable property rights, even if such rights do not exist under domestic law. The *Awdi v. Romania* case,³⁶ for example, centered on two decisions by the Constitutional Court of Romania, which had determined that property rights claimed by the investors regarding two discrete investments were invalid. The Court's first decision had invalidated title to a piece of contested land; the second had found unconstitutional a national law granting the investors a 49-year concession for lands rented from various local governments. In a subsequent action brought by the investors against

Romania under an investment treaty, the arbitration tribunal did not find fault with the Constitutional Court's process or decisions. Nevertheless, the tribunal determined that the investors' legitimate expectations had been breached and must be compensated. In this way, the Constitutional Court's authoritative determination over the validity of the property rights under domestic law resulted in a breach of the government's FET obligation. Romania was thus ordered to compensate the investors €7.7 million for damages, with additional payments to cover the investors' legal fees and related expenses.

Each of the obligations described above has ramifications for the governance of existing land-based investments and governments' options for addressing related grievances. Despite these implications, however, it is difficult—and arguably inappropriate (see Box 10)—for host states to shape their conduct in a way that fully avoids all potential risks. Investment arbitration tribunals are not bound to follow the decisions of previous cases, which means that tribunals in pending and future cases have broad latitude to adopt different interpretations. This lack of precedent, coupled with vague treaty language and differing interpretations by arbitration tribunals, renders it difficult to declare definitively what any one obligation requires. Thus, assessing in advance what types of conduct will and will not give rise to claims of breach is a nearly impossible task, and predicting whether those claims will be successful can be equally challenging.

INTERNATIONAL HUMAN RIGHTS LAW

In the context of land-based investments, international human rights law and the obligations thereunder will often create countervailing pressures for governments. Whereas international investment law obliges governments to provide certain protections to investors, international human rights law sets out protections for individuals and peoples, including those who risk being negatively affected by investments.³⁷ Compared to international investment law, human rights law is far less fragmented: rather than the thousands of investment treaties, there are fewer than a dozen core human rights treaties at the international level,³⁸ supplemented by other relevant multilateral treaties (such as International Labour Organization Conventions)³⁹ and regional human rights treaties in Africa, the Americas, and Europe. Instead of the dispute-specific tribunals created under investment treaties, human rights redress mechanisms are provided through more established forums. These include regional human rights courts,

BOX 6: RIGHTS VIOLATIONS TIED TO EVICTIONS: THE ENDOROIS CASE

This decision by the African Commission on Human and Peoples' Rights concerned the Kenyan government's eviction of hundreds of families belonging to the indigenous Endorois people from their ancestral lands to create game reserves for tourism, and to grant concessions for forestry and mining.⁴⁰ The Endorois were not properly consulted or compensated, and were prevented from accessing the land and resources needed for traditional medicines.

The Commission found that the government had violated the community's rights to religion and culture by restricting access to the land and impeding the Endorois' traditional pastoralist way of life. The community's right to property, and its right to freely dispose of its wealth and natural resources, were also found to have been violated by restricting the Endorois' access to the land and resources. Finally, the Commission found that the government violated the community's right to development, given the community's lack of involvement in the process of developing the region for tourism. The Commission recommended that the government recognize the Endorois' ownership of the land, and return the land to them. It also recommended that the government pay compensation for additional losses, and ensure that the community benefit from any royalties and employment opportunities generated from existing economic activities on the land.

regional human rights commissions, and complaints mechanisms tied to specific treaties.

These human rights fora differ from investment arbitration processes in two important ways. They generally require claimants to first exhaust available domestic remedies. In addition, the remedies awarded by human rights tribunals are not usually in the form of monetary damages; even when monetary awards are provided, the high sums seen in investment law disputes are not common in human rights judgments.⁴¹

States that have ratified human rights treaties have corresponding obligations to respect, protect, and fulfill the human rights codified therein.⁴² Specifically, this means that they must refrain from violating those rights, prevent third parties from violating those rights, and take steps to progressively realize those rights (this latter point is generally more applicable to economic, social, and cultural rights). In addition to binding treaties, soft law instruments, such as U.N. declarations and widely endorsed guidelines, help in interpreting human rights law.

The human rights most commonly affected by land-based investments can be loosely grouped into three categories: human rights tied to land occupation and use; other human rights at risk for those living on, near, or downstream from concession areas; and human rights of employees and contractors. These include:

- › The **right to property**, which includes the right not to be arbitrarily deprived of property. This right can generally be limited for actions that are “in the public interest.” Whether a land-based investment can be considered in the public interest may depend on the context and jurisdiction, as described in Box 17.
- › The **prohibition of forced eviction**, which forbids the coerced or involuntary displacement of individuals or communities from their home or lands without appropriate protection. A government that undertakes or fails to prevent forced evictions related to a land-based investment may violate a range of legally protected human rights, including the **right to adequate housing**.⁴³
- › The **right to free, prior, and informed consent (FPIC)**, which requires governments to consult and cooperate in good faith with indigenous peoples to obtain their FPIC before: relocating them; approving any project affecting their lands, territories, or resources; or adopting and implementing legislative or administrative measures that may affect them. Government measures that violate this right include allowing a land-based investment to displace indigenous peoples without their consent, regardless of whether such peoples hold formal title to the land. Such an action might also violate the **right of minorities to enjoy their own culture**, which includes protections of land use or ownership where the culture is closely tied to the land.
- › The **right to water**, which protects individuals' access to existing water supplies, and includes the right to be free from interference, such as from arbitrary disconnections or contamination of water supplies. A land-based investment that diverts or pollutes water relied on by local individuals or communities thus might give rise to a violation of their right to water.
- › The **right to food**, which is realized when an individual has uninterrupted physical and economic access to adequate food, or to the means for procuring adequate food, such as access to land and other productive resources. When a government allows an investor to displace people from land on which they had relied for access to food, it is failing protect the right to food.

- › The **right to health**, which contains both entitlements and freedoms, such as the right to control one’s health and body, and the right to be free from interference. A land-based investment that directly or indirectly contributes to poor health can affect this right for workers or local communities. Such practices might also affect their **right to a healthy environment**, which includes the right to live in an environment adequate for health and wellbeing.
- › The **right to self-determination**, which includes the right of peoples to freely dispose of their natural wealth and resources. Land-based investments that deprive peoples of their access to productive resources might infringe on this right.
- › The **right to life**, which must be protected by law, and the **right to liberty and security of person**, which prohibits arbitrary arrest or detention. In addition, there is a **right to peaceful assembly**, which includes the right to participate in peaceful meetings or protests, as well as the **right to freedom of expression**, which covers the freedom to seek, receive, and impart information (including a **right of access to information** held by public bodies). In the context of land-based investments, these rights are sometimes at risk when the government or private security forces respond to efforts by community members or land rights defenders to draw attention to negative impacts of an investment.
- › The **right to just and favorable conditions of work**, which includes requirements for fair wages and safe and healthy working conditions. Additionally, the **right to form and join trade unions** and the **right to freedom of association** cover workers’ rights to join unions to protect their interests. In some contexts, a government might fail to ensure that these rights are respected in the operation of land-based investments.

Government obligations related to these rights also have important implications for how governments address land grievances. While the

BOX 7: OTHER INTERNATIONAL LEGAL OBLIGATIONS

In addition to obligations under investment law and human rights law, governments have obligations under other types of international law, such as **international environmental law** and **international humanitarian law**, which might in some cases affect resolution of a land grievance. For example:

- › States party to the Convention on Biological Diversity are bound to **respect and maintain environmentally beneficial knowledge, innovations and practices** of indigenous and other local communities practicing traditional lifestyles, and to do so with their approval and involvement.
- › Individuals displaced during armed conflict have a **right to voluntary return** in safety, with the government’s assistance, to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. The property of displaced individuals, and of civilians more generally, must not be destroyed or appropriated as part of a reprisal or collective punishment.⁴⁴
- › During armed conflict, governments must **protect cultural property** (defined as “movable or immovable property of great importance to the cultural heritage of every people”), which can include archaeological sites, such as indigenous burial sites and places of worship.⁴⁵

content of many of these human rights and corresponding governmental obligations are subject to fewer divergences in interpretation than in investment law, there remains confusion on the part of some government entities about what these rights require. The right to food, for example, does not equate to a general right to be fed, but it does require a government to refrain from interfering with existing access to food (or the resources used to obtain it) and to prevent third parties from doing so. Thus, a more thorough understanding of what such obligations entail can help governments in addressing grievances in a way that complies with their legal obligations under human rights law.

DOMESTIC LAW

Domestic laws and regulations are also relevant for host governments seeking to take action on land grievances. These domestic legal frameworks shape how land-based investments are undertaken and regulated, providing processes and rules to be followed. For instance, a law might describe the incentives to be offered to investors, prevent foreigners from purchasing certain types of land, or set out the authorizations required to receive a forestry permit. Individuals claiming breach of a domestic law generally seek redress through domestic courts. A court might, for example, assess the legality of a land concession under domestic law.

Depending on the jurisdiction, there may be specific laws regulating investments or protecting human rights. Some of these laws provide greater protection—of investments, or of human rights—than at the international level. For example, a domestic investment law might expand the opportunities for investment dispute procedures beyond what an investor would receive under an applicable investment treaty. In turn, a domestic human rights law might set forth more specific obligations that a government must follow. One distinction from international law is that domestic law frequently also creates obligations for investors, rather than just for governments.

INVESTOR-STATE CONTRACTS

In countries where the government sells, leases, or otherwise grants access to land for agricultural or forestry projects, investor-state contracts may be used. These contracts allocate risk between contracting parties and delineate a range of rights and obligations.

BOX 8: ROLE OF THE DOMESTIC COURT: EXAMPLE FROM PAPUA NEW GUINEA

In 2012, a Malaysian investor acquired, through acquisitions of another company, two Special Agriculture & Business Leases in Papua New Guinea for over 38,000 hectares of land, which it planned to use for oil palm plantations.⁴⁶ Communities protested these plans, and claimed that they were customary owners of the land in question. Plaintiffs representing the affected communities sought judicial review of the leases, claiming that the procedures established by law to obtain the leases were not followed.⁴⁷ The National Court of Papua New Guinea issued an interim injunction restraining activities on the land, and the leases were subsequently quashed. The investor stated in an announcement that it would comply with the related Order, and also noted that “without the acceptance and co-operation of the customary land owners ..., there will be no end to challenges over [its] right to operate”⁴⁸

Investor-state contracts differ in their complexity, as well as in their purported comprehensiveness.

Investor-state contracts sometimes include a stabilization clause addressing how changes in the law of the host state will affect the contract. Stabilization clauses can be framed broadly, as applying to all domestic laws, or narrowly, applying only to certain topics (for example, tax laws). There are three general categories of stabilization clauses:

- › Freezing clauses specify that the law in effect on the day that a contract is signed will apply to the investment for the life of the project regardless of any subsequent changes in law.
- › Economic equilibrium clauses require an investor to comply with new laws, but oblige the host state to compensate the investor for any loss incurred in doing so.
- › Hybrid clauses are a combination of freezing clauses and economic equilibrium clauses.⁴⁹

Although stabilization clauses are discouraged by the OECD Guidelines for Multinational Enterprises,⁵⁰ some investors continue to seek them in the hopes of insulating the investment from unpredictable and costly changes in domestic laws. As explained below, such clauses interact with international investment law and international human rights law in various ways.

Investor-state contracts generally define the process to be used in addressing disputes arising out of or in connection with the contract. Many provide for commercial arbitration under the same or similar rules that govern arbitration arising out of investment treaties; as with investment arbitration, these commercial arbitrations often occur outside of the host country. Thus, while only an investor can bring a claim for breach of an investment treaty obligation, either the investor or the government can bring a claim under commercial arbitration for breach of a contractual obligation.

INTERACTION BETWEEN LEGAL OBLIGATIONS

Governments' legal obligations interact in complex ways, and can even conflict with each other. For example, investor-state contracts are generally subordinate to domestic law, but can be essentially elevated above domestic law by an international investment treaty. Investment treaties have also been interpreted in a way that effectively creates new property rights that might not exist under domestic law. At the same time, an investor-state contract can potentially create obligations that conflict with a government's obligations under international human rights law, while a government's obligations under an investment treaty and under relevant human rights treaties may also be in tension.

Governments' obligations under these different legal frameworks and agreements interact in various and complex ways. They may, at times, also conflict.

Investor-state contracts, for example, are generally subordinate to domestic law. However, to the extent that a stabilization clause has been included in the contract, the contracting parties seek to circumvent relevant changes in the domestic law, excepting the investor from having to comply with or incur the costs of those changes. This may be

acceptable in some jurisdictions. Yet it may not be allowed in others, where a court might deem such a clause to be invalid and unenforceable on grounds that it violates the constitutional separation of powers or improperly restricts the government's power to act in the public interest. Additionally, investor-state contracts may seek to create a particular legal regime that differs from what would originally apply under domestic law. Some contracts, for example, provide for particular methods of dispute settlement, and purport to impose specialized rules on available remedies. As with stabilization provisions, the enforceability of such provisions traditionally depends on the domestic law that governs the contract (which is often, but not necessarily, the law of the host state).

The rise of international investment treaties, however, has complicated the role of domestic law. One effect of these treaties is to elevate states' contractual commitments to investors to the international law level, placing those commitments above—rather than subordinate to—domestic law. Thus, even if a domestic court deems a stabilization clause or other contractual provision invalid, an investment arbitration tribunal asked to interpret the investor-state contract may adopt a different view, holding the government to those promises and enforcing them under the umbrella clause and/or fair and equitable treatment obligation. In this way, the presence of an international investment treaty can potentially shield a contractual clause from challenges that, under domestic law, might have been successful.

Moreover, international investment treaties have been interpreted in a way that effectively creates new property rights that might not exist under domestic law. In evaluating whether the fair and equitable treatment standard was breached, some investment arbitration tribunals have determined that investors' rights and mere "legitimate expectations" are protected against subsequent government interference. Under this reasoning, even if a tribunal determined that the investor did not possess a valid property right or authorization under domestic law, it could still conclude that the investor had formed "expectations" that should be protected. This essentially turns these expectations into new and enforceable property rights. Such an interpretation differs from the traditional approach under international law, which recognizes the power of domestic systems to define whether and to what extent a property right exists.

Astonishingly, an international investment treaty can potentially protect an entire investor-state contract (or provisions in that contract) that might otherwise be deemed illegal or unenforceable under domestic law. This is less likely when the illegal nature of the contract is severe: some tribunals, for example, have determined that they do not have the power to hear claims brought by investors that have secured their contracts through corruption or fraud. Yet tribunals have been less likely to dismiss cases in which contracts are illegal on other grounds—for example, if the government entity that signed the contract did not have the authority to do so, or if the process of entering into the contract did not comply with necessary requirements established by domestic law.⁵¹

Even in the absence of a stabilization clause in an investor-state contract, some investment arbitration tribunals have determined that promises of legal stability can be inferred from the fact that, when the investor and government entered into their contract, the deal was governed by a particular legal framework. Changes to that framework could then, according to these tribunals, give rise to a violation of the fair and equitable treatment obligation. In such a situation, an international investment treaty may also have the effect of shielding an

investor from complying with, or requiring the government to provide compensation for the costs of, changes in the legal framework that negatively affect the investor, even without the parties having explicitly agreed that the government would provide the investor such protections.

International investment treaties are typically asymmetrical (creating protections for investors and corresponding obligations for governments), and therefore do not have a similar impact on investors' contractual commitments to governments. One example is found in the context of renegotiation of investor-state contracts. Due to investment arbitration tribunal decisions interpreting the fair and equitable treatment obligation as requiring governments to protect investors' "legitimate expectations," and the umbrella clause's mandate that host states abide by commitments made to foreign investors, host governments may be constrained in their ability to seek renegotiation. In contrast, investors retain more freedom to request renegotiations—or to resist renegotiation attempts by states—without incurring liability under international law.

Given that international and regional human rights treaties are not principally concerned with the protection of investment, they generally do not affect commitments in investor-state contracts as investment treaties do.⁵² Yet international human rights law and investor-state contracts can potentially create conflicting obligations for governments. For example, a contract granting a concession that displaces land users and violates their rights to food or housing would place the government's human rights obligations in conflict with its contractual obligations. Similarly, a broadly framed stabilization clause in an investor-state contract may be in tension with a government's human rights obligations to the extent that the clause limits the applicability to the underlying investment of new laws or policies necessary to respect,

protect, or fulfill human rights.⁵³ When a government is party to an investment treaty relevant for the investment, the treaty can create an additional potential conflict, between the government's obligations under the investment treaty and under relevant human rights treaties.

This web of international, domestic, and contractual legal obligations can pose difficulties for governments seeking to assess their full set of obligations, as well as to take actions to address land grievances in a manner that complies with their relevant obligations. To date, international tribunals have not provided much assistance in resolving potential conflicts, tending either to avoid finding that a conflict exists or to resolve a dispute based only on one set of legal obligations, as noted in Box 9.

UNDERSTANDING LEGAL OBLIGATIONS IN THE CONTEXT OF LAND GRIEVANCES

Governments' legal obligations are relevant in their efforts to redress land grievances. As they navigate the options at their disposal, governments should take into account the full range of their legal obligations.

The obligations that bind governments under these various legal regimes and agreements raise the specter of non-compliance or potential liability stemming from certain actions, which governments may see as constraining their options. Two examples from different stages in the project cycle highlight how governments' obligations may arise and conflict in their pursuit of addressing land grievances.

As described above, many grievances precipitated by land-based

BOX 9: HOW INTERNATIONAL BODIES HAVE TREATED CONFLICTS BETWEEN INVESTOR PROTECTION OBLIGATIONS AND HUMAN RIGHTS OBLIGATIONS

Few human rights courts, tribunals, or expert bodies have addressed how a conflict between a state's human rights obligations and its obligations under an international investment treaty should be determined. One notable exception, however, is found in the Inter-American Court of Human Rights' decision in the case of *Sawhoyamaxa Indigenous Community v. Paraguay* (March 2006). That case focused on Paraguay's failure to resolve a legal claim by the Sawhoyamaxa Indigenous Community of the Enxet-Lengua people over the community's ancestral lands, which had been sold by the government to foreign investors. Paraguay argued that the land had been bought by a German national, whose interest in the land was protected by a "bilateral treaty"⁵⁴ between Paraguay and Germany. While the Court rejected that argument on procedural grounds, it also offered two alternative justifications for upholding the community's rights to the land even when a bilateral investment treaty might be operative. The Court's first alternative rationale was that the bilateral investment treaty allowed for expropriation of capital investments where necessary for a public purpose, and such a purpose could include the restitution of ancestral land to an indigenous community. Its second alternative rationale involved holding that the bilateral and reciprocal nature of the investment treaty rendered it inferior to the American Convention on Human Rights, asserting that the enforcement of

"bilateral commercial treaties ... should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."⁵⁵

Investment arbitration tribunals have also generally avoided addressing conflicts between a state's obligations under human rights treaties and an investment treaty. While host governments and amicus curiae have made submissions to investment arbitration tribunals asking that a government's human rights obligations be taken into account when assessing the scope of its obligations and potential liabilities to foreign investors, tribunals have tended to dismiss such arguments rather summarily. This includes by not engaging with the arguments at all, by determining that human rights were not in fact at risk, and/or by concluding that the government's obligations to protect and fulfill human rights did not excuse its obligations to comply with investment treaty commitments. As the field of international investment law continues to evolve, however, future investor-state arbitration decisions may give more weight to, and become more thorough in their treatment of, human rights arguments.

investments arise from displacement from land, whether forcible or voluntary, and the negative consequences of such displacement. These grievances can emerge before any displacement actually occurs—for example, when those who stand to be displaced learn about a project during a survey of the land taken after the investor-state contract has been signed. When the grievances are lodged, the government may realize that the planned investment would cause it to violate its obligations to respect or protect the human rights of those who would be displaced, such as their rights to property, food, water, or housing.

A government might then decide to ask the investor to first receive the consent of potentially displaced communities before the project proceeds. Such a request could help assuage community grievances while also helping the government to comply with its human rights obligations. However, the terms of the investor-state contract may have warranted that the government was providing unencumbered land, and may have allocated sole responsibility to the government to resettle any settlements on the concession land that impede investor operations. If the investor thus refuses to seek community consent, or insists that the government must resettle individuals or communities on the land regardless of their grievances, the government may be limited by its contractual obligations in its options for response. If a government nevertheless attempts to force the investor to obtain such consent, the investor may raise arguments that such actions breach the contract and/or obligations under an investment treaty.⁵⁶ In such a case, the government may find that its obligations under human rights law, international investment law, and the contract are not easy to reconcile.

Another common grievance tied to land-based investments relates to jobs, including the creation of relatively few jobs compared to the

number promised or expected. A government concerned about addressing these grievances might consider various strategies for maximizing job creation, such as adopting an export ban on non-processed timber to generate greater employment through local processing. If investors have entered into timber contracts with the government that include a broad stabilization clause or explicitly provide rights to export non-processed timber, however, the new export ban might not apply to those investors and therefore may be of limited use. A government that nevertheless tried to enforce such an export ban vis-à-vis such investors might be in violation of its contractual obligations or investment treaty obligations. In such a situation, an investor protected by an investment treaty could, depending on the treaty language, potentially bring a claim under a fair and equitable treatment, expropriation, or other applicable provision. Moreover, investors in forestry operations might not be the only corporate actors seeking an investment treaty claim related to the export ban. For instance, the imposition of such a law might give rise to a claim from traders who had invested in the host country to sell non-processed timber to an export market, while foreign processors in the host country might sue the government if the export ban were subsequently lifted.

Understanding a government's legal obligations in the context of land-based investments helps in assessing its potential options to address grievances arising from those investments. While there are multiple options that governments can take to address such grievances, not every option is appropriate for a given situation. Further, a government may find that it is at times useful to undertake more than one option to address certain situations—for example, reshaping concession boundaries in order to reconstitute land to affected persons.

BOX 10: ACTING IN THE PUBLIC INTEREST

When governments take action in the public interest, for example, to strengthen environmental and labor laws or to regulate the use of property rights, those actions are frequently challenged in domestic courts by private individuals or entities as violating contractual commitments, domestic laws, regulations, or constitutional requirements. Yet the fact that a challenge has been brought does not mean that the government's action was illegitimate, nor that the government should not have taken that action. Rather, such challenges are a cost of allowing private actors to hold governments accountable for violations of the law. Governments, however, can regulate the flow and implications of such challenges through rules on who may sue, on what grounds, and for what remedies.

International investment treaties provide foreign investors with another route to challenge government action that can be used

instead of, and even in addition to, challenges under domestic law. As long as investment treaties exist in their present form, it will be difficult if not impossible for governments to avoid claims challenging even good faith actions taken to address public interest issues. This report highlights the risks that arise under investment treaties in order to provide insights into what types of conduct toward investors are more or less likely to trigger claims and liability, as well as to help inform treaty policy moving forward. The discussion of investment treaties, however, is not meant to counsel governments against taking good faith actions designed to address land grievances or comply with human rights obligations based on the concern that, by doing so, they may face claims or liability under investment treaties.



PART III

OPTIONS FOR ADDRESSING LAND GRIEVANCES

Although land-based investments can provoke a range of grievances from local individuals or communities, a host government's competing obligations under different legal frameworks may constrain or influence its efforts to address such grievances. Pragmatic concerns and political considerations may also factor into a government's decision on how to respond: some actions may not give rise to legal liability but could still potentially result in sub-optimal outcomes by, for instance, exacerbating tensions or damaging a country's reputation.

Furthermore, while there are a number of options at the disposal of a government seeking to address land grievances, many of these options may not fully satisfy the concerns raised by communities, or may not be appropriate for the situation at hand. A government thus must be careful both in selecting its plan of action and in implementing it, taking steps to do so in a way that adequately manages the problems while minimizing any potential liability or unnecessary repercussions.

A government that hosts land-based investments may need to confront immediate complaints that require specific action, or may anticipate the need to address grievances in the future. Part III of this report first explores the specific actions that a host government can take when distinct grievances are triggered by a particular investment or investor, before turning to general options for governments seeking to improve their overarching approach to addressing land grievances or to minimize their liability under international investment treaties. Each of the options explored below has its own set of advantages, risks, and accompanying considerations. While these options do not comprise an exhaustive list, they cover an array of steps that a government could take in the context of actual or potential land grievances.

SPECIFIC OPTIONS

When actual grievances are triggered by land-based investments, host governments will need to take specific steps to address those grievances. Although various options exist, many of them may raise potential problems, by creating liability under investment law or inflaming already existing tensions among local community members. Governments considering their options should therefore be aware of the risks related to each action, and should take care in designing their approach. Awareness of the benefits, drawbacks, and risks can support governments in making informed and appropriate decisions.

REQUESTING INVESTOR ACTION

A government can **ask an investor to modify its actual or planned operations** to help address related grievances. When the investor is exercising rights given to it under a contract, license, or other authorization, such a request would be for voluntary action. While this may create some risks for the government, there are pragmatic reasons why an investor might comply.

A government seeking to redress land grievances may consider asking an investor to change its actual or planned operations. This could include, for example, a request that the investor gain the free, prior, and informed consent of land users before expanding its operations into new parts of the concession area. When the investment and its operations do not run contrary to domestic laws or the relevant investor-state contract, this would be a request that the investor comply voluntarily. There are pragmatic and political reasons why an investor might be inclined to consider such requests.

WHAT TYPE OF REQUESTS MIGHT A GOVERNMENT MAKE?

At times, an investor may be acting legally and within the scope of its contract or other applicable authorization, even when its operations lead to legitimate grievances or have negative human rights impacts. While the government may find it politically difficult to compel changes in this situation, it could request that the investor voluntarily change or modify its operations. For example, a government could consider asking an investor to not commence new operations on land within the concession area until receiving permission from or reaching an agreement with any affected persons. This is a tricky position when the

government has already contracted with the investor to allow use of the land.⁵⁷ Such a strategy thus has risks, yet there are also reasons why an investor might be likely to agree, as discussed below.

WHY MIGHT AN INVESTOR WANT TO COMPLY?

Even when an investor is operating within the scope of a relevant investor-state contract, and thus not contractually obligated to change its practices or to take steps to address grievances, there may be practical reasons for doing so. In some contexts, a “social license to operate” may be as important as the legal contract for ensuring a favorable operating environment. Conflicts over land tenure, meanwhile, significantly increase financial risks for investors, with estimates ranging from operating costs increased by “as much as 29 times ... to outright abandonment of an up-and-running operation.”⁵⁸ Seeking to gain or maintain a social license to operate, and particularly to address land tenure conflicts, may be the most prudent financial step a company can take when grievances start to arise.

In addition, an investor may have other relevant commitments, such as through certification bodies or its own company policies, that would encourage it to comply with government requests to assist in addressing land grievances. For example, a palm oil company that is certified by the Roundtable on Sustainable Palm Oil (RSPO) must meet the standards set out in the RSPO Principles and Criteria, which include that the company’s land use “does not diminish the legal, customary or user rights of other users without their free, prior and informed consent.”⁵⁹ The RSPO provides indicators to assess whether this was upheld, as well as guidance on the steps companies must take in respect of FPIC. Indeed, the body has ordered companies to suspend land-clearing work until complaints related to FPIC have been resolved.⁶⁰ The voluntary commitments of buyers may also be relevant considerations for an investor; for example, Bonsucro, the sustainable sugarcane organization, has suspended an agribusiness company purchasing sugar produced on concessions with contested land.⁶¹ These external commitments may align with requests made by the government to take actions that would address grievances.

BOX 11: LIBERIA: PREDICATING EXPANSION WITHIN CONCESSION LAND ON COMMUNITY APPROVAL?

In Liberia, a country with a number of large-scale agricultural and forestry concessions covering a significant swath of the country’s land, grievances have arisen as investors seek to expand operations within concession areas onto land claimed by communities. These grievances have led to conflict, violence, advocacy campaigns against the investors, a request from an outside certification body to halt further expansion while complaints were investigated, and, in one case, a commitment by the President that no further expansion of operations would occur without the affected community’s approval.⁶²

This commitment was unexpected, provided during a meeting with communities concerned about the investor’s efforts to expand palm oil production onto their customary lands. The relevant concession agreements, however, which arguably covered the land in question, provided no recognition of customary ownership rights, excepting tribal reserves of land.⁶³ While the story is still playing out, this is a particularly interesting example of how a government has sought to balance community rights in respect of planned expansion within a concession area.

Further, an investor's own policies might require respect for human rights, and an investor seeking to comply with the UN Guiding Principles on Business and Human Rights may have already undertaken human rights due diligence or other steps to ensure that its operations are rights-compliant. A government's request to modify operations to better comply with human rights would thus be compatible with the investor's internal policies, and a refusal to do so may pose reputational or other risks.

HOW WOULD REQUESTING INVESTOR ACTION HELP?

Requesting investor action may be a pragmatic way to find solutions for grievances. For example, an investor may be better placed to address grievances stemming from concerns that it had not delivered promised benefits, which the community may have expected even if the investor was not contractually obligated to provide them.

If an investor agrees to take certain requested actions, this could help redress grievances while avoiding a need to renegotiate or end the investment. Voluntary investor action in this manner may help make the investment more sustainable in the long run.

WHAT ARE THE POTENTIAL RISKS RELATED TO REQUESTING INVESTOR ACTION?

A request by the government for the investor to take, or refrain from taking, certain actions is likely permissible under international law. Some investment arbitration tribunals, however, have found governments liable for efforts to force or pressure investors into giving up their contractual rights.

Depending on the request, or how frequently a government makes such requests, this strategy may pose reputational risks for the country. While a government should not be faulted for taking steps to protect the rights of its citizens, repeated requests that are taken as demands contravening a relevant investment agreement could make potential investors wary.

Yet another risk of this strategy arises from its dependence on the voluntary actions of the investor. This strategy might not be appropriate when the government needs to ensure that the investor takes or refrains from taking certain actions, such as when the grievances relate to human rights abuses. It also might not be appropriate when grievances require more comprehensive solutions involving more than one investor. In these cases, other options might be more suitable, such as renegotiating a contract or adopting changes in the law (both discussed below).

WHEN IS THIS OPTION APPROPRIATE?

Requesting investor action may be appropriate when grievances are the result of operations that are not technically violations of the law or the investor-state contract. (To the extent that operations violate law or contractual obligations, the government has much greater scope to force the investor to take remedial actions.) This option is also a sensible approach when the grievance could be more effectively resolved by the investor than by the government.

Legal or reputational risk might be mitigated when the investor agrees that the requested action would make good business sense or aligns with standards to which it has already committed, whether voluntary or binding in nature.

SHAPING OR RESHAPING CONCESSION BOUNDARIES

In limited contexts, a government may be bound by an investment contract that does not explicitly delineate the specific boundaries of the land the investor will use. In this case, the government may be able to **shape concession boundaries** in a way that minimizes negative impacts on local communities and thus reduces grievances. Additionally, even when the concession boundaries have already been established, a government may seek to **reshape the boundaries** to help address grievances over land allocation.

A government that has already entered into an investor-state contract may be in a position to shape—or may seek to “reshape”—the specific boundaries of the concession to address grievances tied to the allocation of land to an investor. Shaping the boundaries could occur when the government and investor have entered into an agreement for land use without well-defined boundaries for the area to be used. The window of opportunity for this approach is generally limited, with some space for maneuvering after a contract has been concluded but before the concession boundaries have been delineated. Reshaping the boundaries, on the other hand, could occur at any point during the term of the contract.

WHAT IS MEANT BY “SHAPING” CONCESSION BOUNDARIES?

Investor-state contracts for land-based investments often set out the area allocated to the investor for use. Some contracts provide extremely specific information on the area boundaries, such as a long list of geographic coordinates or a detailed explanation of the physical boundaries. Other contracts provide more general information on the area boundaries, noting, for example, that the investor is to lease a certain number of hectares in specified areas or sub-divisions (for example, sectors or districts). In this case, the contracting parties may have agreed to a map or site plan of the concession area that provides more concrete details, which is generally provided in an annex to the contract and considered to be part of the agreement.

In some situations, however, an investor-state contract may have been concluded without explicit agreement on the final area to be used by the investor for operations under the agreement. This may have been a deliberate effort to help avoid the use of land that is already claimed, or it may have been incorporated in a contract for other reasons. In such cases, the contract may simply provide approximate amounts of hectares and general locations. When this occurs, national law or policies may provide a more explicit process to define the boundaries of land that can be used,⁶⁴ or the contract itself may describe the process that will be followed.⁶⁵ Such a process opens up the possibility for the government to try to minimize negative impacts, when, for example, new information appears after the contract's conclusion, but before the final delineation of boundaries, that illustrates the potential for grievances to arise.

WHAT IS MEANT BY “RESHAPING” CONCESSION BOUNDARIES?

Even after the boundaries of a concession have been delineated, there may still be some scope for the government and the investor to “reshape” those boundaries. In practice, many large concessions provide much more land than is necessary for operations, and an

investor may not intend to use all of its allocated land.⁶⁶ Indeed, in the course of operations, some investors identify parcels of land that they do not intend to use, even though they may be entitled through their contract to operate on it.⁶⁷ Particularly if an investor has already planned to not use some land within the concession area, this may open up an opportunity for the government to ask the investor to reshape the concession boundaries by explicitly carving out certain parts of the concession area.⁶⁸

Reshaping specific concession boundaries could be predicated on the provision of alternative land, or instead with the understanding that it would narrow the total amount of land available. When reshaping would require carving out or swapping a substantial amount of land, a government and investor may decide that a full renegotiation of the investor-state contract is necessary. In other cases, this could be documented through a side letter, or through a simple amendment to the contract or to the contract's relevant exhibit defining the concession area.⁶⁹

WHAT ARE THE BENEFITS OF SHAPING OR RESHAPING CONCESSION BOUNDARIES?

When a government has the opportunity to shape concession boundaries as described above, this strategy may help to delineate areas in a way that avoids or mitigates negative impacts. Doing so presents an opportunity for a government to address actual or potential grievances about which it may not have been aware or concerned at the time of the contract negotiations, or that have arisen, for example, during the survey process. Careful upfront work in shaping boundaries can also help the government avoid the need to seek a negotiation of a contract amendment, or even a renegotiation of the contract. This helps protect the government's interests, as such an amendment may require the government to give up other points in return, while pressure to renegotiate concession boundaries after an investor-state contract has been entered into may create risks related to government obligations under an investment treaty. In addition, efforts to shape boundaries with an eye to minimizing grievances may also appeal to the investor, as a careful delineation could help prevent future community conflicts and avoidable risks.

Even after the concession area has been selected, a government and investor may find it prudent to reshape the boundaries.⁷⁰ If use of certain parts of the concession area is strongly contested, carving such parts out (with or without additional land to replace it) may help reduce investor-community conflict and ensure the sustainability of the investment's general operations. Particularly if the land tied to the grievances is unlikely to be used by the investor, relinquishing it can help address both operational and reputational risks with minimal impact on the investor. Investors may also be interested in this approach to the extent that ceding land reduces rental fees (where fees are paid on the entire concession area), or helps ensure compliance with development commitments (when the contract obliges the investor to develop a certain percentage of the land by a certain date).

Undertaking efforts to shape or reshape concession boundaries also creates the opportunity to seek and obtain the free, prior, and informed consent (FPIC) of potentially affected individuals or communities. Doing so may be required of the government or investor in some cases. Even when not required, a proper FPIC process constitutes best practice and helps to reduce avoidable risks. Among other benefits, obtaining FPIC, and undertaking community consultation more generally, provides useful insight for the government and investor on

how best to shape or reshape boundaries to minimize future problems while also diminishing existing tensions by demonstrating respect for peoples' land and their claims to that land.

WHAT POTENTIAL RISKS ARISE FROM THIS STRATEGY?

One risk related to shaping boundaries may simply be that the narrow situations in which this option applies reduce the likelihood that a government would be aware of potential grievances in time to take appropriate steps. Another risk is that the government may not have sufficient scope within the established process to shape the boundaries in a way that fully respects the rights of individuals or communities that stand to be affected. For example, the scale of the land promised might be so vast that the government is unable to find a sufficient amount that is truly unencumbered and does not require displacement of communities. The investor-state contract may or may not contemplate an alternative if not enough suitable land is available within the identified concession area. A government seeking to shape boundaries in a way that minimizes grievances thus may still end up agreeing to concession or production areas that require displacement and raise corresponding risks of violating human rights obligations.

Efforts to reshape boundaries may carry greater risks than shaping them in the first place, particularly when the land in question is of such a significant scope that a formal agreement or renegotiation of the contract might be required. Risks related to renegotiation are discussed below, while risks arising from asking an investor to undertake voluntary action are discussed above. In addition, if the government seeks to use this option repeatedly, or at a large scale, this strategy could create reputational risks for the government, affecting future investors' perceptions of the operating environment. Yet another risk is that the land that aggrieved individuals or communities recover through the reshaping of boundaries might be inadequate, or less optimal than the land remaining within the concession.

WHEN SHOULD A GOVERNMENT TRY TO SHAPE OR RESHAPE CONCESSION BOUNDARIES?

As noted above, the option to shape boundaries after an agreement has been signed will not always be available. This approach could be taken, however, when the investor-state contract does not provide explicit boundaries of the land to be leased or used, the government and investor have not yet agreed to the specific boundaries, and the relevant process established by domestic law or by contract provides an opportunity for the government to shape boundaries as needed. Because of these restrictions, a government may not realize that such a strategy would be useful until it is too late to implement. However, because the process of surveying the land can itself create tensions with existing land users, it is conceivable that situations may arise in which this strategy would be viable and useful.

A strategy to reshape boundaries does not have the same time constraints, and could be undertaken at any point during the contract term. Because this was likely not a process contemplated at the time the contract was negotiated, however, there may be more legal and political risks tied to this strategy. This strategy thus might be more feasible when it is also in the interest of the investor, for the reasons outlined above, or when the investor is not tied to the land in question and is amenable to receiving replacement land.

FACILITATING DISPUTE RESOLUTION PROCESSES FOR AFFECTED INDIVIDUALS OR COMMUNITIES

A government can facilitate efforts to resolve disputes or grievances in many ways, including through **establishing, supporting, or facilitating access to dispute resolution processes** for affected individuals or communities. Such processes include non-judicial public institutions, government-supported mediation and facilitation, project-level grievance mechanisms established by the investor, and external grievance mechanisms. Dispute resolution processes should be designed carefully: while they have the potential to minimize conflict and foster solutions, they can also compound conflicts and grievances when not designed and implemented according to best practices.

Ensuring access to appropriate dispute resolution processes can help resolve community grievances regarding land-based investments. Dispute resolution processes include courts and tribunals, as well as “non-judicial” processes and institutions. The latter are not meant to replace domestic courts, but a government may find that, in some cases, an additional forum is useful to address community concerns, such as when domestic court systems are overburdened or inaccessible.

WHAT ARE NON-JUDICIAL DISPUTE RESOLUTION PROCESSES?

Non-judicial “dispute resolution processes” are procedures used to help resolve a grievance, dispute, or claim. While these come in many forms, four types are particularly relevant for land grievances:

- › Non-judicial institutions that are financed by the state and have some scope to receive or investigate complaints, such as Cambodia’s Cadastral Commission or the Kenya National Commission on Human Rights;
- › Government-supported mediation and facilitation between communities and companies;
- › Project-level grievance mechanisms, which are generally established by the investor, either voluntarily or in compliance with government requirements; and
- › External grievance mechanisms, such as those provided by multi-stakeholder initiatives or certification schemes (such as the Roundtable on Sustainable Palm Oil), or by development finance institutions (such as the International Finance Corporation’s Compliance Advisor/Ombudsman).

WHAT ARE THE BENEFITS OF A DISPUTE RESOLUTION PROCESS, AND WHAT ELEMENTS SHOULD BE INCLUDED?

A neutral and easily accessible dispute resolution process can offer an effective way to resolve grievances in a timely manner, as well as to remedy past wrongs. Resolving grievances quickly and effectively can also help limit or mitigate consequences that might otherwise arise from grievances, such as public outrage, protest, or even violent conflict. In turn, this may reduce operational, financial, and reputational risks for the government and the investor.

As part of their obligations to protect human rights, governments are bound to take steps to provide access to effective remedy for business-related human rights abuses.⁷¹ This includes state-based judicial and non-judicial mechanisms, which can be complemented by project-level grievance mechanisms and other dispute resolu-

tion processes. To ensure compatibility with human rights, dispute resolution processes should comply with the effectiveness criteria for non-judicial grievance mechanisms set out in the UN Guiding Principles on Business and Human Rights. This means that processes should be legitimate, accessible, predictable, equitable, and transparent. They also should be rights-compatible, meaning that outcomes and remedies are aligned with human rights norms, and should evolve and improve over time. In addition, operational-level or project-based mechanisms operated by or in partnership with the investor should be based on engagement with the stakeholders that will use them.⁷²

Each of these criteria highlight a range of issues to consider in the design or implementation of any dispute resolution process. For example, to ensure accessibility, careful attention should be paid regarding language, cost, physical location, and ease of use, including for people who are illiterate. Considerations regarding gender must also be factored into the design, as women and girls often face additional barriers in accessing dispute resolution processes.⁷³

Remedies awarded through such processes must also be appropriately tailored and proportionate to the specific concern. As with compensation, discussed below, remedies should be determined in consultation with affected persons.⁷⁴

BOX 12: INSUFFICIENT REMEDIES: EXAMPLE FROM THE MINING INDUSTRY

An example of compensation for human rights abuses that was challenged as not being appropriately tailored and proportionate is the compensation paid by Barrick Gold Corporation to women who had been raped by security guards contracted by the company. The women were initially offered assistance with setting up small-scale development projects, such as being given secondhand clothes to sell or livestock. Such remedies were perceived as incommensurate with, and not designed to remedy, the harm they had suffered. The company later announced plans to adjust the remedy to a scheme that was more reliant on cash payments. This was also seen as ineffective, owing in part to the fact that all women receiving compensation were to receive a uniform amount, regardless of the gravity of the violation they had suffered.⁷⁵

SHOULD A GOVERNMENT CONSIDER ESTABLISHING AN INDEPENDENT MECHANISM?

A government can establish independent mechanisms to address land grievances. Alternatively, it can empower existing public institutions to assist with the investigation of complaints and the determination of an appropriate remedy. Government mechanisms may focus primarily on land claims, or on a broader range of issues, such as human rights. In some contexts, mechanisms established by the government may be perceived as more legitimate than investor-established mechanisms. This may not be the case, however, when government representatives also act as investors, or when the government has demonstrated its intention to allow a problematic investment to continue. In such circumstances, concerns about legitimacy can sometimes be alleviated by ensuring that the dispute resolution process operates independently, and that, when appropriate, it possesses the power to require (rather than merely recommend) that investors or the government provide a remedy. In addition to establishing or empowering appropriate mechanisms, processes, or institutions, it is equally important to facilitate their use by aggrieved individuals or communities.

BOX 13: CAMBODIA'S CADASTRAL COMMISSION

Cambodia's Cadastral Commission is a public institution that was created to resolve disputes regarding land ownership in a quicker, less expensive, and less adversarial manner than resorting to a court.⁷⁶ The Commission has a three-tiered hierarchy (district, provincial, and national levels), and is empowered to hear disputes about land ownership of untitled land.⁷⁷ The district level seeks to assist parties to arrive at an agreement through facilitation and mediation. If agreement cannot be reached, parties can take the matter to the provincial Cadastral Commission, which has the power to "decide" a dispute.⁷⁸ Its decision can be appealed to the National Cadastral Commission, whose decision is then appealable to Cambodia's court system.⁷⁹

One significant shortcoming is the limited scope of issues that the Commission can consider, which precludes claimants from pursuing related claims falling outside its mandate.⁸⁰ For instance, community members that brought a claim to Cambodia's Koh Kong Provincial Court regarding, amongst other complaints, infringements on property rights allegedly caused by investments in sugar plantations were referred to the Cadastral Commission because the claim involved a dispute over unregistered land. In the Cadastral Commission process, however, the claimants were unable to pursue an additional claim challenging the legality of the sugar plantations, because the Commission did not have the jurisdiction to determine such a claim.⁸¹

BOX 14: THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

The Kenya National Commission on Human Rights is an independent institution that can hear complaints regarding a broad range of human rights,⁸² including complaints about land-related issues.⁸³ The Commission attempts to resolve complaints using conciliation, mediation, and negotiation, but ultimately has the power of a court to order the payment of compensation⁸⁴ or "any other lawful remedy or redress."⁸⁵ The Commission has experience managing a large number of complaints in a rights-compliant way.⁸⁶

In practice, the Commission's summonses and its orders for redress are not always implemented, and have been ignored by government officials.⁸⁷ However, this problem also plagues the country's courts.⁸⁸

investment. When requested, providing the community with access to legal representation or assistance during the mediation can help to minimize power imbalances between the parties and to build meaningful consensus.⁹⁰

SHOULD A GOVERNMENT REQUIRE OR ENCOURAGE PROJECT-LEVEL GRIEVANCE MECHANISMS, OR FACILITATE THE USE OF EXTERNAL MECHANISMS?

Governments should encourage investors to develop their own project-level grievance mechanisms to complement existing state-based dispute resolution processes.⁹¹ In some circumstances, governments might consider requiring investors to establish them. Such mechanisms, which may use conciliation, negotiation, or more adjudicatory processes, often can resolve disputes in a more efficient manner than court processes while also removing from the government the operational burden of hearing complaints. They should not, however, preclude individuals from accessing domestic courts or other forums for seeking redress.⁹² One way of ensuring that a project-level mechanism operates legitimately is to incorporate the oversight of an independent supervisor, or a representative stakeholder group.⁹³ Where needed, an independent, neutral expert can be added to the stakeholder group to help facilitate the group's oversight role.⁹⁴

In addition to project-level mechanisms, other external accountability processes through which individuals can pursue complaints

BOX 15: THE IFC'S COMPLIANCE ADVISOR/OMBUDSMAN

The IFC's Compliance Advisor/Ombudsman (CAO) is a grievance mechanism accessible to persons aggrieved by a project financed by the IFC. In a recent case, CAO-led mediations resulted in a Vietnamese rubber corporation reaching an agreement with 14 project-affected communities in Cambodia.⁹⁵ The investor committed to not clearing or developing additional land or otherwise expanding its operations associated with certain concessions. This commitment was accompanied by a range of other measures aimed at redressing past adverse impacts and minimizing the negative impacts of existing operations, including commitments to only use chemical products that comply with environmental regulations, to repair infrastructure damaged by the investor, and to adopt an operational grievance mechanism for the investor's agribusiness operations within Cambodia. The agreement came 19 months after the lodging of the communities' initial written complaint.⁹⁶

also exist. A government confronting land grievances can thus explore whether these additional processes are available to aggrieved individuals, and, if so, can provide information or other support to facilitate their use. These mechanisms include those provided by multi-stakeholder initiatives and certification schemes, like the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council, as well as complaints processes offered by development finance institutions, such as the International Finance Corporation (IFC). When the investor is a member of, certified by, or has received funding from such entities, these external mechanisms will generally be an option for individuals or communities harmed by an investment.

SHOULD A GOVERNMENT HELP FACILITATE MEDIATION BETWEEN THE INVESTOR AND THE COMMUNITY?

Mediation is a dispute resolution process that is facilitated by a neutral third party; it is generally non-binding. Not all situations are suitable for mediation. When grievances relate to criminal offenses, for example, those offenses should be prosecuted rather than mediated. In addition, when relevant stakeholders are not committed to reaching an agreed outcome, mediation will not work.⁸⁹ When stakeholders do wish to address their conflict through mediation, however, a government potentially can assist, including through helping to install an independent facilitator with expertise in dispute resolution. Mediators and facilitators must refrain from exerting any undue influence over community members, and their selection should be agreed upon by both the community and the investor. In addition, negotiations related to how the mediation will proceed should take place in the context of both sides having access to all relevant information regarding the

WHAT ARE THE POTENTIAL RISKS OF ESTABLISHING, REQUIRING, OR FACILITATING ACCESS TO A DISPUTE RESOLUTION PROCESS?

In developing or requiring non-judicial dispute resolution processes, a government risks doing so in a manner that fails to comply with its international legal obligations, and should thus take care in designing such processes. For example, a government-implemented grievance mechanism should meet the criteria articulated in the UN Guiding Principles on Business and Human Rights, described above, and in particular should not supplant or preclude access to judicial or other non-judicial mechanisms.

While efforts to establish, require, or facilitate access to a dispute resolution process are not likely to implicate an investment treaty obligation, some situations might raise risks. For example, if requiring an investor to establish a grievance mechanism is contrary to an already existing commitment given by the government, this requirement could be considered problematic. Or, if a public institution were to impose a solution to address land grievances that was contrary to the investor's protected interests, a government might confront tensions in seeking to implement that solution while also meeting its obligations under an applicable investment treaty. Additionally, to the extent that a government's efforts to facilitate access to existing grievance mechanisms are seen as encouraging opposition to the project or frustrating the investment's operations, an investor might also argue that the government's actions violated its obligations under the fair and equitable treatment standard, full protection and security obligation, or other treaty commitment.⁹⁷

There are also risks that the dispute resolution process will not effectively resolve grievances, or will not be used by aggrieved persons. For example, a mechanism that excludes legitimate complainants or is hard to access may be ineffective. Those aggrieved may decide not to pursue a remedy through a dispute resolution process if the remedies offered are inadequate, or if engaging with the process precludes pursuit of claims in other legal forums.⁹⁸ Affected individuals also may be unwilling to engage with dispute resolution processes for fear of government- or company-backed reprisals.⁹⁹ Project-level grievance mechanisms, in particular, run the risk that the relevant investor may become unable or unwilling to maintain the requisite level of resources and engagement for the mechanism to operate effectively.

RESTITUTING PROPERTY TO DISPLACED INDIVIDUALS OR COMMUNITIES

When grievances relate to the loss of land or property, **restitution** to those who lost their land may be one of the most effective remedies that a government can employ. However, restitution of land already allocated to an investor may not always be possible, may not be deemed appropriate, or may raise risks related to a government's investment law obligations. A government that decides to pursue restitution by taking land from an investor and returning it to displaced individuals should follow requirements set by domestic and international law regarding expropriation of property.

Restitution can be an appropriate remedy in some cases for individuals or communities that have lost their land or material possessions due to a land-based investment. When applicable, restitution should also always be considered once an investment has concluded, including when it has failed (see Box 16). Restitution may not be possible,

however, where the land has been rendered uninhabitable or unproductive, and may be difficult for a government in the context of ongoing investments, where investors have ownership or leasehold rights over the land in question. Such challenges are not insurmountable, but pose some risks.

WHAT IS RESTITUTION?

Restitution refers to “reestablish[ing] the situation which existed before the wrongful act was committed.”¹⁰⁰ While restitution can include a range of actions, this discussion focuses on restitution as the return of land or property. When development-based evictions or displacement have occurred, including due to land-based investments, a government should, when possible, “establish conditions and provide the means, including financial, for voluntary return in safety and security, and with dignity, to homes or places of habitual residence.”¹⁰¹ Such a return should only occur when in line with the wishes of the resettled individuals or communities,¹⁰² and according to procedures that are equitable, timely, independent, transparent, and non-discriminatory.¹⁰³

WHEN IS RESTITUTION APPROPRIATE?

Grievances flowing from land-based investments are often related to displacement from land. In some cases, the negative impacts of such displacement may be so severe, and the grievances so strong, that restitution of land may appear to be the most appropriate option. Moreover, in certain situations, restitution may be necessary for the government to comply with its human rights obligations. Indeed, restitution is the most appropriate remedy for property- or land-related violations of human rights, to which other remedies like compensation are secondary alternatives.¹⁰⁴ Accordingly, when rights violations are involved, a government should assess whether restitution is possible before considering alternatives like compensation. Restitution is particularly important when indigenous peoples' land has been taken without their free, prior, and informed consent.¹⁰⁵

Restitution is not always possible, however. In practice, the circumstances of forced evictions and resettlement “seldom allow for

BOX 16: WHAT HAPPENS AFTER AN INVESTMENT HAS CONCLUDED?

What happens after an investment has concluded can sometimes be as consequential as what happens during its operation. Although many land-based investments fail,¹⁰⁶ and still others are designed for a limited duration, governments and investors do not always have comprehensive plans for sustainable project closure. This creates the possibility that land grievances can endure even after the investor has left. When these grievances relate to displacement from land, and when that land remains habitable or productive, restitution of the land to those displaced is an appropriate option, and should be considered before assessing whether the land can be offered to other investors.¹⁰⁷ Where there are multiple claims to the land, or when the contested evictions are not recent, a government should strive to ensure that efforts to reconstitute such land benefit those with legitimate tenure claims.

TO WHOM SHOULD RESTITUTED PROPERTY BE MADE AVAILABLE?

Restitution should be awarded to the individuals or communities who held some form of title or legitimate tenure claims to the property before it was taken away. Restitution should be undertaken with the participation of affected individuals, groups, or communities in the planning and management of return processes.¹¹⁸ This includes special measures to ensure the meaningful participation of women to overcome existing gender biases and marginalization, if needed.¹¹⁹ An inclusive process helps assure that restoring individuals to the situation they were in before they were deprived of property does not reinforce pre-existing inequalities.

WHAT ARE THE POTENTIAL RISKS OF RESTITUTION AS A REMEDY?

Restitution of land used by an investor may raise risks related to a government's international investment law obligations. An investor, for example, might argue that the government's decision to grant restitution:

- › Constitutes an expropriation of the investment;
- › Breaches the investor's right to fair and equitable treatment by violating a legitimate expectation that it would have unrestricted and continuing access to the land; or
- › Impacts more on that investor than on other businesses and therefore constitutes discrimination.

A government seeking to take land from an investor and return it to displaced individuals or communities should first determine whether the investor in fact has valid rights to the land. If so, the government should follow requirements set by domestic and international law regarding expropriation of property.

restitution and return.¹⁰⁸ For instance, it may be materially impossible to order restitution in respect of property that has been altered or damaged to the point that its return would not fulfill the right being asserted.¹⁰⁹ In this case, restitution will not be able to entirely remedy the wrong, and compensation should be used as an additional or alternative remedy.¹¹⁰

In addition, restitution may not be deemed appropriate when the land was expropriated for the public's benefit or for a public purpose. As discussed in Box 17, it is unclear whether the taking of land to facilitate a private investment can constitute a public purpose, especially where the potential public benefits of such an investment, such as job creation or increased national fiscal revenues, are difficult to realize.

BOX 17: DOES THE TAKING OF LAND FOR A PRIVATE INVESTMENT CONSTITUTE A PUBLIC PURPOSE?

Whether the taking of land to facilitate the purposes of private investment constitutes a public purpose is debatable. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security exhort states to “clearly define the concept of public purpose in law, in order to allow for judicial review” while also ensuring that “all actions are consistent with their national law as well as their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.”¹¹¹

Projects requiring land for the construction of public amenities and services may well fall within the public interest, as may large infrastructure projects requiring land.¹¹² It may be more difficult to invoke the public interest where land is taken to enable an investor to carry out an agricultural or forestry concession. The benefits of agricultural or forestry investments are said to lie primarily in their potential for employment creation, leveraged infrastructure, and increased public revenue;¹¹³ however, such potential is often difficult to realize, which may reduce the chances an investment will constitute a public purpose.

Courts in different jurisdictions have expressed divergent opinions on whether the taking of land for a private investment can constitute a public purpose. The Supreme Court of Canada noted in *Tsilhqot'in Nation v. British Columbia* that a logging concession could be considered to be a public interest objective that could override Aboriginal title, while also noting that logging is a “serious infringement [of Aboriginal title] that will not lightly be justified.”¹¹⁴ In that case, the Court ultimately held that logging in the area in question was not in the public interest, as it was not economically viable, and had an impact on the plaintiff's Aboriginal title that was disproportionate to the economic benefits that would accrue to the State, or Canadian society generally.¹¹⁵

However, in the *Sawhoyamaxa Indigenous Community v. Paraguay* case, discussed above in Box 9, the Inter-American Court of Human Rights rejected an argument that the allocation of indigenous land for the purposes of investment constituted a public purpose.¹¹⁶ It held that such an argument approached indigenous claims to land title “from the standpoint of land productivity and agrarian law,” which was “insufficient” because it failed to address “the distinctive characteristics of such peoples.”¹¹⁷

BOX 18: GROUP CLAIMS REGARDING RESTITUTION OF LAND

When it comes to claims by indigenous groups or tribal communities requesting restitution of land, the tests used to determine whether restitution is warranted vary by jurisdiction. Often, a primary issue considered is whether affected claimants can demonstrate an enduring connection,¹²⁰ or an “all-encompassing relationship,”¹²¹ with the land claimed. In addition, domestic and regional laws differ regarding the entitlement of indigenous or tribal communities to restitution of land when an investor has subsequently obtained an interest in the land in good faith. For instance, private ownership of land can act as a complete bar to restitution in Australia.¹²² In Canada, however, the Supreme Court has found that once Aboriginal title has been established, a project might need to be canceled if its continuation “would be unjustifiably infringing.”¹²³ Meanwhile, the Inter-American Court of Human Rights has determined that the transfer of ownership of land into the hands of an investor does not pose a bar to restitution,¹²⁴ noting that otherwise restitution rights would become “meaningless.”¹²⁵

COMPENSATING AFFECTED INDIVIDUALS OR COMMUNITIES

Providing compensation (land, goods, services, and/or money) is one way in which a government, as well as investors, may seek to alleviate land grievances. While compensation is often a significant remedial mechanism, it should not be used to excuse flagrant violations of land rights or human rights. Further, when the grievances are severe, compensation alone may not stop the risk of community conflict and protest. When provided, compensation should be determined in consultation with affected individuals or community representatives, and should comprise primarily “in kind” compensation—land, goods, and improved public services—with supplemental cash payments where appropriate. Compensation should seek to restore project-affected individuals or communities to a position that is as favorable as, or more favorable than, their position before the harm causing the grievance occurred.

Compensating individuals or communities that have been or will be negatively affected by a land-based investment is another option available to a government seeking to address land grievances. While compensation is often an insufficient remedy for certain grievances, at times it may be the most appropriate option available. When compensation is provided, a government should carefully assess who should receive compensation, as well as the type and quantum of compensation.

WHAT IS “COMPENSATION”?

Compensation, in this context, means the payment of money and/or the allocation of land or other goods and services as a means of acknowledging and remedying a harm. Such harms can include, for example, displacing individuals or communities from the land on which they rely or otherwise causing them to suffer financial loss.

WHAT ARE THE LIMITATIONS OF COMPENSATION AS A REMEDY?

Compensation, whether monetary or in kind, is unlikely to provide a comprehensive remedy for certain grievances, such as those arising from forced evictions and accompanying human rights violations. One ex-World Bank staffer, for instance, underlined the importance of compensation in this context while lamenting that the limits of compensation as a remedy “reinforce the main poverty risks inherent in forced displacements.”¹²⁶ Compensation will almost always fall short for resettled communities because of the many economic, social, cultural, and other networks that are broken when a community is forced off its land. The destruction of these networks, which are often unquantifiable, can impoverish those resettled in ways that extend beyond simply losing a real property asset. For this reason, a government seeking to redress grievances stemming from forced evictions and resettlement should first assess whether restitution of the taken land is possible.

WHEN IS COMPENSATION APPROPRIATE?

A government may determine that compensation should be incorporated in its efforts to address a range of grievances tied to land-based investments. For example, compensation might be offered to amend for negative environmental impacts causing harm to communities, or

for unwarranted detentions of individuals protesting an investment. When compensation is provided to address violations of human rights, its provision will not necessarily absolve a government of its legal obligations, but may form an important part of the remedy for such violations.

Compensation is most commonly considered as a strategy for addressing displacement (both voluntary and involuntary) from land, as well as related grievances. When involuntary displacement has occurred, including forced evictions, a government should first consider whether restitution of land, discussed above, is a viable option. Even when restitution occurs, compensation may also be necessary to address other losses suffered by those forcibly resettled. If the land cannot be returned to those who have been resettled, however, including when the land is no longer suitable for previous livelihood uses, compensation is an appropriate remedy for a government to consider.

When grievances concern an investment’s future effects, and those concerned remain living on their land, compensation should not be viewed as a means of “buying” or “paying a penalty for” future human rights violations, such as those linked to forced evictions. However, providing adequate compensation can be an appropriate remedy when the taking of land is deemed to be in the public interest,¹²⁷ or for a public purpose.¹²⁸ The European Court of Human Rights, for example, has deferred to governments to determine when takings are needed to fulfill the public interest,¹²⁹ and has noted that whether the taking strikes a fair balance between competing interests depends in part on the terms of the compensation offered to those whose land is expropriated.¹³⁰ Box 17, above, discusses whether taking land for the purposes of private investment can constitute a public purpose. In such cases, compensation provided as part of a resettlement action plan may be a precondition for the legality of the expropriation.

WHO SHOULD BE COMPENSATED?

A government seeking to compensate for displacement from land must determine who is entitled to compensation. This is a critical and complex question in rural areas of low-income countries, where different types of land rights can be held by individuals or collectively by households, groups, or communities, and where such rights often overlap.¹³¹ International standards, such as those developed by international and regional development banks,¹³² underline that absence of formal legal title should not bar affected persons from receiving compensation for expropriation of their property. A government thus needs to compensate all individuals or communities with legitimate rights to the land in question, regardless of whether they have formal legal documentation.

In some places, women risk not benefiting from compensation received by their household for the expropriation of their land.¹³³ This is especially true in societies where women are unlikely to hold legal title, as compensation is often paid only to individuals who hold legal title to the land or who are deemed the “head” of the household.¹³⁴ For instance, amongst households resettled in Vietnam to make way for hydropower projects, some women only learned that compensation had been paid to the household after it had already been spent.¹³⁵ To address these challenges, the Food and Agriculture Organization of the

United Nations recommends that a government paying compensation identify which household members hold de facto interests in the land, and ensure that compensation is paid using a mechanism that facilitates joint decision-making within households regarding the use of such funds.¹³⁶

Individuals who lose access to common land or public lands on which they had relied for resources or livelihood activities are particularly vulnerable, as they are often overlooked in compensation schemes.¹³⁷ Such “landless” individuals must also receive compensation for their economic displacement from the land.¹³⁸

SHOULD COMPENSATION BE IN KIND OR FINANCIAL?

When displacement from land has occurred, in-kind compensation—in the form of replacement property, public services, and infrastructure—should be the primary form of compensation allocated.¹³⁹ This is preferable to cash compensation, which transfers the risks associated with acquiring replacement land, housing, and infrastructure onto the individuals or communities being resettled.¹⁴⁰ In many contexts, cash compensation alone will not suffice in restoring the lost livelihoods of recipients, leading to further impoverishment. Any replacement land should also be titled and registered in the names of both female and male heads of each household when relevant. Additional arrangements that can be included in a “compensation package” to communities include state-funded pensions,¹⁴¹ increased access to health care,¹⁴² and increased spending by the investor on community development programs.¹⁴³

HOW TO DETERMINE COMPENSATION: (I) CONSULTATION

A government should consult with the affected individuals or community when determining the form and amount of compensation.¹⁴⁴ Consultation has many advantages. Incorporating a community’s perspective can help in restoring any economic, social, or other networks harmed by displacement; it may also help to avoid future community grievances, conflict, or litigation. Consultation may also minimize the chances of a court later determining that the type or amount of compensation was insufficient or unreasonable.

Consultation processes should ensure opportunities for women and other non-dominant groups within a community to provide input. Gender-sensitive consultative strategies include researching the times and locations that suit women’s availability, anonymous voting on proposals to facilitate participation free of influence, and expressly requiring women to be included in meetings of community leaders.¹⁴⁵

HOW TO DETERMINE COMPENSATION: (II) CALCULATION OF QUANTUM

Where land cannot be returned, individuals who have lost land should be compensated with land commensurate in quality, size, and value, or better.¹⁴⁶ Such land should be accompanied by security of tenure, as well as adequate housing and access to necessary services.¹⁴⁷ In addition, the Basic Principles and Guidelines on Development-Based Evictions and Displacement recommend that, at a minimum, a government must provide displaced individuals with “safe and secure access to:

- > essential food, potable water and sanitation;
- > basic shelter and housing;
- > appropriate clothing;
- > essential medical services;
- > livelihood sources;
- > fodder for livestock and access to common property resources previously depended upon; and
- > education for children and childcare facilities.”¹⁴⁸

A government providing cash compensation should ensure the amount (quantum) is appropriate. Leading practices seek to place the affected individuals in a position that is as favorable as, or better than, the position they were in before the land was taken.¹⁴⁹ In addition to incorporating objective valuations of the market value of the land, improvements, and any lost personal property, this may require economic analyses of land-derived income, and articulation of the cultural, economic, and other benefits provided by the land.¹⁵⁰ This can be extremely difficult, and many domestic laws regarding compensation for resettlement fall short of this standard, compensating only for the market value of lost assets.¹⁵¹

As noted above, the loss of land is not the only loss from land-based investments that must be compensated. Compensation must also be paid for any other economically assessable damage, which, as noted by the Basic Principles and Guidelines on Development-Based Evictions and Displacement, may include “loss of life or limb; physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”¹⁵² Calculation of fair compensation for these losses should include a gender-specific analysis.¹⁵³

WHO PAYS?

When compensation is provided to address displacement caused by land-based investments, the government is generally responsible for providing it. Under international law, the government is the primary bearer of human rights obligations, while many domestic laws also place the responsibility to compensate on the government.¹⁵⁴ In practice, however, governments may shift the burden of compensation onto investors, for instance, as part of the costs of land leases.¹⁵⁵ When relevant finance-related standards, such as the IFC Performance Standards on Environmental and Social Sustainability or the Equator Principles, apply to an investment, investors may also have to supplement domestically mandated compensation amounts to ensure that those international standards are met.¹⁵⁶

THE NEED FOR GRIEVANCE MECHANISMS, MONITORING, AND EVALUATION

Compensation must be monitored and evaluated to track its impact,¹⁵⁷ as well as to ensure it is granted in its entirety in a timely manner.¹⁵⁸ This can be done by independent state institutions, such as human rights commissions or land boards. Government decisions regarding compensation should also be subject to judicial review, ensuring that decisions are reasonable and accountable.¹⁵⁹ For communities

BOX 19: COMPENSATION RELATED TO SUGAR CONCESSIONS IN CAMBODIA

In Cambodia, villagers alleging that they were forcibly evicted to make way for sugar plantations have pursued multiple avenues for receiving remedies, including compensation. One avenue pursued by community members was to seek compensation from an Ad Hoc Inter-Ministerial Committee, convened by the Cambodian government in 2014 to resolve human rights issues arising from land concessions that were transferred to sugar plantation companies, including Koh Kong Sugar Industry Co. Ltd. and Phnom Penh Sugar Co.¹⁶⁰ The committee involves Cambodian government departments and representatives from the European Union, and is tasked with working with sugar companies to devise a mechanism for determining and paying affected villagers due compensation.¹⁶¹

Separately, some villagers displaced by sugar plantations brought a court case in the United Kingdom against Tate & Lyle, which had purchased sugar grown on the disputed land. The villagers claim that they own the land, and thus also the crops grown on it, and argue that they are owed compensation for the purchased sugar.¹⁶² They also allege that these events amount to violations of the International Covenant on Economic, Social and Cultural Rights.¹⁶³

lacking easy access to judicial institutions, other government- or investor-operated grievance mechanisms whose procedures are tailored to community contexts may also be needed.¹⁶⁴ Such procedures are especially important where the entity (the government or the investor) determining the amount of compensation is also the entity paying that compensation, as it otherwise may be incentivized to reduce the amount of compensation payable.¹⁶⁵

WHAT ARE THE POTENTIAL RISKS OF PROVIDING COMPENSATION?

The potential consequences of providing compensation vary depending on the point at which the grievance arises, as well as the type of grievance to be compensated. The below discusses relevant considerations when the grievance relates to displacement from land.

Where restitution or return of the land is not possible, compensation can act as an appropriate, albeit likely insufficient, remedy. One significant risk, however, is that property or resources lost through displacement may be undervalued, resulting in inadequate compensation for those displaced. From a legal perspective, compensation that is adequate and rights-compliant might limit the government's liability in domestic courts, regional human rights courts, and other international human rights institutions. So long as the government provides the compensation, or the investor has agreed to do so under the investor-state contract, provision of compensation would also be unlikely to engender government liability under any operative investment treaty or investor-state contract.

Where a community remains on the land and the grievance concerns future impacts of an investment, compensation will be less appropriate, unless the community has provided its free, prior, and informed consent to vacating the land in exchange for agreed compensation. Without such an agreement, a government seeking to “resettle and compensate” may violate its legal obligations under international human rights law. This could result in official findings of legal liability for violations of international human rights law, which could potentially be accompanied by orders from a human rights tribunal to reconstitute taken lands, as occurred in the *Sawhoyamaxa* case at the Inter-American Court of Human Rights, discussed in Box 9.

As a practical matter, a “resettle and compensate” approach can also inflame community discontent, leading to demonstrations or conflict. In such circumstances, the risk of property damage and the disruption of investment projects increases, as does the risk that protestors might be harmed by security personnel meant to protect the investment. In addition, because compensation is generally incapable of fully replenishing what a community loses when it is transplanted, a displaced community is likely to become impoverished.¹⁶⁶ Increased poverty can lead to lower socioeconomic indicators and greater demand for public services and development programs,¹⁶⁷ requiring significant financial resources to address. Moreover, improper resettlements pose reputational risks for governments, as resulting conflicts can create the impression of an unstable business environment.

RENEGOTIATING WITH THE INVESTOR

Grievances arising from existing land-based investments may, in certain cases, arise from the legal terms of the investor-state contract and the scope of the investor's rights and obligations under that contract. In such cases, **renegotiation of the investor-state contract** to alter those rights or obligations may help address the grievances. There are, however, a number of challenges that can arise with respect to renegotiations. For one, investors may be unwilling to give up rights previously secured or to take on new obligations under the contract; thus, it may be difficult to bring them back to the negotiating table and secure additional commitments. In such cases, the government may be limited in what it can accomplish, particularly if it is concerned about potential liability under investment treaties. Moreover, the government party to the contract may not have an interest in addressing the relevant issue(s), or the authority to do so.

In long-term contracts, requests for renegotiation are not uncommon. Indeed, they are often requested by investors who are party to investor-state contracts and seek to reduce their obligations or increase their rights under the agreement. Government requests for renegotiation in order to address land grievances are therefore also possible, and may be a feasible option to ensure that the contract survives over time.

However, when one party seeks to renegotiate a contract, the other party may resist, reluctant to give up what it sees as validly secured legal rights. Thus, a government seeking to renegotiate an investor-state contract for a land-based investment may face difficulties getting the investor to return to the table. In some cases, the contract will specify circumstances in which renegotiation is mandatory; absent such language, renegotiation requests may not be met with the desired response.

WHEN MIGHT AN INVESTOR BE WILLING TO RENEGOTIATE?

Certain factors may render an investor more likely to renegotiate. Efforts to understand the investor's strategy and culture can be helpful for assessing whether it might agree to a renegotiation request.¹⁶⁸ An investor with other interests in the country may be more willing to renegotiate and less likely to seek arbitration, as it has some incentive to maintain its relationship with the government. Likewise, if an investor is more interested in the products it would receive through the investment—for example, rubber needed for the core operations

of a parent company—than in monetary compensation, it may be more willing to renegotiate.

An investor also might be more amenable to renegotiation if there has been public pressure around the investment, and credible documentation of issues related to it. Conversely, an investor with significant home country support may be less interested in renegotiating, relying instead on such support to pressure the host government to revoke its request. In addition, an investor that has access to investor-state arbitration under an investment treaty might have less incentive to renegotiate.

WHAT POTENTIAL RISKS ARISE FROM THIS OPTION?

If a government seeks to renegotiate the investor-state contract, and the investor does not wish to cooperate, a government might try to exercise political pressure and take or threaten sovereign action (such as a change in the law to accomplish what the renegotiation had aimed to achieve). Investment arbitration tribunals have disfavored those approaches, and have held governments liable under international investment treaties for using government powers to compel investors to give up their contractual rights.¹⁶⁹ Thus, to the extent possible, a government seeking to renegotiate should try to do so using only the weight that a normal contracting party would use.

TERMINATING AN INVESTOR-STATE CONTRACT

Another option for addressing land grievances related to the grant or performance of an investor-state contract is **termination of the contract**. The terms of the contract and domestic law (including, in some legal systems, law developed by judicial doctrine) will typically specify the grounds on which one or both parties may or must terminate the contract and the remedies, if any, for taking such action. One important consideration for a government considering contract termination—even termination permitted under domestic law and/or the contract—is whether international investment treaties affect its exposure to claims and liabilities. Even if a government has concluded that it has valid rights to terminate the contract, the investor may nevertheless seek to challenge that conclusion. In addition, a government may occasionally decide that contract termination is in its best interests even when not permitted; in such a case, it may seek to terminate the agreement and then pay compensation and/or face legal actions.

Contracts, and the rules of domestic law that govern them, typically delineate circumstances in which termination by one or both parties is permitted, sometimes accompanied by payment of compensation. In some circumstances, a government thus may be entitled, and may view it to be in its best interests, to put an end to contractual relations with an investor. Additionally, a contract may be terminated by judicial decision or other government act declaring the contract void or unenforceable.

WHAT ARE THE BENEFITS OF CONTRACT TERMINATION?

There are various legitimate grounds on which a government party to an investor-state contract may seek to terminate the deal, including a desire to exit a controversial arrangement tainted by fraud or corrup-

tion, or to put an end to an unproductive relationship in which the other contracting party fails to fulfill its obligations. Additionally, even if not entitled to terminate the contract, a contracting party may nevertheless determine that maintaining the deal is not in its best interests and seek to exit the deal, paying compensation as required by applicable law.¹⁷⁰

WHAT ARE THE POTENTIAL RISKS RELATED TO CONTRACT TERMINATION?

Termination of an investor-state contract has potentially negative consequences at both the domestic and international law levels. In addition to opposition from the investor, domestic consequences include opposition from government officials and entities in support of the project, project employees, individuals and entities that generate revenue based on supplying goods or services to the investor, and individuals and entities that depend on inputs produced by the investor. As a result of such opposition, the government entity responsible for terminating the contract may face legal action, pressure from within the government, or pressure from the public.

If the investor is a foreign investor, the investor's home government may use diplomatic channels to question or seek reversal of the decision to terminate. If there is an international investment treaty in place that covers the investor, the investor may also seek to bring an investor-state arbitration claim to challenge the termination.¹⁷¹ When determining whether and to what extent a government may be exposed to claims and liability under international investment treaties, two key considerations are: (1) whether the contract was terminated using powers and authority available to a normal contracting party (as opposed to a government entity); and (2) whether the applicable treaty contains an "umbrella clause."

With respect to the first consideration, tribunals have typically determined that a government's breach of an investor-state contract will not constitute a breach of international law if the government was acting as any normal contracting party. If, however, the government terminated the contract through an exercise of sovereign powers (by, for example, passing a decree or law, or issuing a judicial decision, declaring the contract void), then that exercise of sovereign powers could potentially give rise to an international law violation under the FET obligation or obligation to provide adequate compensation for an expropriation.

The second consideration—whether the treaty has an umbrella clause—operates as an exception to the first. While there are some differences in opinion among arbitrators on this issue, the majority view is that the umbrella clause allows covered foreign investors to bring claims against host governments for contract violations (including unlawful termination) even when the government has not exercised any sovereign powers.

WHEN SHOULD A GOVERNMENT CONSIDER TAKING THIS OPTION?

In some cases, grievances may be so severe, as well as difficult to remedy while the investment continues, that cancellation of the investor-state contract appears to be the best option. For the government entity that is party to the contract, determining whether and when it should take this option depends on an analysis of what is justified under the circumstances, as well as what is permitted under the contract and the law governing its interpretation. While applicable legal frameworks do recognize situations in which a party may terminate an investor-state contract, those grounds are often specifically defined and, even if satisfied, may nevertheless require some form of remedy to be provided.

In addition to terminating an agreement in accordance with its terms, a government may also exercise its sovereign authority to terminate an investor-state contract. A court, for example, may rule that a contract is void under domestic law. Although the formal purpose of such a holding may not be to address land grievances per se, the case itself may have arisen from grievances related to the investment. Courts play an important role in ensuring that investor-state contracts are consistent with legal norms and policies, and this may require decisions invalidating deals that violate domestic law. Such decisions, however, are not immune from arbitration claims.

REVOKING AUTHORIZATIONS NECESSARY FOR INVESTOR OPERATIONS

In certain cases, the reasons behind land grievances (for example, the extent of environmental pollution) or the severity of their effects (such as resulting violence) may cause a government to **revoke or terminate existing permits or other authorizations**. Ideally, the grounds and procedures for terminating existing authorizations will be clearly set forth in domestic law, and may provide permit holders certain rights of notice and appeal before such action is taken. If government officials seek to comply with the substantive and procedural requirements of the law when terminating such authorizations, those actions are more difficult to challenge under both domestic law and international investment treaties.

Domestic law generally governs how investment-related authorizations (for example, environmental permits or investment licenses) are provided and how they may be revoked or terminated, including permissible grounds, procedures, and available remedies. These rules differ between jurisdictions, and often vary depending on the nature of the authorization and the activity that it governs. Depending on the relevant rules in the host state, the government may have the ability—and, in some cases, may be required—to revoke or terminate¹⁷² authorizations that are necessary for investment operations.

WHAT ARE THE BENEFITS OF REVOKING AUTHORIZATIONS?

Revoking authorizations, such as permits or licenses, may have a number of advantages for a government and for communities. This step may help (and in some cases may be necessary to) address the relevant grievance. Additionally, to the extent that the revocation is done in accordance with applicable substantive and procedural requirements, it helps to affirm the rule of law in the host country and the government's commitment to hold investors to their legal obligations. If the authorization was revoked because it had been issued through fraud or corruption, or if the revocation was due to harms caused by the investor, a subsequent reissuance to another investor may produce a more positive outcome.

WHAT ARE THE POTENTIAL NEGATIVE CONSEQUENCES ASSOCIATED WITH THIS OPTION?

Revoking existing permits or other authorizations may pose various legal, economic, and political challenges at the domestic and international levels.

As with contract termination, a government decision to revoke an authorization may prompt negative political and legal reactions at the domestic level by those who would be negatively affected by the revocation. For example, the entity whose permit, license, or other authorization was revoked may contest the action through legal and/or political avenues. Other stakeholders, such as individuals or entities that rely on the operation of the investment project for employment, sales revenue, or supply of inputs, may protest any decision that stops or halts operations. Government entities that expect or depend on the permitted activity for tax or other revenue may similarly oppose revocation.

At the international level, a government may face diplomatic pressure, as well as investor-state arbitration claims challenging the permit revocation. The investor could, for example, potentially argue that the revocation violated various obligations or prohibitions under the treaty. While the fact that a revocation decision was taken in good faith and in accordance with domestic law will help strengthen a government's defense in response to any such arbitration claims, neither good faith nor compliance with domestic law will necessarily immunize permit revocations from successful challenges under international investment treaties.

BOX 20: WHAT ARGUMENTS MIGHT AN INVESTOR MAKE IF A PERMIT IS REVOKED?

An investor bringing a treaty-based arbitration case because of a revoked permit might argue that the government violated the following:

- Non-discrimination obligations: for example, if the activities of other domestic or foreign permit-holders also gave rise to grievances or were not conducted in strict compliance with the law, but those permit-holders were nevertheless allowed to continue operating, the investor whose permit was revoked might argue that the revocation decision violated the investment treaty's national treatment or most-favored nation obligations;
- Fair and equitable treatment obligation: for example, if the permit was terminated without due process, the investor might argue that this breached the FET obligation. Or if the investor's obligations under the permit had been interpreted and applied in a particular way and then, due to a change in administrative policy or judicial doctrine, were subsequently interpreted to impose more stringent requirements on the investor, the investor might argue that the shift violated its "legitimate expectations";
- Prohibition on uncompensated expropriations: for example, the investor may argue that revocation of the permit destroyed the value of its investment in the country, constituting an indirect expropriation; and
- Umbrella clause: for example, the investor may argue that the decision to revoke the permit violated the government's obligations to the investor under the umbrella clause, thereby asking the tribunal to rule on the scope of the government's and investor's respective rights and obligations with respect to termination.

WHEN IS REVOKING AN AUTHORIZATION AN APPROPRIATE OPTION?

The clearest circumstances in which revocation of authorizations will be an appropriate option are when:

- › Revocation is dictated by domestic law;
- › Revocation is required in order to fulfill the government’s obligations under international human rights law; or
- › Revocation is necessary to address the grievances (or the circumstances giving rise to them), and allowed under the domestic legal framework.

A government may, in comparison, face more difficult decisions when its obligations under international human rights law are unclear, or when there is uncertainty under domestic law regarding the grounds, procedures, or remedies for terminating permits or other authorizations. Moreover, even when the appropriate course of action under domestic law or international human rights law is relatively discernible, it will be difficult to know in advance whether that action will trigger an investment treaty claim and liability. An investment arbitration tribunal may, for example, accept that the government’s revocation of the authorization was necessary in order to comply with human rights obligations while nevertheless deciding that the government is still required to pay the investor compensation under the treaty.

GENERAL OPTIONS

When governments become aware of potential land grievances that may arise in the future, they may be interested in exploring ways to improve their overarching approach to addressing such grievances or to minimize their general liability under investment treaties. Taking proactive and general steps can be advantageous: they can help prevent multiple conflicts from emerging, and, in the event that an investor dispute arises in the future, a broad approach to addressing problems may be viewed more favorably by an investment arbitration tribunal than actions that appear targeted at a specific investor or project. Many of the general steps described below, however, are not easily tailored to specific situations, nor are they able to provide timely redress to individuals or communities that have already suffered harm. In spite of these limitations, a host government concerned about protecting its citizens from the negative impacts of land-based investments may wish to consider the steps below either before or after problems arise.

DEVELOPING A NATIONAL STRATEGY FOR LEGAL AND POLICY REFORM

Land grievances will often center on issues that require comprehensive solutions, such as through law or policy reform. A government may **undertake a national policy strategy process** to determine how laws and policies can better protect against the negative impacts of investors or other business operations. National Action Plans on business and human rights (“NAPs”) are one example of a strategic process that can be used to determine how to protect against the negative impacts of investments.

Land grievances will often center on issues that are not limited to a specific investment or community, such as the need to recognize and

protect undocumented community land rights across the nation, or the desire to better balance the protections provided to investors and to citizens. In such circumstances, a government may decide to investigate whether legal or policy reform is needed to adequately respond to issues underlying land grievances, resulting in the development of a national policy strategy. One process that a government can pursue is to develop a national action plan on business and human rights, which will help the government to determine what reforms are needed. Using the example of NAPs, this discussion sets out how a government can embark on a policy strategy process to devise comprehensive solutions that enhance compliance with international human rights law while still complying with obligations under international investment law.

WHAT LEGAL OR PRACTICAL FORCE DO NATIONAL POLICY STRATEGIES HAVE?

National policy strategies usually do not have any legal force, but are intended to guide the government’s strategy regarding legal and policy reform. Thus, while they will not change how investments are regulated or establish new ways to redress grievances, policy strategies may lead to laws and policies that do attain these objectives. In addition to catalyzing legal reform, policy strategies may improve coordination amongst different government departments, which can enhance the government’s ability to regulate investments.

A national policy strategy process that helps to shape a government’s efforts to protect human rights and influences its approach to legal or policy reform may also affect an investor’s “legitimate expectations” regarding how its investment might be affected by human rights issues. This process thus might provide useful context for an investment arbitration tribunal if an investor brought a dispute tied to the impacts of such reform.

BOX 21: WHAT IS A NAP?

A National Action Plan on business and human rights is a national policy strategy developed by a government that sets out how it will protect against adverse human rights impacts caused by business enterprises.¹⁷³ A NAP is not a law, but rather a process by which the government determines the laws or policies needed to ensure that it is comprehensively preventing, mitigating, and remedying adverse impacts of business on human rights.¹⁷⁴ It can support legal reform in a way that increases inter-governmental coordination and policy coherence, and can provide a platform for ongoing dialogue with relevant stakeholders.

Each NAP should be adapted to the specific circumstances of the country,¹⁷⁵ and ideally should be an ongoing process subject to review, evaluation, and improvement, rather than a one-off document.¹⁷⁶ One aspect that can be included in a NAP is a national baseline assessment (“NBA”), which is a means of taking stock of existing laws and policies that currently address the human rights impacts of business operations.¹⁷⁷ As part of the NBA, a government can carry out a comprehensive survey of existing grievances by collecting data from multiple sources; this data can be supplemented by additional baseline research.¹⁷⁸ Analysis of the research, including of the prevalence and gravity of various types of grievances and rights violations, can help in determining how law or policy reform could reduce the occurrence of negative human rights impacts that lead to land grievances.

WHAT ARE THE POTENTIAL RISKS OF DEVELOPING A NATIONAL STRATEGY FOR LEGAL AND POLICY REFORM?

A government undertaking broad legal reforms, including reforms tied to policy strategy processes such as a NAP, may confront some risks related to its international investment law obligations. As explained below in the discussion on adopting changes to the law, a negatively affected investor may seek to argue that the changes to the law breach various governmental obligations under an investment treaty.

However, the process of undertaking a national policy strategy does not, in itself, raise these risks. As noted above, such a process may actually be useful in providing some defense for a government's actions if a dispute was brought, providing a way for the government to show that its reforms were reasonable, legitimate, and considered.

ADOPTING CHANGES IN THE LAW

Grievances regarding land-based investments may arise because there is a gap in the domestic legal framework (or a failure to enforce it) that leaves the rights of affected individuals and communities inadequately protected. In other cases, applicable domestic laws may create or exacerbate the grievances. In both of these situations, **changes to the legal framework** may be appropriate or necessary. Depending on the issue involved, these changes may be to the constitution, to laws, or to regulations or administrative policies or acts implementing those laws. The changes may be undertaken by the legislative, executive, judicial, or other government branch. In addition to opposition from certain stakeholders and associated political hurdles, some of these changes may face legal challenges regarding their consistency with other domestic and international legal norms. Contractual stabilization clauses and international investment treaties are two potential sources of conflict.

The establishment of a robust legal framework capable of equitably governing rights over and use of land is an ongoing process. This process involves various constituents and institutions that refine, amend, modify, and even repeal standards and rules over time. While there are some limits on that flexibility, largely arising from constitutional and international restraints on the freedom and powers of domestic governments, significant latitude remains for governments to adopt and change their laws, including to address grievances arising from land-based investments.

WHEN SHOULD A GOVERNMENT CONSIDER TAKING THIS OPTION?

The need to adopt certain changes in the law may be clear based on the grievances that have arisen from land-based investments, and the reasons for such grievances. This may be particularly apparent when a law causes or augments the grievances. Alternatively, a government may decide to undertake a more in-depth process to assess necessary legal or policy reforms, for example through the development of a NAP, as discussed above. Consideration of the need for legal reform may also arise in response to an opinion from a human rights tribunal on the incompatibility of a country's domestic laws with its human rights commitments, or following the establishment of new international instruments, standards, or best practices concerning investments.

Changes in the legal framework can be a key and, indeed, necessary option for a government seeking to holistically and effectively address

serious problems regarding existing land-based investments. Despite potential conflicts with stabilization clauses and international investment treaties, this option will therefore likely form a fundamental part of a government's strategy to address grievances, as well as its efforts to prevent future grievances from arising.

WHAT ARE THE POTENTIAL RISKS OF ADOPTING THIS OPTION?

Changes to domestic legal frameworks may prompt political opposition, for example, from those who may be negatively affected by the changes. Such changes may also lead to domestic legal challenges, such as arguments that they violate constitutional protections, or did not comply with appropriate procedures.

A government also confronts the risk that changes to the law may be challenged by an investor as violating a stabilization provision in the investor-state contract. Where stabilization clauses are enforceable, an investor benefiting from such a clause may either be freed from, or be entitled to compensation for the costs of, having to comply with the changes in the law. Moreover, even if a domestic court might deem the stabilization clause invalid, an investment arbitration tribunal interpreting a contract with such a clause may adopt a different view, enforcing it under the umbrella clause and/or fair and equitable treatment obligation.

Even in the absence of a stabilization clause, an investor that is negatively affected by changes to the law might initiate an investment arbitration claim under an applicable treaty. In doing so, it might argue that such changes breach its right to fair and equitable treatment by violating a legitimate expectation that relevant laws and policies would not change, constitute discrimination by affecting the investor more than other businesses, or amount to an expropriation of the investment.

REQUESTING AN ADVISORY OPINION FROM A HUMAN RIGHTS TRIBUNAL OR BODY

Seeking an advisory opinion from a human rights tribunal can provide greater clarity on how a government can manage a potential conflict between its human rights duties and its obligations under international investment law. While an advisory opinion will not be binding on an investment arbitration tribunal, its existence may help to dissuade an investor from resorting to arbitration for loss suffered as a result of a government's actions taken to comply with the opinion. The options for a government without access to regional human rights courts that produce advisory opinions are more limited, but include using the Human Rights Council's Universal Periodic Review (UPR) process to request recommendations from the international community.

Two regional human rights courts—the Inter-American Court of Human Rights, which covers the countries of the Americas, and the African Court on Human and Peoples' Rights, which covers countries that are members of the African Union—provide advisory opinions that clarify a state's human rights obligations in the absence of a formal dispute. A government under the jurisdiction of either court could thus seek an advisory opinion on complying with its human rights obligations in the context of other legal obligations, such as those contained in international investment treaties. Such guidance would generally focus on

WHAT QUESTIONS CAN BE THE SUBJECT OF AN ADVISORY OPINION?

Inter-American Court of Human Rights

A member state of the Organization of American States¹⁸⁴ can seek an advisory opinion from the Inter-American Court of Human Rights on questions regarding the compatibility of its own domestic laws with the American Convention on Human Rights or with other treaties concerning the protection of human rights in the American states.¹⁸⁵ A government seeking guidance on how to respond to land grievances could thus ask the Court whether implementing a proposed law to comply with an investment treaty or investor-state contract is compatible with its human rights obligations.

The Court can exercise its discretion not to offer an advisory opinion, even where the request put to it is admissible.¹⁸⁶ When it has provided such opinions in the past, it has issued them between one and three years after receipt of the initial request.¹⁸⁷

In addition to seeking an advisory opinion from the Inter-American Court, a state can also request “advisory services” from the Inter-American Commission on Human Rights.¹⁸⁸ Such advice is often initially communicated privately to the state, but can be made public.¹⁸⁹

African Court on Human and Peoples’ Rights

Under the African Charter on Human and Peoples’ Rights, member states of the African Union can seek an advisory opinion from the African Court on Human and Peoples’ Rights “on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the [African] Commission [on Human and Peoples’ Rights].”¹⁹⁰ This is likely broader than the Inter-American Court of Human Rights’ jurisdiction, in that “any legal matter” likely could include conflicts between the Charter, on one hand, and international investment treaties, investor-state contracts, government policies, or executive action relating to an investment, on the other. While not explicitly mentioned, domestic laws that have an impact on human rights concerns likely also come within “any legal matter.”¹⁹¹

The Court’s advisory jurisdiction is relatively untested, and it is therefore difficult to predict the likelihood of its granting a request for an advisory opinion. There is also no clear indication of how long the Court might take to issue an opinion. The Court has so far released only one advisory opinion,¹⁹² which was issued approximately one year after the request was first received.

Members of the African Union technically may be able to request an advisory opinion from the African Commission on Human and Peoples’ Rights as well, although this has not yet been attempted.¹⁹³

WHAT OPTIONS EXIST FOR COUNTRIES WITHOUT REGIONAL COURTS?

Countries that do not fall under the jurisdiction of regional courts that offer advisory opinions have fewer opportunities to obtain official interpretations of their human rights obligations, and how they square with their international investment obligations.

One potential option for member states of the United Nations is to seek support or advice from other member states using the Human Rights Council’s Universal Periodic Review (UPR) process. Each member state periodically undergoes a UPR, through which the members of the Council evaluate the government’s human rights performance and offer recommendations. During the UPR, the government will submit a national report,¹⁹⁴ which can include a request for

overarching issues, rather than on specific investments or grievances.

A government that does not have access to either court can engage with other human rights processes, although these options will usually not offer guidance regarding specific instances of conflicting state obligations. A government can also facilitate domestic litigation by not opposing human rights claims brought against it (see Box 22), which may lead to further clarity on how to meet its relevant obligations.

WHAT IS AN ADVISORY OPINION?

Advisory opinions help interpret laws within the scope of an adjudicatory body’s purview. Regional human rights courts use advisory opinions to interpret human rights law. Advisory opinions are interpretations of specific legal questions. They do not require an existing dispute, and can consider hypothetical questions. Regional human rights courts that provide advisory opinions do so upon request from a government or from other institutions, such as a regional human rights commission.

Not all adjudicatory bodies provide advisory opinions; investment arbitration tribunals do not offer them.¹⁷⁹ The European Court of Human Rights provides limited advisory opinions, but not on the content or scope of the human rights and freedoms set out in the European Convention on Human Rights.¹⁸⁰ While the International Court of Justice provides advisory opinions, a state cannot request one.¹⁸¹

WHAT LEGAL FORCE DO ADVISORY OPINIONS HAVE?

Advisory opinions are not binding.¹⁸² They are persuasive, however, as they are a formal expression of the court’s view on a particular legal matter. Advisory opinions can therefore have significant influence on the behavior of states—even states that have not submitted to the court’s jurisdiction.¹⁸³ This persuasive character makes advisory opinions important sources for clarifying international legal rights and corresponding governmental obligations.

WHAT PRACTICAL FORCE COULD AN ADVISORY OPINION HAVE?

When a government believes that, by granting a concession, it has created a situation in which its human rights obligations may conflict with its international investment law obligations, seeking an advisory opinion could provide greater clarity on how the government should proceed. A government acting to protect human rights in accordance with an advisory opinion will not automatically avoid liability under international investment law. However, the existence of an advisory opinion may give pause to investors contemplating a claim to an investment arbitration tribunal, particularly if the government publicly acknowledges the advisory opinion and transparently sets out to comply with it. For instance, arguments that a government has discriminated against an investor or otherwise acted unreasonably are weakened when its actions are clearly intended to comply with the opinion of an authoritative adjudicatory body. An advisory opinion thus may create doubts as to an investor’s chances of success, lower its expectations regarding the amount of compensation it might receive if successful, or raise its reputational risks if it were to proceed.

assistance.¹⁹⁵ While the requests are usually for financial assistance or technical expertise in establishing human rights institutions,¹⁹⁶ member states have occasionally requested advice on resolving human rights problems.¹⁹⁷ Any recommendations received in response would not be legally binding, and likely would not be accompanied by extensive analysis. Yet such recommendations could strengthen the perceived legitimacy of government efforts to protect human rights in such contexts and potentially provide new ideas for ways to address land grievances.

BOX 22: ENCOURAGING DOMESTIC LITIGATION

Aside from proactively seeking guidance, governments can obtain further clarity on the human rights impacts of granting specific concessions by encouraging, facilitating, or simply not challenging domestic court claims brought against the government by individuals alleging human rights violations. This may not always be politically desirable, given the reputational and legal risks that litigation can create. In some circumstances, however, such an approach may be suitable—for instance, where a newly elected government inherits grievances based on policies or administrative decisions made by the former administration with which it also has concerns. In such a situation, the government can encourage claims by making its position clear, and by ensuring adequate access of those aggrieved to independent legal advisors. The government can facilitate claims by cooperating with court processes, providing all pertinent information, and not objecting to the court’s jurisdiction or defending the substantive case at trial.¹⁹⁸

WHAT ARE THE POTENTIAL RISKS OF SEEKING AN ADVISORY OPINION OR OTHER RECOMMENDATION?

While advisory opinions, or other formal recommendations, can provide public and compelling clarifications of how a government should uphold its human rights obligations in the context of overlapping obligations under international investment law, they are not the final resolution of specific conflicts. There is also no certainty that a request for an advisory opinion will be granted.

One risk is that the existence of an advisory opinion may not dissuade an investor from initiating an investor-state arbitration. This may be especially true for investors that are not concerned with their international reputation. This risk is compounded by the fact that advisory opinions generally take years, rather than months, to be produced. Another risk is that, if an investor does proceed with a claim, the investment arbitration tribunal may not place much weight on the advisory opinion. While tribunals may consider the rulings of a regional human rights court,¹⁹⁹ they are generally not bound to follow those courts’ decisions.

INTERPRETING INVESTMENT TREATIES

Establishing “subsequent agreement” and “subsequent practice” on the meaning of international investment treaties can be a feasible way for host governments to rein in overly broad and unintended interpretations of those treaties. After signing and ratifying such treaties, governments retain powers to help shape their meaning. This includes using inter-state agreements and domestic practices to demonstrate their understanding of international

investment treaty obligations; under the rules governing treaty interpretation, those subsequent agreements and practices must be taken into account by tribunals when interpreting treaties. These tools might be useful for governments that anticipate potential problems related to land-based investments, and that are concerned about their international investment treaty obligations being interpreted in a way that they do not intend.

A host government that foresees potential conflicts with investors regarding efforts to address land grievances may wish to assess how its investment treaty obligations would be interpreted in any future disputes brought before an investment arbitration tribunal. Although a host government cannot unilaterally change these obligations (except by pulling out of a treaty altogether, as discussed below), it can take steps to assist future tribunals in interpreting such obligations. Two important mechanisms available to governments to help influence tribunal interpretations are through establishing “subsequent agreement” and “subsequent practice” on the meaning of its treaties.

WHAT IS MEANT BY “SUBSEQUENT AGREEMENT” AND “SUBSEQUENT PRACTICE”?

International law of treaty interpretation recognizes the ongoing role of states, as “masters of their treaties,” in managing the interpretation and application of treaties they have signed. In particular, the Vienna Convention on the Law of Treaties (“VCLT”) provides that *after* states have entered into a treaty, (1) any subsequent agreement by the parties to the treaty regarding its meaning, and (2) any subsequent government practices in interpreting and applying the treaty that establish a shared understanding of that instrument must be taken into account by tribunals when interpreting the treaty.²⁰⁰

More specifically, the rules regarding “subsequent agreement” mean that if, after an international investment treaty has come into force, the state parties to the treaty expressly agree on an interpretation of a vague

BOX 23: NAFTA PARTIES’ STATEMENT CLARIFYING THE MEANING OF THE FET OBLIGATION

The North American Free Trade Agreement (NAFTA) specifically notes that interpretations issued by the NAFTA parties are binding on investment arbitration tribunals.²⁰¹ In response to certain tribunals’ expansive interpretations of the NAFTA’s fair and equitable treatment obligation (Article 1105) in early cases arising under that treaty, the NAFTA parties issued a statement clarifying their understanding of that provision. It states:

Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).²⁰²

provision, that agreed interpretation must be considered by investment arbitration tribunals. States can form these agreements through an exchange of diplomatic notes, or through other steps, such as a jointly issued statement. In 2001, for example, the parties to the North American Free Trade Agreement (NAFTA) issued a joint interpretation to clarify the meaning of the fair and equitable treatment obligation in that treaty, as noted in Box 23.

The rules regarding “subsequent practice” mean that, after an international investment treaty has come into force, if the officials of both state parties to the treaty make statements or take actions reflecting a certain shared understanding of the agreement, that shared understanding must be considered by investment arbitration tribunals. Subsequent practice can include “not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as” certain “practices by non-state entities.”²⁰³ No specific form of conduct is required,²⁰⁴ nor is there any requirement that it occur with any degree of frequency.²⁰⁵ Its value depends on the extent to which it establishes “common understanding of the parties as to the meaning of the [treaty’s] terms.”²⁰⁶

If, for example, after signing investment treaties, officials in each state party provide information to the public explaining that a “national treatment” violation requires the claimant to provide proof of intentional, nationality-based discrimination, those statements can constitute subsequent practice establishing an authoritative agreed interpretation of the non-discrimination provision. Subsequent practice can also be established by submissions states make to tribunals in the context of disputes, whether as a respondent state or as a non-disputing party to the treaty.

WHAT LEGAL FORCE DO “SUBSEQUENT AGREEMENT” AND “SUBSEQUENT PRACTICE” HAVE?

Subsequent agreements and subsequent practice can be used to narrow, widen, or otherwise determine the range of interpretations that can be given to a treaty.²⁰⁷ They help add clarity to vaguely worded clauses, but are generally not presumed to amend or modify the treaty.²⁰⁸

Subsequent agreement and subsequent practice are not necessarily conclusive on issues of interpretation. Tribunals are not generally bound by them. Rather, tribunals must take subsequent agreement and practice into account along with other means of treaty interpretation. Some international investment treaties, however, specify that subsequent agreements by the treaty parties are expressly binding on investment arbitration tribunals.²⁰⁹ This gives the state parties clear and strong authority to ensure that tribunals adhere to and apply the state parties’ understanding of their treaties.

Even in cases when state practice does not establish joint agreement between or among treaty parties on an issue of interpretation, state practice can still be relevant as a supplementary means of treaty interpretation that may be taken into account by tribunals. Unilateral statements and conduct by government officials clarifying and elaborating on the government’s understanding of its treaty provisions therefore can still be relevant for shaping interpretation of those treaties, even if conduct of the other state party or parties to the treaty does not show a shared interpretation.

HOW WOULD THIS OPTION HELP?

Questions regarding the scope of treaty obligations are not always settled by the terms of the treaty. Many of the problems that govern-

ments have faced related to investment treaties have arisen from vaguely worded provisions, which are vulnerable to broad interpretations by tribunals. This creates the possibility that a tribunal might interpret obligations under a treaty in a way that the treaty parties did not intend, and in a way that creates greater risks of liability for good faith actions taken by a government to address land grievances.

A government can exercise its rights under international law to try to clarify and narrow the scope of its investment treaty obligations. Subsequent agreement and subsequent practice can be used to help provide needed clarification on issues such as the requirements for establishing a violation of the non-discrimination obligation, the meaning of the fair and equitable treatment obligation, the scope of the umbrella clause, and, more generally, the relationship between international human rights law and international investment law.

WHEN IS THIS AN APPROPRIATE OPTION?

When ambiguity in international investment treaty provisions can leave a government exposed to potentially significant litigation and liability, including in response to efforts to address land grievances, the government should consider clarifying the meaning of such provisions by establishing subsequent agreement and subsequent practice. To do so, a government can take any of the following concrete steps:

Alone and with other countries, a government can:

- › Make public its understanding of vague or uncertain treaty provisions through unilateral action (e.g., by communicating its understanding to the public, or posting interpretative statements on a website);
- › Monitor statements and practice of other parties to its treaties to identify areas of agreement and disagreement; and
- › Cooperate with other states to establish and issue joint statements clarifying ambiguous language.

In disputes, a government can:

- › Remain informed on the interpretation and application of its treaties;
- › Make its submissions, which constitute state practice, public;
- › Participate as a non-disputing state party in disputes arising under its treaties; and
- › Make clear when it disagrees with interpretations given by tribunals.

In addition, in its future treaties, a government can insert provisions:

- › Ensuring that joint interpretations on some or all issues are binding on tribunals;
- › Encouraging (or requiring) state parties to consult and cooperate to resolve ambiguities on questions of interpretation and/or application; and
- › Requiring that the home state or other non-disputing state parties: (1) are notified of claims filed under their treaties, (2) receive documents submitted to and issued by tribunals, and (3) can make submissions to tribunals on issues of treaty interpretation.

Because tribunals have tended to discount the weight of governments’ statements regarding their understanding of treaty provisions that are made in the context of disputes in submissions by respondent states, it is important for a government, to the extent possible, to seek to clarify ambiguities before claims arise.

DECLINING TO CONCLUDE NEW TREATIES, AND TERMINATING OR NOT RENEWING EXISTING TREATIES

The costs posed by international investment treaties, including threats to domestic policy space, the potential for incurring high litigation costs, and risks of facing significant orders to pay compensation to foreign investors, have led a growing number of governments to review their policies regarding such treaties, as well as to take steps such as **placing moratoria on the negotiation of new international investment treaties and terminating existing treaties**. These actions can help reduce states' exposure to claims and liabilities for conduct that affects the rights or expectations of foreign investors. A government concerned about the costs of investment treaties in the context of addressing land grievances might wish to explore these steps.

As discussed throughout this report, international investment treaties can constrain a government's ability to address land grievances through actions that affect the rights or expectations of foreign investors without fear of incurring potentially significant litigation costs and liabilities. A government may thus wish to consider whether the costs of such treaties outweigh their benefits and, if so, to seek to minimize or avoid those costs. As noted above, one strategy for minimizing the costs of international investment treaties is to clarify and narrow the meaning of treaty obligations. Other strategies are to refrain from concluding new international investment treaties that provide for investor-state arbitration or to terminate existing agreements.

WHAT ARE THE LIMITATIONS OF THIS OPTION?

Not concluding future international investment treaties and terminating existing ones can help reduce a government's exposure to claims and liabilities under such treaties. Such strategies will not necessarily eliminate the costs of these treaties, however.

For one, if a government decides not to conclude new international investment treaties, it will still remain vulnerable to claims and liability under existing ones. Given the ability of investors to structure their investments in order to gain protection of investment treaties, this limitation is greater than it may first appear.

Moreover, international investment treaties typically have survival clauses stating that, if a government decides to terminate the agreement, the treaty (and its investor-state arbitration provisions) will remain in force for a set period, which may range from 10 to 20 years. Thus, even if a government terminates a treaty, it will still be subject to claims and potential liability for a significant length of time. However, a government can agree with the other state party to first amend the treaty to remove the survival clause, and then terminate the treaty. This approach has been taken to terminate certain treaties with immediate effect.

WHAT ARE THE POTENTIAL CONSEQUENCES OR RISKS RELATING TO THIS OPTION?

Many international investment treaties were signed with relatively little attention paid to and discussion of their implications. As the number of arbitrations has risen, and governments have become more aware of the treaties' implications, various countries have paused or stopped negotiations of treaties and/or sought to terminate existing agreements. These actions, which have been taken by a diverse group of countries, have often involved multi-year and multi-stakeholder processes.

In developing their strategies toward existing and future international investment treaties, governments have encountered some resistance. Some governments, for example, have faced diplomatic pressure from capital-exporting countries to conclude new agreements and to keep existing treaties in force.²¹⁰ Governments also report concerns that, in the absence of treaties with investor-state arbitration provisions, the home states of investors will use diplomatic pressure to press for resolution of disputes in favor of their investors. Thus, treaties with such provisions may, according to this reasoning, help avoid inter-state tensions. Governments have also noted concerns that not having investment treaties may harm (or, at least, not help) their reputations as host countries and their ability to attract foreign investment.

These concerns may be overblown. With respect to the concerns regarding diplomatic pressure, evidence from investor-state arbitrations and other sources indicates that, even when an international investment treaty is in place between the host state and the investor's home state, the investor's home state may still use diplomatic channels to try to advance its investor's interests.²¹¹ Treaties therefore may not be effective at removing diplomatic pressure. Additionally, regarding concerns over the impacts on investment flows, data is inconclusive on whether international investment treaties actually influence investors' decisions on whether and where to invest.²¹² Moreover, foreign direct investment in South Africa and Indonesia rose in the year following those countries' respective announcements that they were terminating existing bilateral investment treaties.²¹³

WHEN IS THIS AN APPROPRIATE OPTION?

It is always useful for governments to analyze whether the costs of existing or future international investment treaties outweigh their benefits. Frameworks exist for analyzing whether to enter into new treaties,²¹⁴ providing key questions regarding the economic and political benefits and costs that should be considered. A government that is concerned about the implications of its international investment treaties for its ability to effectively address land grievances could consider similar questions to determine whether to terminate existing treaties.

CONCLUSION

The responsible governance of land-based investments hinges not only on ensuring that new investments comply with guidelines and standards, but also that the operations of existing investments are conducted responsibly and that related grievances are adequately addressed. Addressing actual or potential grievances offers benefits for both host governments and investors, including a reduction of risks associated with community conflict.

Yet dealing with land grievances can be complicated for host governments. This is particularly so when the investor and project-affected communities have opposing perspectives on how to resolve grievances. Moreover, the complex web of legal obligations that bind a government can constrain its options, rendering it difficult to achieve optimal solutions in all cases.

As discussed in this report, however, host governments have a range of options at their disposal to address land grievances. This includes actions to address specific grievances, as well as steps that can be taken to either minimize potential liability under investment treaties, or to improve their general approach to land-based investments and the grievances they engender. Not all options are suitable for every situation, and some entail risks: for example, risks that the action may not address the grievance, or that the action may expose the government to costly legal claims. The risk of doing nothing, however, may be greater.

Indeed, although this report discusses risks that arise under investment treaties, such risks are not reason to preclude democratic responsiveness or good faith actions designed to comply with human rights obligations. Rather, analyzing its legal obligations is simply a useful first step for a government seeking to protect its citizens against the negative impacts of land-based investments.

The options described in this report provide guidance on how governments can address concerns related to existing land-based investments. In this way, the report is distinct from much of the existing research on such investments, which emphasize ex ante best practices to be implemented before an investment occurs. Yet the descriptions of the complex implications of governments' legal obligations can also be read as a cautionary tale, highlighting the urgency of getting land-based investments right from the start. Whether a government currently hosts such investments, or plans to do so in the future, there are actions that can be taken to promote more responsible investment, providing greater benefits and fewer problems for all relevant stakeholders.

GLOSSARY

This glossary defines key terms as used in this report.
Some terms may be defined differently in other contexts.

› **COMMERCIAL ARBITRATION:**

a form of binding dispute resolution between two or more parties to a business venture or transaction, which is usually established by the contract regulating that venture or transaction. Commercial arbitrations are conducted before a private arbitrator or arbitrators.

› **CONCESSION:**

the right, granted by a government to an investor, to use land or a property for the purposes of an investment.

› **CONCESSION AGREEMENT:**

an agreement made between a host government and an investor in which the government grants the investor the right to develop and operate a particular investment project. It is a type of investor-state contract.

› **FREE, PRIOR, AND INFORMED CONSENT (FPIC):**

the right of a group of people, usually an indigenous community, to be consulted with and to provide or withhold their approval before the establishment of any project that stands to directly affect access to their lands, territories, or resources. A government must also obtain the FPIC of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them. Any consent obtained must be “free,” occurring without undue pressure or manipulation; it must be obtained sufficiently “prior” to the commencement of the project or public measure; and it should be given after the community is sufficiently “informed” about all aspects of the project.

› **GRIEVANCE MECHANISM:**

a routinized process through which an individual or group of people can bring complaints concerning any aspect of an investment and seek a remedy. Grievance mechanisms can be operated by the host government, by the investor, or by other entities, and can be judicial or non-judicial in nature.

› **HOME GOVERNMENT:**

the national government of the country in which an investor company is primarily based, headquartered, or incorporated. Sometimes referred to as home country or home state.

› **HOST GOVERNMENT:**

the national government of the country in which an investment takes place. Sometimes referred to as host country or host state.

› **INTERNATIONAL INVESTMENT ARBITRATION:**

a form of binding dispute resolution between an investor and a host government that is provided for in an international investment treaty. International investment arbitration allows an investor to allege that the host country has breached its obligations under an international investment treaty, and to seek damages for that breach. The arbitration is conducted before a private arbitrator or arbitrators. Only an investor can initiate an international investment arbitration claim. Also referred to as investor-state arbitration or investor-state dispute settlement (ISDS).

› **INTERNATIONAL INVESTMENT TREATY:**

a formal agreement between two or more countries establishing the terms and protections applying to private investment by nationals and companies of one country (the home country) in another country (the host country). International investment treaties also typically include provisions permitting investors to initiate international investment arbitrations.

› **INVESTMENT ARBITRATION TRIBUNAL:**

the arbitrator or panel of arbitrators in an international investment arbitration. The tribunal is the equivalent of a judge in a court proceeding. However, unlike judges who receive a salary from the state, arbitrators are paid by one or both of the parties to the arbitration.

› **INVESTOR:**

the commercial entity or individual carrying out a land-based investment project. This can include foreign companies and individuals, as well as any company incorporated in the host country by them for the purposes of implementing such investments.

› **INVESTOR PROTECTIONS:**

clauses contained in an international investment treaty or an investor-state contract that require the government to treat the investor in accordance with certain standards, such as the obligation to provide an investor “fair and equitable treatment.”

› **INVESTOR-STATE CONTRACT:**

a negotiated agreement between a government and investor covering at least some aspect of an investment project; frequently a concession agreement. Different from a permit, license, or other authorization issued by the government in its regulatory capacity.

› **LAND-BASED INVESTMENT:**

an investment for the purposes of an agricultural or forestry project that is authorized by a concession, permit, license, or some combination of authorizations.

› **LAND GRIEVANCES:**

concerns raised by local individuals or communities in response to the actual, perceived, or potential negative impacts of land-based investments.

› **RESTITUTION:**

a measure to restore, for a wronged person, the situation that existed before the wrongful act was carried out. While restitution can include a range of actions, this report focuses on restitution as the return of land or property to displaced individuals and communities.

FURTHER RESOURCES

This is a non-exhaustive list of relevant guidance documents that may assist host governments pursuing options discussed in this report. Additional resources related to the report, including a training module and bibliography, are available at: ccsi.columbia.edu/work/projects/land-grievances/

› RESPONSIBLE LAND-BASED INVESTMENTS

- › Organisation for Economic Co-operation and Development - Food and Agriculture Organization of the United Nations, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (2015)
<http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>
- › New Alliance for Food Security and Nutrition, *Analytical Framework for Land-Based Investments in African Agriculture: Due Diligence and Risk Management for Land-Based Investments in Agriculture* (2015)
<https://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments>
- › United States Agency for International Development (USAID), *Operational Guidelines for Land-Based Investment* (2015)
<http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>
- › French Agency for Development (AFD), *Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights* (2014)
<http://www.landcoalition.org/sites/default/files/documents/resources/Guide-to-due-diligence.pdf>
- › UN Special Rapporteur on the right to food, Olivier De Schutter, *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge* (2009)
<http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>

› DISPUTE RESOLUTION PROCESSES

- › Rees, C., *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and Their Stakeholders* (2008)
<http://goo.gl/2LssjN>

› FREE, PRIOR, AND INFORMED CONSENT; RESTITUTION; AND COMPENSATION

- › Food and Agriculture Organization of the United Nations, *Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (2014) <http://www.fao.org/3/a-i3496e.pdf>
- › Food and Agriculture Organization of the United Nations, *Compulsory Acquisition of Land and Compensation* (2008) <http://www.fao.org/3/a-i0506e.pdf>
- › UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (2007)
http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf

› NEGOTIATING AND RENEGOTIATING WITH THE INVESTOR

- › International Institute for Sustainable Development, *IISD Guide to Negotiating Investment Contracts for Farmland and Water* (2014)
<http://www.iisd.org/library/iisd-guide-negotiating-investment-contracts-farmland-and-water>
- › Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *UN Principles for Responsible Contracts* (2011)
<http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>
- › International Institute for Environment and Development, *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* (2010)
<http://pubs.iied.org/pdfs/17507IIED.pdf>

› NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS

- › Danish Institute for Human Rights and International Corporate Accountability Roundtable, *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (2014)
<http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>
- › United Nations Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights, Version 1.0* (2014)
http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf

› INTERPRETING INVESTMENT TREATIES

- › Columbia Center on Sustainable Investment, *State Control over Interpretation of Investment Treaties* (2014)
http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf
- › United Nations Conference on Trade and Development (UNCTAD), *Interpretation of IIAs: What States Can Do* (2011) http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf

ENDNOTES

1 While there is no definitive count of how many recent land deals have been concluded or how much land they cover, the most comprehensive effort to map these deals estimates that land deals concluded since 2000 cover over 42 million hectares of land. This data, however, is “inherently unreliable.” *About*, LAND MATRIX, <http://www.landmatrix.org/en/about/> (last visited Jan. 26, 2016).

2 To date, there have been relatively few publicly known international investment arbitration cases arising from agricultural or forestry investments. However, Lorenzo Cotula and Thierry Berger, who have identified 26 cases related to agriculture, note that, “[i]n line with wider trends in investor-state arbitration, there appears to have been a marked increase in the arbitral case load since 2003.” LORENZO COTULA AND THIERRY BERGER, *LAND DEALS AND INVESTMENT TREATIES: VISUALISING THE INTERFACE* 13 (INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT 2015). Databases of publicly known arbitrations also show cases falling within the agriculture, forestry, and fishing economic sector. For example, the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub classifies 26 cases under this economic sector: 14 relating to “crop and animal production, hunting and related service activities”; 8 to “forestry and logging”; and 4 relating to “fishing and aquaculture.” See *Economic sector and subsector*, <http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector> (last visited Feb. 11, 2016). The International Centre for Settlement of Investment Disputes (ICSID) database includes 20 cases related to agriculture, fishing and forestry. See *Cases*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx> (last visited Feb. 16, 2016).

3 While this report focuses on agricultural and forestry investments, many of the issues and options discussed are equally relevant for other large-scale investments that require land, such as mining or oil projects. This report also draws on examples from these industries when relevant.

4 The authors reviewed 40 cases of grievances arising from agriculture or forestry projects. Interviews were undertaken with lawyers, civil society representatives, and other experts that have worked on land-based investments on behalf of either host governments or communities.

5 This report does not constitute legal advice, however, and governments would be well advised to seek specific legal advice as needed.

6 See, e.g., Lorenzo Cotula et al., *Testing Claims about Large Land Deals in Africa: Findings from a Multi-Country Study*, 50 J. DEV. STUD. 903 (2014) [hereinafter Cotula et al., *Testing Claims*]. Outdated numbers regarding the scale of land-based investments continue to circulate, particularly based on the Land Matrix’s initial dataset, which has been substantially reduced since its launch—from over 200 million hectares of land to approximately 40 million hectares at the time of writing.

7 See, e.g., WARD ANSEEUW ET AL., *TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH* (The Land Matrix Partnership 2012), http://www.rightsandresources.org/documents/files/doc_4899.pdf; Cotula et al., *Testing Claims*, supra note 6.

8 Carin Smaller and Howard Mann, *A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER* (International Institute for Sustainable Development 2009), http://www.iisd.org/pdf/2009/thirst_for_distant_land.pdf.

9 The discussion of land grievances in this sub-section draws primarily from the authors’ review of 40 cases of grievances arising from agricultural or forestry investments, as well as interviews conducted by the authors with lawyers, advocates, and others who work with communities or host governments. More information on these grievances is available for download at <http://ccsi.columbia.edu/work/projects/land-grievances/>.

10 The IFC Performance Standards on Environmental and Social Sustainability describe physical displacement as “relocation or loss of shelter,” and economic displacement as “loss of assets or access to assets that leads to loss of income sources or other means of livelihood.” INTERNATIONAL FINANCE CORPORATION (IFC), *PERFORMANCE STANDARD 5: LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT* ¶ 1 (2012) [hereinafter IFC, *PERFORMANCE STANDARD 5*].

11 See, e.g., LIBINC Oil Palm Inc., *Concession Agreement* art. 24.3, Dec. 28, 2007, <http://www.openlandcontracts.org/contract/ocds-591adf-LR5534629561OL/view>: “Notwithstanding the incorporation in Liberia of LIBINCO, LIBINCO shall be treated as a Person that is a national of the United States of America for purposes of the Convention and of this Agreement.” At the time the contract was ratified, the company was a wholly owned subsidiary of Equatorial Palm Oil, PLC, which is a UK publicly listed company.

12 A review of 139 georeferenced large-scale land acquisitions found that 35 percent of the deals occurred on densely populated and easily accessible croplands, “indicating strong competition with other claims on this land.” Another 26 percent of deals occurred on shrubland or grassland that is moderately populated and accessible. The rest of the deals arose in forests with lower populations, raising concerns about deforestation as well as about the impact on individuals who rely on forest resources. Peter Messerli et al., *The Geography of Large-Scale Land Acquisitions: Analysing Socio-Ecological Patterns of Target Contexts in the Global South*, 53 *App. Geo.* 449, 454 (2014).

13 See, e.g., the provincial court complaint filed against Koh Kong Plantation and Koh Kong Sugar Industry in Cambodia by 4,000 villagers. *Koh Kong sugar plantation lawsuits (re Cambodia)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia>. See also Oxfam’s estimates of 22,500 people being evicted between 2004 and 2010 following the granting of licenses by the Ugandan National Forestry Authority. OXFAM INTERNATIONAL, *OXFAM CASE STUDY: THE NEW FORESTS COMPANY AND ITS UGANDA PLANTATIONS* (2011), <https://www.oxfam.org/sites/www.oxfam.org/files/cs-new-forest-company-uganda-plantations-220911-en.pdf>.

14 RIGHTS AND RESOURCES INITIATIVE, *WHO OWNS THE WORLD’S LAND? A GLOBAL BASELINE OF FORMALLY RECOGNIZED INDIGENOUS AND COMMUNITY LAND RIGHTS 1* (2015) [hereinafter RIGHTS AND RESOURCES INITIATIVE], http://www.rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf.

15 See, e.g., Liz Alden Wily, *The Global Land Grab: The New Enclosures*, in *THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET & STATE* (David Bollier and Silke Helfrich eds., 2012).

16 For example, the government of Uganda has failed to provide compensation or benefit sharing to some customary landowners who lack certificates of customary ownership. RIGHTS AND RESOURCES INITIATIVE, *supra* note 14, at 14.

17 Interview with Civil Society Representative, Dec. 7, 2015.

18 U.N. Special Rep. of the Secretary-General for Human Rights in Cambodia, *Economic Land Concessions in Cambodia: A Human Rights Perspective*, 8-12 (June 2007), http://cambodia.ohchr.org/WebDOCS/DocReports/2-Thematic-Reports/Thematic_CMB12062007E.pdf; *Economic Land Concessions* (ELCs), OPEN DEVELOPMENT CAMBODIA, <http://www.opendevdevelopmentcambodia.net/briefing/economic-land-concessions-elcs/> (last visited Jan. 29, 2016).

19 Commission of Inquiry into Special Agriculture & Business Leases (SABL), *Final Report* (June 24, 2013), <https://pngexposed.files.wordpress.com/2013/12/numapo-sabl-final-report.pdf>.

20 Across the globe, activists and others have been murdered for their work defending land rights and the environment, including at times in the context of land-based investments. For example, Global Witness has documented 908 people who were killed in 35 countries protecting rights to land and the environment between 2002 and 2013. The organization argues that the death rate has been increasing and that it is linked to commercial pressures on land. GLOBAL WITNESS, *DEADLY ENVIRONMENT: THE DRAMATIC RISE IN KILLINGS OF ENVIRONMENTAL AND LAND DEFENDERS* 5, 13 (2014), <https://www.globalwitness.org/en/campaigns/environmental-activists/deadly-environment/>.

21 In one example from Cambodia, an investor allegedly encroached on community members’ farms. Later, the Cambodian military stormed the village to carry out a forced eviction; a 14 year-old girl was hit by gunfire and died. The military claimed its action was necessary because some of the villagers resisting the eviction were armed. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Cambodia 2012 Human Rights Report* (2013), www.state.gov/j/drl/rls/hrrpt/2012/eap/204192.htm; CAMBODIAN LEAGUE FOR THE PROMOTION AND DEFENSE OF HUMAN RIGHTS, *ATTACKS & THREATS AGAINST HUMAN RIGHTS DEFENDERS IN CAMBODIA 2010-2012* 11 (2012), www.licadho-cambodia.org/reports/files/172LICADHOREPORtAttacksHRDs2010-2012-Eng.pdf.

22 As the financial impacts of company-community conflict and disputes related to tenure risks receive more attention, these issues will become increasingly important to investors. Multiple research reports in recent years have focused on these impacts and risks in relation to investment in agriculture, forestry, and extractive industry projects. See, e.g., TMP SYSTEMS, *IAN: MANAGING TENURE RISK* (2016); THE MUNDEN PROJECT, *COMMUNITIES AS COUNTERPARTIES: PRELIMINARY REVIEW OF CONCESSIONS AND CONFLICT IN EMERGING AND FRONTIER MARKET CONCESSIONS* (2014) [HEREINAFTER THE MUNDEN PROJECT, *COMMUNITIES AS COUNTERPARTIES*], http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf; THE MUNDEN PROJECT, *THE FINANCIAL RISKS OF INSECURE TENURE: AN INVESTMENT VIEW* (2012), http://www.rightsandresources.org/documents/files/doc_5715.pdf; Daniel Franks et al., *Conflict Translates Environmental and Social Risk Into Business Costs*, 111 *Proc. Nat’l. Acad. Sci. U.S.A.* 7576 (2014).

23 While there are many definitions for the social license to operate, it is generally seen as “a local community’s acceptance or approval of a company’s project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development.” Brian F. Yates and Celesa L. Horvath, *Social License to Operate: How to Get It, and How to Keep It* 1 (Pacific Energy Summit, Working Paper, 2013), http://www.nbr.org/downloads/pdfs/eta/PES_2013_summitpaper_Yates_Horvath.pdf. As John Morrison explains, “[s]ocial licence can never be self-awarded, it requires that an activity enjoys sufficient trust and legitimacy, and has the consent of those affected.” John Morrison, *Business and Society: Defining the ‘Social License,’* The Guardian (Sept. 29, 2014), <http://www.theguardian.com/sustainable-business/2014/sep/29/social-licence-operate-shell-bp-business-leaders>.

24 Many legal scholars assert that governments have human rights obligations beyond their own borders. See, e.g., MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS ¶¶ 24-5 (2011).

25 See U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter U.N. Guiding Principles]. Principle 2 of the U.N. Guiding Principles asserts that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

26 Examples of home country measures to regulate overseas activities are available here: Columbia Center on Sustainable Investment (CCSI) and Herbert Smith Freehills, *Home Country Measures (HCM) Taxonomy: Examples of Home Country Measures to Regulate the Overseas Activities of Individuals and Corporations* (Nov. 7, 2014), http://ccsi.columbia.edu/files/2014/01/CCSI-Taxonomy-_-Nov-10.pdf.

27 International law codified in treaties or covenants is legally binding on States Parties that have ratified the instrument. In addition, states are bound by customary international law, which is established by state practice. Customary International Law, Legal Information Institute, https://www.law.cornell.edu/wex/customary_international_law (last visited Jan. 31, 2016). Commitments found in soft law, on the other hand, are generally considered to be quasi-legal rules that provide important norms and guidance but do not hold the same legal authority. See, e.g., Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172-4 (2010).

28 Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 GLOBAL ARB. REV. (2014), <http://globalarbitrationreview.com/news/article/32513/>.

29 Investment arbitration tribunals have taken a relatively permissive approach toward allowing companies to structure or restructure their holdings so as to gain treaty protection, and to use parent or intermediate companies to secure treaty coverage for their investments. See, e.g., *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶¶ 248-272 (Sep. 22, 2014); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, ¶¶ 239-242 (Mar. 17, 2006).

30 See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004); but see *id.*, Dissenting Opinion of Chairman Prosper Weil.

31 See, e.g., *TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award (Dec. 19, 2013), and *Iberdrola Energía S.A. v. Guatemala*, ICSID Case No. ARB/09/5, Award (Aug. 17, 2012). The two claimants in these cases were separate investors in a single electricity distribution project in Guatemala. After a dispute arose regarding tariffs, the two investors filed separate investment treaty claims against the government of Guatemala.

32 The expropriation provisions also often set out other criteria for a lawful expropriation, including that it be done for a public purpose, on a non-discriminatory basis, and in accordance with due process of law.

33 See, e.g., *Micula v. Romania*, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013); *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004); *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 74-101 (Aug. 30, 2000); *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, ¶ 547 (Apr. 8, 2013).

34 See, e.g., Agreement between the Government of the Republic of Colombia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Colom.-Fr., art. 4(2), July 10, 2014. Some treaties similarly state that FPS requires the level of “police protection” mandated under international law. See, e.g., Canada-South Korea Free Trade Agreement, S. Kor.-Can., art. 8.5(3)(b), Mar. 11, 2014.

35 U.N. Conference on Trade and Development (UNCTAD), *Policy Options for IIA Reform: Treaty Examples and Data* (Working Draft, June 24, 2015).

36 *Awdi v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015).

37 In some cases, investors have also sought protections under human rights law related to the right to property. See, e.g., *Rosenzweig and Bonded Warehouses v. Poland*, Eur. Ct. H.R. 51728/99 (2005); *Zlinsat Spol. S.R.O. v. Bulgaria*, Eur. Ct. H.R. 57785/00 (2008).

38 *The Core International Human Rights Instruments and their Monitoring Bodies*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

39 See, e.g., Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention 169]. ILO Convention 169 is particularly relevant for land grievances, as it sets out legally binding requirements for States Parties regarding free, prior and informed consent. In addition, all International Labour Organization member states are required to comply with the rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

40 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Merits and Provisional Measures, Decision, Afr. Comm’n H.P.R., No. 276/03 (Nov. 25, 2009).

41 Decisions regarding the treatment of OAO Yukos Oil Company (“Yukos”) offer an interesting example of differences in awards provided by investment arbitration tribunals and human rights tribunals. Yukos brought an investment arbitration claim against the government of Russia, as well as a human rights claim in the European Court of Human Rights. Three related UNCITRAL awards provided more than US \$50 billion to the investor—the largest investment arbitration award to date. While Yukos also prevailed in the European Court of Human Rights, the Court awarded a relatively small €1.8 billion (approx. US\$2.5 billion) in damages (although this, too, was significantly higher than any other compensation award provided by the Court). See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (July 18, 2014); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (July 18, 2014); *OAO Neftyanaya Kompaniya Yukos v. Russia*, Eur. Ct. H.R. 14902/04 (2014).

42 Human rights instruments create binding obligations for states that have ratified them. States that have signed a treaty but not yet ratified it are prohibited from taking steps to undermine rights set out in the treaty. In addition, some human rights are considered to be binding under customary international law, and therefore bind states regardless of whether or not they have ratified a treaty setting out such rights.

43 U.N. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. A/HRC/4/18, annex (Feb. 5, 2007) [hereinafter U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement].

44 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(1), June 8, 1977, 1125 U.N.T.S. 3.

45 Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 1(1), 19, May 14, 1954, 249 U.N.T.S. 240; see also UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage art. 1, adopted by the thirty-second session of the UNESCO General Conference, Paris, Oct. 17, 2003.

46 Kuala Lumpur Kepong Berhad, KLK Response to RAN’s Report Titled “Conflict Palm Oil in Practice,” Apr. 4, 2008, <http://www.klk.com.my/wp-content/uploads/2013/06/2014-04-08-KLKs-Response-to-RANs-Article-Conflict-Palm-Oil-ProductionFINAL.pdf>.

47 *Isu v. Ofot* [2014] P.G.N.C 216; N5518 (Mar. 3, 2014).

48 Kuala Lumpur Kepong Berhad, Announcement: Kuala Lumpur Kepong Berhad (“KLK” or “The Company”) – Acquisition of a subsidiary: Collingwood Plantations PTE LTD (“Acquisition”), May 22, 2014, <http://www.bursamalaysia.com/market/listed-companies/company-announcements/1147985>.

49 ANDREA SHERBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS (IFC and the U.N. Special Rep. of the Secretary-General on Business and Human Rights 2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>.

50 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), GUIDELINES FOR MULTINATIONAL ENTERPRISES § II(A)(5), at 19; see also 21-22.

51 See, e.g., *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award (March 3, 2010), ¶¶ 171-184; *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶¶ 212-236.

52 While human rights are generally deemed held by individuals or peoples, they are sometimes ascribed to investors or companies. The European Court of Human Rights, for example, has found that a government's actions can violate the rights of a company, both under the European Convention on Human Rights and under the Convention's First Protocol (which includes the protection of property). A human rights treaty that applies to an investor thus might also affect the relationship between an investor and a government. Here, too, the obligations are assigned to the government, rather than the investor.

53 U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, Principle 4, at 12, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011). See also the Commentary to Principle 4, *id.* at 14.

54 This treaty is presumably the 1993 bilateral investment treaty entered into between Germany and Paraguay, although it is only referred to as a "bilateral treaty" and a "bilateral commercial treaty" in the judgment. *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 137, 140 (Mar. 29, 2006).

55 *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 140 (Mar. 29, 2006).

56 Where the investor raises arguments that the government breached an obligation depends on the contract and any applicable investment treaty. For instance, depending on the contract, a contract-based claim might be raised in domestic court or in arbitration. If there is an applicable investment treaty, the investor may pursue a claim through investor-state arbitration in addition to or instead of a contract-based claim.

57 Situations will vary depending on the contract language, but this option assumes that the contract does not explicitly provide for such a process of attaining consent; if it did, then following the process established in the contract should not present any problems. Based on a review of publicly available contracts, however, it is more likely that the contract explicitly states that the land transferred is unencumbered. The contract may also cover resettlement processes or responsibilities.

58 THE MUNDEN PROJECT, COMMUNITIES AS COUNTERPARTIES, *supra* note 22, at 3.

59 ROUNDTABLE ON SUSTAINABLE PALM OIL, PRINCIPLES AND CRITERIA FOR THE PRODUCTION OF SUSTAINABLE PALM OIL Principle 2.3 (2013). Principle 2.2 also requires that "[t]he right to use the land is demonstrated, and is not legitimately contested by local people who can demonstrate that they have legal, customary or user rights."

60 See, e.g., Letter from the Roundtable on Sustainable Palm Oil to Golden Veroleum (Dec. 13, 2012), <http://www.rspo.org/file/GVLPrem.pdf>; Letter from the Roundtable on Sustainable Palm Oil to Herakles (June 8, 2012), <http://www.rspo.org/file/RSPO%20letter%20Herakles%20Farms%20080612.pdf>.

61 Press Release, EarthRights International, *Bonsucro Suspends Tate & Lyle Over Cambodia Land-Grabbing* (July 17, 2013), <http://www.earthrights.org/media/bonsucro-suspends-tate-lyle-over-cambodia-land-grabbing>.

62 Press Release, Global Witness, *NGOs Welcome Liberian President's Commitment to Stop British Palm Oil Company "Taking" Community Land*, (Mar. 11, 2014), <https://www.globalwitness.org/en/archive/ngos-welcome-liberian-presidents-commitment-stop-british-palm-oil-company-taking-community/>.

63 Kaitlin Y. Cordes, *Making Agricultural Investments Work for Land Users & Communities*, FOCUS ON LAND IN AFRICA, <http://www.focusonland.com/fola/en/for-comment/making-agricultural-investments-work-for-communities/> (last accessed Jan. 29, 2016).

64 For example, in Cameroon, a Consultative Committee makes recommendations on the land to be allocated to an investor; these recommendations are sent to the relevant authority granting the concession. Concessions greater than 100 hectares must be signed by the President. SAMUEL NGUIFFO AND MICHELLE SONKOUÉ WATIO, *AGRO-INDUSTRIAL INVESTMENTS IN CAMEROON: LARGE-SCALE LAND ACQUISITIONS SINCE 2005* 42 (International Institute for Environment and Development 2015), <http://pubs.iied.org/pdfs/17571IIED.pdf>. These recommendations and the granting of the concession would generally occur after an investor-state contract, such as an Establishment Convention, has been signed. Interview with Civil Society Representative, Dec. 7, 2015.

65 See, e.g., the Lease Agreement between Mukaya Payam Cooperative (a territorial subdivision of South Sudan) and Nile Trading & Development, under which the Cooperative agrees to lease one or more parcels of land within its territory with an aggregate area of no less than 600,000 hectares. The investor is to undertake a land survey and compare it with certain maps, after which the parties will "in good faith, determine the actual parcel or parcels within the Cooperative Territory to be leased by the Cooperative to the Company." Lease Agreement between Mukaya Payam Cooperative (a territorial subdivision of South Sudan) and Nile Trading & Development art. 1, Nov. 11, 2008, <http://www.openlandcontracts.org/contract/ocds-591adf-SS5768196941OL/view>. Another example is the Concession Agreement between the Government of the Republic of Liberia and Golden Veroleum (Liberia) Inc., which states that the investor will conduct a survey within 24 months of the effective date of the contract to identify 350,000 hectares of land in certain counties to constitute the "gross concession area," before selecting, jointly with the government, an area of 220,000 hectares to constitute the concession area. Concession Agreement between the Government of the Republic of Liberia and Golden Veroleum (Liberia) Inc. arts. 1, 4.1(d), Jan. 10, 2010, <http://www.openlandcontracts.org/contract/ocds-591adf-LR8868308849OL/view>.

66 CCSI Roundtable on Land Contract Disclosure, Oct. 7, 2015; Interview with Civil Society Representative, Dec. 7, 2015. This may also be one reason why some contracts only require land rental fees to be paid for "development areas" rather than the entire "Concession Area." See, e.g., Concession Agreement between the Government of the Republic of Liberia and Liberian Agricultural Corporation, 1959, <http://www.openlandcontracts.org/contract/ocds-591adf-LR2920078334OL/view#pdf>.

67 Interview with Business Expert, Dec. 10, 2015; Interview with Civil Society Representative, Dec. 7, 2015.

68 Note that this is different from taking actions based on an investor's failure to develop, which often provides the opportunity for the government to terminate the contract.

69 Interview with Lawyer, Dec. 10, 2015.

70 Aside from using this approach to address land grievances, a strategy to reshape boundaries may also be useful in cases in which maps conflict, concessions overlap, or multiple legal claims are made to the same piece of land. For example, parliamentarians in Cameroon have suggested a similar approach for re-adjusting mining permits that overlap with protected areas. Interview with Civil Society Representative, Dec. 7, 2015; see also *Discussions autour des Aires Protégées*, CAMEROON TRIBUNE (Apr. 24, 2012).

71 U.N. Guiding Principles, *supra* note 25, Principle 25.

72 U.N. Guiding Principles, *supra* note 25, Principle 31.

73 Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: Report from an Expert Workshop entitled "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience" held in Toronto in 2013, at 14, U.N. Doc. A/HRC/26/25/Add.3 (Apr. 28, 2014) [hereinafter Report of the Working Group]; see also DEANNA KEMP AND NORA GOTZMANN, *COMMUNITY COMPLAINTS AND GRIEVANCE MECHANISMS AND THE AUSTRALIAN MINERALS INDUSTRY 39* (Centre for Social Responsibility in Mining, The University of Queensland 2009) http://www.csr.uq.edu.au/docs/CSR%20Community%20Complaints%20and%20Grievance%20Discussion%20Paper%202009%20_FINAL%20REPORT.pdf.

74 Report of the Working Group, *supra* note 73, at 14.

75 CATHERINE COUMANS AND PATRICIA FEENEY, *PRIVATIZED REMEDY AND HUMAN RIGHTS: RE-THINKING PROJECT-LEVEL GRIEVANCE MECHANISMS 6-7* (MiningWatch Canada and Rights and Accountability in Development 2014), <http://accessfacility.org/privatized-remedy-and-human-rights-re-thinking-project-level-grievance-mechanisms>.

76 Cambodian Center for Human Rights, *The Failure of Land Dispute Resolution Mechanisms 3* (Briefing Note, July 2014), [http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_07_28_CCHR_Briefing_Note_The_Failure%20of_Land_Dispute_Resolution_Mechanisms_\(ENG\).pdf](http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_07_28_CCHR_Briefing_Note_The_Failure%20of_Land_Dispute_Resolution_Mechanisms_(ENG).pdf).

77 Land Law of 2001, Sub-decree No. 47 on Organization and Functioning of the Cadastral Commission 2002 arts. 3 and 4 (Cambodia).

78 MLMUPC Prakas No. 32 on Delegation of Power to Governors of Provincial-Municipal Boards, Chairmen of PMCC to Decide Land Disputes in the CC Mechanism, 21 January 2010, referred to in Cambodian Center for Human Rights, *supra* note 76, at 4.

79 Land Law of 2001 art. 47 (Cambodia).

- 80 Preclusion of access to courts or other grievance mechanisms is strongly discouraged by the U.N. Guiding Principles, which state that operational-level grievance mechanisms “should not be used [...] to preclude access to judicial or other non-judicial grievance mechanisms.” U.N. Guiding Principles, *supra* note 25, at 32. Similar principles should apply to state-initiated mechanisms, especially where the result is that a claimant otherwise may be precluded from pursuing a claim at that institution *and* in other forums.
- 81 EQUITABLE CAMBODIA AND INCLUSIVE DEVELOPMENT INTERNATIONAL, BITTERSWEET HARVEST: A HUMAN RIGHTS IMPACT ASSESSMENT OF THE EUROPEAN UNION’S EVERYTHING BUT ARMS INITIATIVE IN CAMBODIA 81 (2013), http://www.inclusivedevelopment.net/wp-content/uploads/2013/10/Bittersweet_Harvest_web-version.pdf.
- 82 THE CONSTITUTION OF KENYA 2010 art. 59(2)(e) (Kenya).
- 83 KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, 2013/2014 ANNUAL REPORT 26 (2014).
- 84 Kenya National Commission on Human Rights Act, No. 2 (2002) Kenya Gazette Supplement No 22 art 19(2)(b).
- 85 Kenya National Commission on Human Rights Act (2002) art. 19(2)(c).
- 86 The Commission’s 2013/14 Annual Report noted that economic, social and cultural rights made up 64.33% of complaints received, alongside complaints regarding civil and political rights (26.22%) and group rights (9.46%). See KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, *supra* note 83, at 22.
- 87 U.S. Dep’t of State, Country Reports on Human Rights Practices for 2009, Volume I: Africa, East Asia and the Pacific 344 (2012).
- 88 *Id.* at 344.
- 89 Roundtable on Sustainable Palm Oil, Dispute between IOI Pelita Plantations and Community of Long Teran Kanan, Sarawak: Report to the Roundtable on Sustainable Palm Oil on Stage 1 of a Mediation Process, 7 (Dec. 12, 2011), [http://www.rspo.org/file/Stage%201%20Report%20-%20IOI%20Pelita%20&%20Long%20Teran%20Kanan%20Community\(1\).pdf](http://www.rspo.org/file/Stage%201%20Report%20-%20IOI%20Pelita%20&%20Long%20Teran%20Kanan%20Community(1).pdf).
- 90 Caroline Rees, *Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges* 13-15 (Harvard Kennedy School, Working Paper No. 56, 2010).
- 91 Project-level grievance mechanisms are a key component of the remedy pillar of the U.N. Guiding Principles, which note that governments “should consider ways to facilitate access to effective non-State-based grievance mechanisms.” See U.N. Guiding Principles, *supra* note 25, Principle 28.
- 92 U.N. Guiding Principles, *supra* note 25, at 32.
- 93 Caroline Rees, *Corporate Social Responsibility Initiative, Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and Their Stakeholders* 15 (Harvard Kennedy School, Working Paper No. 41, 2008).
- 94 *Id.*
- 95 Press Release, Inclusive Development International, Major Breakthrough in Mediation Between Hoang Anh Gia Lai Company and Fourteen Indigenous Villages (Sep. 19, 2015), <http://www.inclusivedevelopment.net/major-breakthrough-hoang-anh-gia-lai-company-and-fourteen-indigenous-villages/>.
- 96 Office of the Compliance Advisor Ombudsman, International Finance Corporation, Re: Complaint concerning IFC investment in Dragon Capital Group and VEIL (Project no. 10740 and 20926) (Feb. 10, 2014), <http://www.inclusivedevelopment.net/wp-content/uploads/2014/02/Complaint-to-CAO-re-Dragon-Capital-HAGL-.pdf>.
- 97 See, e.g., *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Award in Resubmitted Proceedings (Aug. 20, 2007).
- 98 For instance, some eligible claimants decided not to engage with Barrick Gold Corporation’s grievance mechanism established for survivors of rape by security personnel at the Porgera mine, in part because of the mechanism’s requirement that survivors receiving redress waive their right to pursue claims in other legal forums, through which more substantial remedies might have been available. Press Release, EarthRights International, Survivors of Rape by Barrick Gold Security Guards Offered “Business Grants” and “Training” in Exchange for Waiving Legal Rights, 2 (Nov. 21, 2014) (“the only women who refused to sign Barrick’s legal waiver were those represented by ERI – in other words, those who thought they might have other options”).
- 99 Interview with Civil Society Representative, Oct. 29, 2015.
- 100 U.N.G.A. Res. 56/83, annex, Articles on Responsibility of States for Internationally Wrongful Acts, art. 35 (Dec. 12, 2001).
- 101 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 65. Governments arguably have a responsibility to provide a legal means of restitution to redress a forced eviction that breaches human rights; see, e.g., *Xenides-Arestis v. Turkey*, App. No. 46347/99, 45 I.L.M. 657 ¶ 40 (2006).
- 102 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 64.
- 103 U.N. Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, Principles 12 and 13, U.N. Doc. E/CN.4/Sub.2/2005/17/, annex (June 28, 2005) [hereinafter U.N. Principles on Housing and Property Restitution for Refugees and Displaced Persons].
- 104 *Factory at Chorzow*, Merits, 1928 P.C.I.J. (ser. A) No. 17, at 48; U.N. Principles on Housing and Property Restitution for Refugees and Displaced Persons, *supra* note 103, Principle 2.2.
- 105 The U.N. Declaration on the Rights of Indigenous Peoples emphasizes that dispossessed indigenous peoples should be granted “the option of return,” and that restitution should be provided for indigenous “cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” See U.N.G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, arts. 10 and 11(2) (Oct. 2, 2007).
- 106 Lorenzo Cotula, ADDRESSING THE HUMAN RIGHTS IMPACTS OF ‘LAND GRABBING’ 15 (2014).
- 107 USAID, OPERATIONAL GUIDELINES FOR RESPONSIBLE LAND-BASED INVESTMENT (Mar. 2015) 53 (“To the greatest extent possible, [as an agricultural project comes to a close] it is preferable to return land rights to local women and men rather than allowing the land rights to revert to the state.”)
- 108 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 64.
- 109 JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 513 (Cambridge Univ. Press 2011).
- 110 Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 100, art. 35(a). See also U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 67.
- 111 THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO), VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY ¶ 16.1 (2012), <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>.
- 112 LORENZO COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL: SECURING LOCAL RESOURCE RIGHTS WITHIN FOREIGN INVESTMENT PROJECTS IN AFRICA 90 (International Institute for Environment and Development 2007), [hereinafter COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL], <http://pubs.iied.org/pdfs/i2542IIED.pdf>.
- 113 Olivier De Schutter and Peter Rosenblum, *Large-Scale Investments in Farmland: The Regulatory Challenge*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010-2011 594, 611 (Karl Sauvant ed., 2012); Adrian Whiteman et al., *Global trends in Forest Ownership, Public Income and Expenditure on Forestry and Forestry Employment*, 352 FOREST ECOLOGY & MGMT 99, 100 (2015); Philipp Baumgartner et al., *Impacts of Large-Scale Land Investments on Income, Prices, and Employment: Empirical Analyses in Ethiopia*, 72 WORLD DEV. 175 (2015).
- 114 *Tsilhqot’in Nation v. British Columbia*, 2 S.C.R. 256 ¶ 127 (Can. 2014).
- 115 *Id.* at ¶ 127. See also discussion of the same point in the trial judgment: *Tsilhqot’in Nation v. British Columbia*, B.C.S.C. 1700 ¶ 1107 (Can. 2007).
- 116 *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 137 (Mar. 29, 2006).
- 117 *Id.* at ¶ 139.
- 118 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 65.

- 119 *Id.*
- 120 Australia, for example, asks whether the indigenous claimant group has continuously maintained a connection to the land and its resources that derives from its traditional practices. *Commonwealth v. Yarmirr*, 208 CLR 1, 122 (Austl. 2001). Canada asks whether the use of the land by the indigenous claimant group has been “sufficient, continuous... and exclusive.” *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 (Can. 1997); *Tsilhqot’in Nation v. British Columbia*, 2 S.C.R. 256, ¶ 25 (Can. 2014).
- 121 The Inter-American Court of Human Rights has on two occasions upheld rights to land of affected communities that were not indigenous to the region, but nonetheless illustrated a “special” or “all-encompassing relationship” with the land that was centred, not “on the individual, but rather on the community as a whole.” *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132 – 133 (June 15, 2005); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 172, ¶¶ 85 – 86 (Nov. 28, 2007).
- 122 *Wik Peoples v. Queensland* (1996) 187 CLR 1; *Fejo v. Northern Territory of Australia* (1998) 195 CLR 96; see also Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 Wash. U. J. L. & Pol’y 225, 262 (2005).
- 123 *Tsilhqot’in Nation v. British Columbia*, 2 S.C.R. 256, ¶¶ 2, 77, 92 (Can. 2014).
- 124 *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 130 (Mar. 29, 2006).
- 125 *Id.* at ¶ 138.
- 126 Michael M. Cernea, *For a New Economics of Resettlement: A Sociological Critique of the Compensation Principle*, 175 INT’L SOC. SCI. J. (2003) 5, 17.
- 127 African Charter on Human and Peoples’ Rights (ACHPR) art. 14, June 27, 1981, 1520 U.N.T.S. 217 (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, ETS No. 9, 213 U.N.T.S. 262 (“No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”); American Convention on Human Rights (ACHR) art. 21(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”).
- 128 SEBASTIAEN ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 63 (2014) (“although there is not conventional definition of such a term [namely, “public interest”], the ECHR has considered it to be similar to that of general interest, known in international law as public purpose.”).
- 129 *Sporrong and Lomroth v. Sweden*, 66 Eur. Ct. H.R. (series A) ¶ 46 (1982) (“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’.” Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken”).
- 130 *James and Others v. UK*, 98 Eur. Ct. H.R. ¶ 54 (1986) (“the taking of property in the public interest without payment of [any] compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes [...] Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake”).
- 131 LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 94 (International Institute for Environment and Development 2009) [hereinafter COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?], <http://pubs.iied.org/pdfs/12561IIED.pdf/>.
- 132 Asian Development Bank, *Involuntary Resettlement Safeguards: A Planning and Implementation Good Practice Sourcebook* ¶ 18 (Draft Working Document, 2012); ASIAN DEVELOPMENT BANK, SAFEGUARD POLICY STATEMENT, APPENDIX 2: SAFEGUARD REQUIREMENTS 2: INVOLUNTARY RESETTLEMENT 45, at ¶ 7 (2013) (both applying involuntary resettlement requirements to “persons who lost the land they occupy in entirety or in part who have neither formal legal rights nor recognized or recognizable claims to such land”); IFC, PERFORMANCE STANDARD 5, *supra* note 11, at ¶¶ 17, 20.
- 133 FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION 33 (Land Tenure Studies 2008) [hereinafter FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION], <http://www.fao.org/3/a-i0506e.pdf>; FAO, THE GENDER AND EQUITY IMPLICATIONS OF LAND-RELATED INVESTMENTS ON LAND ACCESS, LABOUR AND INCOME-GENERATING OPPORTUNITIES IN NORTHERN GHANA 18 (2013), <http://www.fao.org/uploads/media/gender.pdf>.
- 134 FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION, *supra* note 133, at 33.
- 135 Pham Huu Ty et al., *Compensation and Resettlement Policies after Compulsory Land Acquisition for Hydropower Development in Vietnam: Policy and Practice*, 2 LAND 678, 690 (2013).
- 136 FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION, *supra* note 133, at 33, 34.
- 137 Wily, *supra* note 15.
- 138 See, e.g., IFC, PERFORMANCE STANDARD 5, *supra* note 11, at 1, requiring compensation for both physical and economic displacement, with the latter defined as the “loss of assets or access to assets that leads to loss of income sources or other means of livelihood.” Note that the Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas also asserts that peasants, including the landless, should not be relocated without free, prior and informed consent, and that any relocation that occurs must provide “just and fair compensation and, where possible, with the option of return.” U.N. Human Rights Council, Open-Ended Intergovernmental Working Group on the Rights of Peasants and Other People Working in Rural Areas, *Declaration on the Rights of Peasants and Other People Working in Rural Areas*, arts. 1.3, 4.5, U.N. Doc. A/HRC/WG.15/1/2 (June 20, 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/A-HRC-WG-15-1-2_En.pdf.
- 139 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 60. See also IFC, PERFORMANCE STANDARD 5, *supra* note 11, at ¶ 9.
- 140 Cernea, *supra* note 126, at 12.
- 141 Cristián Correa et al., *Reparations and Victim Participation: A Look at the Truth Commission Experience*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 385 (Ferstman et al., eds., 2009).
- 142 INTERNATIONAL CENTER ON TRANSITIONAL JUSTICE, ICTJ PROGRAM REPORT: REPARATIVE JUSTICE, (May 13, 2013), <https://www.ictj.org/news/ictj-program-report-reparative-justice>.
- 143 Compliance Advisor Ombudsman, A JOURNEY TOWARD SOLUTIONS: A STORY OF COMMUNITY-COMPANY DISPUTE RESOLUTION IN UGANDA 16 (2015), http://www.cao-ombudsman.org/documents/CAODisputeResolutionSeries_JourneytowardSolutions_Uganda_October2015.pdf.
- 144 Consultation regarding compensation is an approach also urged by development banks. See, e.g., IFC, PERFORMANCE STANDARD 5, *supra* note 11, at ¶ 10 (“Disclosure of relevant information and participation of Affected Communities and persons will continue during the planning, implementation, monitoring, and evaluation of compensation payments, livelihood restoration activities, and resettlement”).
- 145 ADRIANA EPTIMIE ET AL., GENDER DIMENSIONS OF THE EXTRACTIVE INDUSTRIES: MINING FOR EQUITY 22 (World Bank and IFC Extractive Industries and Development Series 8, 2009), http://siteresources.worldbank.org/EXTOGMC/Resources/eifd8_gender_equity.pdf.
- 146 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 60.
- 147 *Id.* at ¶ 55.
- 148 *Id.* at ¶ 52.
- 149 FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION, *supra* note 133, at 6, 23. Similar obligations are imposed by international development banks: see, e.g., WORLD BANK, OPERATIONAL MANUAL Operational Policy 4.12 (2001), <http://go.worldbank.org/GMoOEIY580>; IFC, PERFORMANCE STANDARD 5, *supra* note 11.
- 150 LAURA GERMAN ET AL., CONTEMPORARY PROCESSES OF LARGE-SCALE LAND ACQUISITION BY INVESTORS: CASE STUDIES FROM SUB-SAHARAN AFRICA 37 (Center for International Forestry Research 2011), http://www.cifor.org/publications/pdf_files/OccPapers/OP-68.pdf.
- 151 RURAL DEVELOPMENT INSTITUTE, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE’S REPUBLIC OF CHINA, AND INDIA 5 (Asian Development Bank 2007), http://www.landesa.org/wp-content/uploads/2011/01/ADB-RDI_Report_on_Land_Taking_Law_and_Practice_in_China_India_Cambodia.pdf.

- 152 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶ 60.
- 153 ACTIONAID, LAY OF THE LAND: IMPROVING LAND GOVERNANCE TO STOP LAND GRABS 8-10 (2012), http://www.actionaid.org/sites/files/actionaid/lay_of_the_land_-_improving_land_governance_to_stop_land_grabs_low_res.pdf.
- 154 COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY?, *supra* note 131, at 94.
- 155 *Id.*
- 156 COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL, *supra* note 112, at 97-98.
- 157 U.N. Basic Principles and Guidelines on Development-Based Evictions and Displacement, *supra* note 43, at ¶¶ 69, 70.
- 158 *Id.* at ¶ 59.
- 159 RURAL DEVELOPMENT INSTITUTE, *supra* note 151, at 14; COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL, *supra* note 112, at 100.
- 160 *Song Mao & Ors v. Tate & Lyle Industries Limited and T & L Sugars Limited*, Claim No. 2013 Folio 451, EWHC (Comm) ¶ 14 (2013).
- 161 *Id.*
- 162 *Song Mao & Ors v. Tate & Lyle Industries Limited and T & L Sugars Limited*, Claim No. 2013 Folio 451, EWHC (Comm) ¶¶ 1-3, 12, 17-33 (2013).
- 163 SHERCHAN DEPIKA, CAMBODIA: THE BITTER TASTE OF SUGAR DISPLACEMENT AND DISPOSSESSION IN ODDAR MEANCHHEY PROVINCE (ActionAid Cambodia and Oxfam GB 2015).
- 164 RURAL DEVELOPMENT INSTITUTE, *supra* note 151, at 63; COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL, *supra* note 112, at 100.
- 165 COTULA, LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL, *supra* note 112, at 100.
- 166 Cernea, *supra* note 126, at 5, 16 (“in most cases, empirical research found chronic impoverishment well entrenched even long after, and despite of, the payment of compensation. This tells us that – in case after case after case – compensation came up short and was unable to prevent impoverishment.”).
- 167 Edward Miguel, *Poverty and Violence: An Overview of Recent Research and Implications for Foreign Aid*, in TOO POOR FOR PEACE? GLOBAL POVERTY, CONFLICT AND SECURITY IN THE 21ST CENTURY 50, 51 (Lael Brainard and Derek Chollet eds., 2007); UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), HUMAN DEVELOPMENT REPORT 2014: SUSTAINING HUMAN PROGRESS 48, 79 (2014), <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>.
- 168 Interview with Business Expert, Dec. 10, 2015. This discussion draws in part from the interviewee’s experience with renegotiations of complex contracts for natural resource investments.
- 169 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Resubmitted Proceeding) (Aug. 20, 2007), ¶ 7.4.39 (“Under the fair and equitable standard, there is no doubt about a government’s obligation not to disparage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation.”).
- 170 According to some theories of contract law, permitting parties to terminate a contract and pay compensation (rather than requiring them to perform according to the terms of the deal) enables “efficient breach” and should be allowed. Even legal systems recognizing “efficient breach,” however, may recognize certain situations in which parties must be held to their promises and not permitted to terminate the contract and pay compensation.
- 171 If the investor initiates formal investment arbitration proceedings, the investor’s home state will then be prohibited from pursuing diplomatic protection.
- 172 This report refers to revocation and termination interchangeably, although such actions may have different connotations in some jurisdictions.
- 173 U.N. Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights Version 1.0*, ii (2014).
- 174 *Id.* at iii.
- 175 *Id.* at ii.
- 176 *Id.*
- 177 See DANISH INSTITUTE FOR HUMAN RIGHTS (DIHR) AND INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (ICAR), NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS ch 5 (2014), <http://icar.ngo/analysis/napsreport/>.
- 178 *Id.* at 38.
- 179 Investment arbitration tribunals usually require a dispute to enliven their jurisdiction. See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.
- 180 Member states cannot request for an advisory opinion. A member state’s highest court can request an advisory opinion, but no court has ever done so. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1(1), Oct. 2, 2013, C.E.T.S. 214.
- 181 Statute of the International Court of Justice art. 65(1), June 26, 1945, 33 U.N.T.S. 933; U.N. Charter art. 96.
- 182 Hugh Thirlway, *The International Court of Justice*, in INTERNATIONAL LAW, 582 (Evans ed., Oxford Univ. Press, 2003).
- 183 Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights* 37 N.Y.U. J. INT’L L. & POL. 259, 267 (2005).
- 184 Currently every state of the Americas is a member of the OAS: http://www.oas.org/en/member_states/. The United States signed but never ratified the ACHR; cases cannot therefore be brought against the United States, but it can still request advisory opinions from the Court. ACHR, *supra* note 127, at art. 64(1).
- 185 ACHR, *supra* note 127, at art. 64(2).
- 186 “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 28 (Sep. 24, 1982).
- 187 The most recent advisory opinion was issued in August 2014 in response to a request made in July 2011: *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, (Aug. 19, 2014). The Court also issued an advisory opinion in September 2009, in response to a request in August 2008: *Article 55 of the American Convention on Human Rights* Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, (Sep. 29, 2009). In November 2005, the Court issued its advisory opinion in response to a request in November 2003: *Control of Due Process in the Exercise of Powers of the Inter-American Commission on Human Rights*, Advisory Opinion OC-19/05, Inter Am. Ct. H.R. (Ser. A) No. 19, (Nov. 28, 2005).
- 188 Statute of the Inter-American Commission on Human Rights art. 18(e), Oct. 1, 1979, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.O.2/80, Vol. 1, 88.
- 189 See, e.g., *Principal Guidelines for a Comprehensive Reparations Policy*, Inter-Am. Ct. H.R., OEA/Ser/L/V/II.131 (Feb. 19, 2008).
- 190 ACHPR, *supra* note 127, at art. 4(1).
- 191 A.P. van der Mei, *The advisory jurisdiction of the African Court on Human and Peoples’ Rights*, 5 AFR. HUM. RTS. L. J. 41 (2005).
- 192 *On the Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples’ Rights*, Advisory Opinion No. 002/2013, Afr. Ct. Hum. Peoples’ Rts., ¶ 100 (2014).
- 193 The Commission has only issued one advisory opinion, concerning the Declaration on the Rights of Indigenous Peoples, and this did not originate upon the request of a state party. *On the UN Declaration on the Rights of Indigenous Peoples*, Advisory Opinion, Afr. Comm’n Hum. Peoples’ Rts. (2007). See also Rachel Murray, *The UN Declaration on the Rights of Indigenous Peoples in Africa: the approach of the regional organizations to Indigenous People* in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 503-04 (Stephen Allen and Alexandra Xanthaki eds., Hart Publishing, 2011).
- 194 Human Rights Council Res. 5/1, U.N. Doc. A/HRC/5/21, annex (June 18, 2007).
- 195 Human Rights Council, Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review, U.N. Doc A/HRC/DEC/17/119, ¶ 2G (July 19, 2011).

196 See, e.g., Human Rights Council, National Report: Botswana, ¶ 104, U.N. Doc. A/HRC/WG.6/15/BW A/1 (Dec. 4, 2012); Human Rights Council, National Report: Solomon Islands, ¶ 83, U.N. Doc. A/HRC/WG.6/11/SLB/1 (Apr. 15, 2011).

197 For example, in its 2011 national report, Somalia appealed to the international community to advise it on “good practices” for prohibiting female genital mutilation. Human Rights Council, National Report: Somalia, ¶ 53, U.N. Doc. A/HRC/WG.6/11/SOM/1 (Apr. 11, 2011).

198 One example from a regional court is Peru’s defense of a case before the Inter-American Court of Human Rights regarding state-organized reprisal killings. After the collapse of the Fujimori regime, the new Peruvian government consented to the Court’s contentious jurisdiction and submitted a communication “recognizing its international responsibility in the instant case.” *Case of Barrios Altos v. Peru*, Merits, Inter-Am Ct. H.R. (ser C.) No. 75, ¶ 31 (Mar. 14, 2001).

199 See, e.g., *Quasar de Valores SICA SA and ors v. Russian Federation*, where the tribunal referred to a decision (not an advisory opinion) of the European Court of Human Rights, but then distinguished the Court’s judgment from the issues considered at arbitration on the basis that it involved a different treaty with different standards. *Quasar de Valores SICA SA and ors v. Russian Federation*, IIC 557 21-25 (2012).

200 Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331.

201 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1131(2), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

202 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001).

203 Int’l Law Comm’n, Second Rep. on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, U.N. Doc. A/CN.4/671 (Mar. 26, 2014), at ¶ 42.

204 *Id.* at ¶ 76 (setting forth Commentary to Conclusion 8, ¶ 11).

205 *Id.* (setting forth Commentary to Conclusion 8, ¶ 11).

206 *Id.* (setting forth Commentary to Conclusion 8, ¶ 11).

207 *Id.* (Conclusion 7(1)).

208 *Id.* (Conclusion 7(3)).

209 See, e.g., Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Benin-Can., art. 35(1), May 12, 2014.

210 Various comments by government officials regarding diplomatic pressure they have faced to conclude new treaties or keep existing in treaties in force were made at the 10th Annual Columbia International Investment Conference, “Investment Treaty Reform: Reshaping Economic Governance in the Era of Sustainable Development,” which took place November 10-11, 2015, at Columbia University in New York.

211 See, e.g., *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award, ¶¶ 335, 361 (Oct. 2, 2006) (referring to Canada’s involvement in the early stages of the dispute between the claimant and the respondent state, Hungary).

212 See, e.g., JONATHAN BONNITCHA, *SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS* 105-109 (Cambridge Univ. Press 2014); Karl Sauvant and Lisa Sachs, eds., *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* (Oxford Univ. Press 2009).

213 Data on foreign direct investment was taken from the *Data Indicators*, WORLD BANK, <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>. South Africa announced plans to terminate its international investment treaty with the Belgo-Luxembourg Economic Union on September 7, 2012, implementing the recommendations of a policy review conducted by South Africa’s Department of Trade and Industry. South Africa followed by terminating additional international investment treaties with other countries as those treaties came up for renewal or expiration. Indonesia announced its plans to terminate international investment treaties as it sought termination with the Netherlands in March 2014. Of course, given that the termination announcements were relatively recent, and that the treaties remain in force for the duration of their survival periods, it is unclear whether trends in investment flows will change in the longer term, and whether any such changes could be traced to decisions with respect to international investment treaty termination.

214 Lauge N. Skovgaard Poulsen et al., *Analytical Framework for Assessing Costs and Benefits of Investment Protection Treaties* (London School of Economics 2013), <http://www.italaw.com/sites/default/files/archive/Analytical-framework-for-assessment-costs-and-benefits-of-investment-protection.pdf> (discussing the analytical framework as it would apply to investment treaties concluded by the United Kingdom).



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