



Columbia Center  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

# GOVERNING LAND INVESTMENTS

**DO GOVERNMENTS HAVE LEGAL SUPPORT GAPS?**

**REPORT** MARCH 2018



The Columbia Center on Sustainable Investment is a leading applied research center and forum dedicated to the study, discussion and practice of sustainable international investment.



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#### About the Authors

Sam Szoke-Burke is a Legal Researcher at the Columbia Center on Sustainable Investment.

Kaitlin Y. Cordes is Head of Land and Agriculture, and Lead: Human Rights and Investment at the Columbia Center on Sustainable Investment.

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Felled timber in South Africa's border region near Swaziland.

## EXECUTIVE SUMMARY

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In the wave of efforts to encourage and support more “responsible” land investments, one aspect has been largely overlooked: are governments equipped with the legal and technical support needed to effectively negotiate and conclude investment contracts that lead to responsible outcomes?

In a number of low- and middle-income countries, governments enter into contracts with investors to grant concessions, provide leases, or give incentives for agriculture or forestry investments. These investment contracts, along with domestic and international laws, shape the rights and obligations of investors and governments, as well as the distribution of benefits. They thus can significantly influence the outcomes and impacts of investments. Despite this, some governments negotiate investment contracts without having adequate internal or external legal or technical support. This can lead to contracts that concede too much ground to investors, or that poorly define key obligations, increasing the likelihood that the resulting projects will fail to produce the anticipated public benefits, seriously degrade the environment, or breach the rights of local communities.

Given these high stakes, there is a need to better understand whether low- and middle-income countries confront “legal support gaps,” which we define as instances where host governments: (i) require or would benefit from legal support regarding land investments, but (ii) cannot or do not obtain or implement adequate support in practice. “Legal support” refers to the provision of legal advice, representation, or assistance; it includes both in-house and external support providers.

By exploring “legal support gaps,” this report seeks to identify possible weak links in global and national efforts to achieve more responsible land investments, as well as opportunities to encourage better practice. For example, legal support holds the potential—albeit not yet regularly realized—to be an entry point for incorporating international best practice and guidelines into negotiations and at other stages of the investment. The report also takes stock of how governments are preparing for, negotiating, implementing, and monitoring land investments in practice, to determine where additional legal support may improve outcomes for governments. It offers good practices that can increase government access to, and use of, legal support and enhance the capacity of lawyers to help governments achieve responsible land investments.

This report considers “responsible land investments” to be investments in agriculture or forestry that: contribute to local and national sustainable development consistently with national objectives; do not violate human rights; operate consistently with domestic laws; and produce the greatest value possible for the government, including by facilitating positive impacts and minimizing negative ones. “Responsible contracts” are contracts between governments and investors that set parameters to achieve responsible land investments.

This report draws on in-depth interviews with present or former representatives from host governments, external legal support providers, external non-legal support providers, the private sector, and civil society from, or with experience in, Chad, the Democratic Republic of Congo, Ethiopia, Ghana, Indonesia, Laos, Liberia, Mali, Sierra Leone, South Sudan, Sudan, Uganda, and Zimbabwe.

## LEGAL SUPPORT FOR GOVERNMENTS

Governments access legal support in different forms and through different means. When accessing legal support, a government may seek legal support from in-house lawyers and/or external firms or organizations based in-country or overseas. Governments either pay for such assistance, in the form of wages or fees, or access it on a pro-bono (free) basis.

**In-house lawyers** may be based in the line ministry responsible for the investment (such as the Ministry of Agriculture for an agricultural project) and in other government entities (such as the Attorney-General’s Department or the Ministry of Finance). They usually do not specialize in the legal aspects of land investments, but rather work on a wide variety of legal issues. **External lawyers from the country** and **external lawyers based overseas** often come from private law firms; these lawyers generally charge for their services, although some provide services on a low-cost or free basis. External lawyers can also be sourced from non-profit legal support organizations on a low-cost or free basis. Overseas lawyers often operate on a “fly-in, fly-out” basis, visiting the country for days or weeks at a time. External legal support can also be provided by **an embedded lawyer**—usually a junior lawyer provided by an international development organization or by a law firm—who works within a government agency for a sustained period of time.

Each type of legal support has its own strengths and limitations. Overseas lawyers may be more likely than lawyers based within the country or within the government to have experience negotiating complex investment contracts; they may also have a deeper commercial understanding of particular industries or commodities and of how similar agreements were negotiated in other jurisdictions. On the other hand, overseas lawyers are not always able to grasp the local political and legal context, which can lead to work that is, in the words of one government representative, “not consistent with reality, and unusable.” Lawyers based within the country or government are generally better equipped to ensure that the government’s investment strategies, and individual deals, are adapted to the country’s laws and context. Such lawyers also may be better able to understand the dynamics and political interplay between various relevant government agencies. However, domestic lawyers may not always have the relevant expertise and experience for certain tasks, such as complex contract negotiations.

While lawyers can help governments with technical legal tasks, such as drafting legal documents or negotiating with investors, lawyers may also be able to provide additional complementary support. For example, where the government hires external lawyers to carry out tasks for which the government lacks experience or expertise, the external lawyers can build capacity by exposing the government's in-house legal staff to substantive expertise, legal strategies, or effective work practices. Where relevant, a commitment to develop local skills and expertise can be included in the government's terms of engagement for an external lawyer. While unlikely to eradicate the government's need for specialized external support, capacity building can help the government to be better prepared, equipped, and autonomous during other stages of the investment, and to work more effectively with external support providers when relevant.

### Issues affecting government access and implementation of legal support

Governments confront a range of impediments that can prevent them from accessing or benefiting from legal support.

Many host governments have strong **in-house legal staff** with the necessary knowledge or skills to advance the government's interests, yet who are unable to meet all of the government's legal needs regarding land investments. In many cases, there simply are not enough in-house lawyers for the government's needs. An additional barrier in some places relates to the allocation of responsibilities within government: staff members with relevant legal expertise may be located in government agencies that play only a peripheral role regarding land investments.

Finding consistent **funding** sources for external legal support is also a challenge. Many governments have asked donors to fund legal support or to connect the government with legal professionals. Such requests are not always granted, however, and in some cases take too long to process. Governments can also source low-cost or free legal and technical support from non-profit organizations or law firms that offer pro bono support. Yet governments are not always able to meet their needs through such support, whether because of conflicts, timing issues, or a mismatch in expertise needed and offered. Relying on external entities also makes governments vulnerable if they are not able to find or fund such support at key moments.

Low- and middle-income governments may also face shortages in **non-legal expertise** needed to properly prepare for, negotiate, and monitor investments. These limitations can reduce the efficacy of even the most sophisticated legal support. Depending on the scenario, the government may need technical support provided by, for example: business and financial experts, experts in the particular commodity or commodities to be produced, agronomists and other scientists, environmental experts, experts in social impacts and community engagement, and/or experts in international best practices regarding land investments.

While essentially a technical service, legal support can be affected by **political factors**. In some situations, political decision-makers may choose to ignore legal advice for legitimate reasons. Yet at times, political factors can lead to situations in which, despite solid legal advice, negotiations still result in subpar outcomes for the country. In addition, governments may be reluctant to follow legal advice, especially from external lawyers, when they do not sufficiently trust them. Government officials skeptical of external legal support may also not seek external legal support at all.

**Corruption** can also cause governments to ignore recommendations from legal support providers, or to forsake legal support altogether. Decision-makers who receive illicit benefits may be less likely to follow legal advice, less willing to push back against investors' demands regarding key contractual terms, less likely to push for clauses that encourage more responsible practices, or less interested in incorporating the results of financial modeling or due diligence into the design of the contract.

### ARE THERE LEGAL SUPPORT GAPS? ASSESSING GOVERNMENT USE AND NON-USE OF LEGAL SUPPORT

Governments use legal support differently at various stages of an investment project. In countries that use investment contracts for land investments, there are four general stages of an investment. **Stage one** involves assessing and adjusting government policies, strategies, and the legal and regulatory framework for investments. **Stage two** involves pre-negotiation processes, including, among other activities, identifying and analyzing specific proposed projects to assess feasibility and potential impacts. **Stage three** involves the negotiation of a contract between the government and the investor. **Stage four** involves each party carrying out its obligations under the contract, and the monitoring of company activities by the government. This report focuses on stages two, three, and four.

#### Pre-negotiation processes

Once the government has identified an investor interested in making a specific investment, various processes can help to determine appropriateness and viability in order to ensure that the proposed investment meets domestic legal requirements and feasibility thresholds. Such processes include the conduct of feasibility studies, due diligence on the investor's capabilities and track record, baseline studies, impact assessments and accompanying management plans, land use surveys, and community consultations. For project-level assessments, governments often require investors to carry out these processes, and to submit the results for verification and approval.

Interviewees reported few instances of governments accessing legal support during this stage. Those interviewed regularly described governments as devoting insufficient attention and resources to this stage more generally, which frequently leaves governments under-prepared for contract negotiations. Moreover, processes like impact assessments and community consultations are not always carried out, or are only

undertaken after a contract has been signed. Reasons for governments' limited preparations through these processes include resource and capacity shortages, investors receiving special treatment when "connected" to senior government officials, and governments being "desperate" for investments. The ensuing lack of information or preparation makes it harder for the government to negotiate a responsible contract, even for officials who are otherwise effective negotiators.

### Contract negotiations

If, after conducting the processes mentioned above, the host government determines that the potential investment is acceptable, it may then need to define the terms according to which the project will be permitted to operate. In countries where investment contracts are negotiated between the government and the investor, relevant legal expertise on the government's negotiating team is crucial. Legal expertise can be particularly important if an investment treaty might apply, as treaties can elevate investor-state contracts above domestic law, increasing potential risks to the government.

When a government plans to negotiate with an investor, legal support can vitally bolster preparations. Lawyers can advise on how existing legal frameworks should be borne in mind during negotiations and can support the development of negotiation positions or strategies, based on the information gleaned during the pre-negotiation stage. When governments have appropriate legal support during negotiations, they are more likely to conclude contracts that clearly articulate the rights and responsibilities of each party and that facilitate the government's objectives for the investment, including ensuring that the contract is easy to implement and enforce in practice.

For the majority of countries principally covered by interviews, interviewees were generally of the view that the host governments were not achieving optimal outcomes during negotiations with investors. While not the only reason for sub-optimal outcomes, the majority of these interviewees identified a lack of adequate legal support as an important factor.

Governments often use lawyers during contract negotiations. In some situations, senior government representatives lead negotiations and use their lawyers as a sounding board for specific legal questions. In other instances, lawyers—whether in-house or external—may lead the negotiations on the government's behalf, although decision-making ultimately resides with the government. When a government's in-house legal staff represents the government at negotiations, those lawyers may be generalists without the relevant expertise needed to negotiate an effective investment contract. For instance, government lawyers may not understand commercial or technical considerations unique to agricultural or forestry projects and to specific commodities, even though such knowledge can be key to negotiating a responsible contract with confidence. Governments sometimes negotiate contracts with only minimal participation by lawyers. This is often problematic, given that lawyers have essential skills that are relevant both in drafting clear legal language and in assessing the potential risks and issues that may arise from legally binding agreements.

In one of the thirteen countries principally covered by interviews, interviewees were more optimistic about how the country had performed in negotiations. That country has benefited from a combination of international and local lawyers, as well as embedded fellows placed in government ministries for sustained periods of time, and an engaged civil society that has closely followed negotiations and implementation of agreements. Lawyers leading negotiations have benefitted from the trust of the President, and have earned credibility with the government's counterparties. Yet there were still challenges. The government's emphasis on reinvigorating its economy meant that social and environmental protections were not always adequately addressed in negotiations. Further, despite negotiators' intent to make the contract easy for government agencies to monitor, the government's resource shortage has constrained monitoring.

In multiple countries covered by interviews, interviewees described negotiation processes where the investor would prepare a first draft of the contract and then send it to the government to review. In some of these countries, the government reportedly either would accept the agreement as drafted or would request very minor changes before signing it. Allowing an investor counterparty to draft an agreement being negotiated—or even to pick the precedent contract that will be used as the starting point—can lead to suboptimal outcomes for the government. The precedent or first version of the contract creates important parameters for the scope of negotiations; this is not always appreciated by governments, who may consider it convenient for the investor to prepare a first draft.

Interviewees described multiple countries having (or developing) some form of model or template investment contract for agricultural or forestry investments, although the degree to which such models are used in practice varies. Robust, context-specific models that make most terms non-negotiable can bolster the government's bargaining position by limiting the focus of negotiations and the discretion of government negotiators. Models also provide guidance to less experienced negotiators, can reduce the time and effort needed for negotiations, and encourage consistency with other contracts. Of course, the benefits of model contracts may not always eventuate: for instance, a government negotiator may stray from the model, or the model itself may be of low quality.

As opposed to model contracts, international guidelines were rarely mentioned by interviewees as playing a significant role in government approaches to contract negotiations. Some interviewees stressed that governments might be more interested in "common practices," and in staying competitive with other countries, rather than "best practices." Yet one external lawyer for governments also noted that international best practices can be incorporated into a contract without being explicitly mentioned; they may be reflected in the choices of the terms of the contract.

### Implementation and monitoring

At some point after the contract has been signed and/or all permits have been granted, the investor will be able to commence operations. A government's capacity to ensure investor compliance with the contract, as well as with domestic laws and the terms of relevant permits, is critical. The government also will need to fulfill its obligations under the contract in a timely manner.

Lawyers can help governments identify the investor's contractual obligations to be monitored, as well as the government's obligations under the contract. This may include, for example, providing a monitoring plan based on the contract. Lawyers can also help governments develop a plan to fulfill their obligations under each contract; this can include alerting relevant staff members to the government's specific contractual obligations and the timeline according to which the obligations must be fulfilled. In addition, lawyers can advise governments regarding the potential consequences of government breaches, including the potential for liability from costly investor-state dispute settlement arbitrations under a bilateral investment treaty.

Few of the countries covered in interviews appeared to monitor investment contracts comprehensively, let alone with the support of lawyers. One country's monitoring and follow-up was described by an external non-legal support provider as "notoriously bad." In another country, although specific multi-agency coordination bodies charged with monitoring the implementation of specific agreements had been established, monitoring was reportedly still limited, focusing primarily on tax collection but not on other issues.

### GOOD PRACTICES

Host governments, donors, external support providers, and investors can aim to use various good practices, when needed, to overcome legal support gaps and to achieve more responsible land investments.

#### Host governments can:

1. Consider all stages of the investment when identifying where legal and technical support is needed.
2. Seek external support at the early stages of planning for an investment, rather than waiting until the last minute.
3. Select legal support providers who collectively have the range of knowledge and skills needed for the particular task.
4. Identify ways to ensure that governments' in-house lawyers and staff with relevant technical expertise can meaningfully apply that expertise in negotiations and at other relevant stages of the investment.
5. Collaborate closely with any external lawyers used, exposing them to all relevant government actors and perspectives; this will better equip them to provide constructive solutions that are consistent with the government's objectives.

6. Approach external legal and other technical support as an opportunity to build government capacity.
7. Incorporate relevant guidelines and best practice standards in the planning, negotiating, and monitoring of land investments.

#### Donors can:

1. Fund different types of legal support based on the needs of each recipient government.
2. Consider facilitating legal support for multiple stages of the investment, as needed.
3. Raise awareness among host governments of the different types of support available, including low-cost or no-fee support.
4. Facilitate various complementary types of support, including non-legal technical support, that can comprehensively meet a host government's different needs.
5. Sensitize governments, lawyers, and other support providers regarding the value and importance of following guidelines and best practices in the provision of legal support tied to land investments.

#### External support providers, including brokers of low-cost legal and technical support, can:

1. Place external support providers in a strong position to influence outcomes by helping them to navigate dynamics within government and to develop important skills that complement their traditional legal expertise, such as facilitating dialogue and consensus.
2. Provide support that is relevant to the local legal and political context by closely consulting and collaborating with government representatives and local advisors.
3. Support the development of expertise within government, where possible and feasible, including through trainings or mentoring initiatives.
4. Be aware of, and suggest incorporating, relevant international guidance and best practice standards.

#### Investors, such as companies seeking to use land for agricultural or forestry projects, can:

1. Assess whether capacity gaps in government might lead to the negotiation of investment contracts that increase business risks, for instance by resulting in projects that adversely affect land users, local communities, or host state citizens.
2. Incorporate relevant guidelines and best practice standards in investments processes, as well as in any contracts with governments.





Oil palm plantation  
in Malaysia.

# PART 1

## WHY THIS REPORT?

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Large-scale land investments, such as for agriculture and forestry projects, have attracted considerable attention in the last two decades. Concerns about the implications of a “global land rush”<sup>1</sup> and about the local impacts of particular projects have resulted in burgeoning efforts to encourage more “responsible” land

investments.<sup>2</sup> One aspect that has been largely overlooked, however, is whether the governments negotiating deals with investors have the legal and technical expertise, or the means to procure external expertise, needed to achieve responsible contracts.

In other words: are governments equipped with the legal and technical support—both in-house and external—needed to effectively negotiate and conclude investment contracts that align with their policies and development objectives, respect rights, and result in the governments receiving the greatest value they can?

This is a particularly important question in low- and middle-income countries where states enter into contracts with investors to grant concessions, provide leases, or give incentives for agriculture or forestry investments.<sup>3</sup> These different types of “land investment contracts” generally allocate rights to access and develop land and/or resources in exchange for investment that may bring revenue, jobs, and other benefits to the host country. Such contracts, along with

domestic and international laws, shape the rights and obligations of investors and governments, as well as the distribution of benefits. They thus can significantly influence the outcomes and impacts of investments. Despite this, some governments negotiate investment contracts without having adequate in-house or external legal or technical support. This can lead to contracts that concede too much ground to investors, or that poorly define key obligations, increasing the likelihood that the resulting projects will fail to produce the anticipated public benefits, or will seriously degrade the environment or breach the rights of local communities. Such contracts may also be more likely to be renegotiated or cancelled, disrupting the investors’ operations.

## BOX 1: “RESPONSIBLE” LAND INVESTMENTS?

In scrutinizing the provision of legal support, this report seeks to determine how any gaps can be met to help low- and middle-income countries achieve responsible land investments. But what does “responsible” actually mean?

This report uses the term “**responsible land investments**” to refer to investments in agriculture or forestry that:

- » Contribute to the sustainable development of the local community and the country as a whole, consistently with the government’s policies and development objectives;
- » Do not violate human rights;
- » Operate consistently with applicable domestic laws and the rule of law more generally; and
- » Result in the government receiving the greatest value it can from a particular deal, including by maximizing the number and extent of positive impacts and minimizing the potential for negative impacts.

“**Responsible contracts**” are investment contracts between governments and investors that set parameters to achieve responsible land investments.

“**Legal support**” refers in this report to the provision of legal advice or representation, as well as legal assistance in developing and drafting guidance, policies, and other documents, whether provided by in-house or external lawyers or legal experts. Training and pure capacity building efforts are not included within this definition, except to the extent that support providers can build capacity while also providing legal support.

Not all governments use investment contracts to allocate land for agriculture or forestry projects. Such contracts are more common in countries where land is primarily owned by the state, such as many African countries and some Southeast Asian countries.<sup>4</sup> They are less common where land is formally owned by clans, families, or individuals, although even in these contexts, states occasionally will enter into agreements with investors that give them rights to use land and resources: for example, for the sale of former state assets,<sup>5</sup> or for

forestry concessions when forests are under the control of the state (as is the case in many Latin American countries).<sup>6</sup> In addition, even where land is generally owned by families or communities, as in Sierra Leone—which requires the investor to enter into leases directly with the land-owning families or community—the government may still enter into agreements with investors in order to agree to the general terms under which the investor will operate, and to provide investment incentives or other benefits to investors.

In countries where governments do allocate land to investors, the investments can be significant in terms of both the amounts of land allocated and the relative importance to the economy. In Liberia, for example, which has concluded at least 30 agreements related to agriculture and forestry investments over the past century,<sup>7</sup> it has been estimated that nearly 10 percent of the nation's land has been given to just three agricultural companies—and that 50-75 percent of its land has been concessioned to foreign investors for resource investments more generally.<sup>8</sup> Indeed, since 2009, at least two agricultural companies have each received a long-term concession for 220,000 hectares of land, with the option for additional land to be used for outgrower programs.<sup>9</sup> Agricultural concessions and activities are also an important contributor to the country's economy. One rubber plantation is the largest private sector employer in the country.<sup>10</sup> A significant amount of the country's export earnings come from rubber.<sup>11</sup> Liberia's context is not unique: other countries have similarly provided extremely large parcels of land to investors and/or have commercial plantation crops as some of the biggest export products by value.<sup>12</sup>

Although this report focuses in particular on the use of investment contracts between governments and investors, we do not advocate for the use of such contracts as an optimal approach. It is often better for the government to set most investment terms and relevant requirements in domestic law, rather than to negotiate them bilaterally with investors. In addition, there are compelling reasons for the law to defer certain decisions about land use, including the decision to transfer rights to use land, to land users with legitimate tenure rights. To the extent that the land desired by investors is occupied by individuals who have legitimate rights to the land that have not yet been recognized by the government, such as customary rights,<sup>13</sup> it is difficult to conceive of a scenario in which large concessions granted by the government will not violate land rights or result in negative social impacts and widespread grievances.

The focus on investment contracts in this report is a function of current practices. To the extent that governments continue to enter into agreements with investors for agriculture and forestry projects, it is important to understand whether or not they are able to negotiate contracts that result in responsible investments. And while some evidence suggests that the pace of land investments may have slowed in recent years,<sup>14</sup> investments continue to be made. Investors still seek lands for agricultural production, forestry operations, and other activities; governments remain interested in attracting investors that may bring revenue, jobs, and other benefits. Indeed, various people interviewed for this report spoke of future<sup>15</sup> or recently concluded<sup>16</sup> investor-state negotiations for agriculture or forestry projects, indicating that consideration of how governments use legal support in the context of land investments remains an important issue.<sup>17</sup>

## OBJECTIVES

Given these high stakes, there is a need to better understand whether low- and middle-income countries confront “legal support gaps,” which we define as instances where host governments: (i) require or would benefit from legal support regarding land investments, but (ii) cannot or do not obtain or implement adequate support in practice. As noted in Box 1, above, “legal support” refers in this report to the provision of legal advice, representation, or assistance; it does not cover training or pure capacity building efforts. “Legal support” includes both in-house and external support providers, given that both types of legal support may have a vital role to play in helping governments achieve more responsible land investments in any particular situation.

How often are governments accessing legal support to prepare for, negotiate, implement, and monitor deals for land investments—and how often are they not doing so? What barriers might governments face in accessing or implementing appropriate legal support? Are there instances where legal expertise is available but not used by governments? Might “gaps” in legal support affect the outcomes of a land investment? How can organizations supporting host governments ensure that legal support is available, accessed, and implemented in practice?

This report investigates these questions in an attempt to identify possible weak links in global and national efforts to achieve more responsible land investments in low- and middle-income countries. It also takes stock of how governments are preparing for, negotiating, implementing, and monitoring land investments in practice, to determine where additional legal support may improve outcomes for governments. Drawing from the research, the report offers good practices that address legal support gaps, tailored to host governments, donors, support providers, and investors.

Exploring legal support gaps can help to identify possible opportunities both within and outside of host governments for encouraging more responsible land investments. In particular, legal support can be an entry point for incorporating international best practice and guidelines into negotiations and at other stages of the investment (see Box 2, below)—including guidelines specifically developed to ensure that agricultural and forestry investments produce positive development outcomes and do not violate human rights.<sup>18</sup> While these legal and normative documents provide useful guidance for governments hosting land investments, such guidance is not consistently heeded.<sup>19</sup> Similarly, legal support could theoretically encourage better implementation of governments' international human rights legal obligations in the context of land investments.<sup>20</sup> Although the interviews conducted for this report indicate that lawyers are not consistently—or even frequently—providing these functions, interventions with in-house or external lawyers could increase opportunities to help embed best practices and international guidance in governments' approaches to land investments.

## BOX 2: STAGES OF LAND INVESTMENTS



Source: NegotiationSupport.org

- » **Stage one** involves assessing, designing, and adjusting government policies, strategies, and the legal and regulatory framework for investments, including setting certain incentives for investment.
- » **Stage two** involves, among other activities, identifying and analyzing specific proposed projects to assess feasibility and potential impacts.
- » **Stage three**, where applicable, involves the negotiation of a contract between the government and the investor.
- » **Stage four** involves each party carrying out its obligations under the contract and/or law, and the monitoring of company activities by the government.

Each stage is discussed in detail in Part III, below.

### A NOTE ON NON-LEGAL TECHNICAL SUPPORT

Legal support is only one component of what governments may need to successfully prepare for, negotiate, implement, and monitor land investments. Other forms of technical assistance may also be critical, including but not limited to:

- » Business and financial experts, as well as experts in the particular commodity or commodities to be produced, who can advise on the nature, timeframe, and potential profitability of investments, and can help with fiscal modeling and developing an approach to taxation and incentives;
- » Agronomists and other scientists, and environmental experts, who can advise on suitability of the project, best practices that can be incorporated, and potential environmental risks;
- » Experts in social impacts and community engagement, who can ensure that impact assessments, management plans, and consultation processes are of an adequate standard; and

- » Experts in international best practices regarding land-based investments, sustainable development, and human rights, to help maximize the project's potential to contribute to sustainable development and ensure that the project is sensitive to human rights concerns.

While we refer to non-legal support throughout the report, we focus primarily on the provision of legal support. Lawyers can provide critical support both in drafting the legally binding requirements that governments place on investors—through the design and drafting of laws and through the negotiation and conclusion of contracts—and in helping the government understand the consequences of those legally binding requirements. Lawyers are also trained to anticipate and minimize risk. During negotiations, lawyers often coordinate among different types of expertise, and may be well placed to identify when other technical support is needed.

While many of the concerns and issues discussed in this report may apply equally to non-legal support, we refrain from fully conflating non-legal support with legal support, given that: (i) the international infrastructure for the provision of external assistance is not the same for legal as for non-legal support; and (ii) most, although not all, of the interviewees for this report tended to focus on legal support. Developing further understanding of non-legal technical support gaps—including the types of support needed at different stages of the investment, how these are and are not accessed, and any barriers that may prevent successful government uptake of such support—is a topic ripe for further research.

### WHO IS THIS REPORT FOR?

This report is highly relevant for government representatives from low- and middle-income countries that host or seek to host land investments for agriculture and forestry projects. Although every government's processes and challenges are different, the report reveals how legal support can be accessed and used by governments hosting land investments, and provides recommendations for addressing barriers to effective legal support that may arise. This report is also written for donors and other organizations and practitioners seeking to improve the outcomes and impacts of land investments for host governments and affected communities from low- and middle-income countries—including international development organizations, and international financial institutions. In addition, it is relevant for lawyers and other support providers who provide support to governments in the context of land investments. Finally, this report is relevant for investors who may negotiate contracts with host governments. Improving legal support for governments and achieving responsible contracts can help investors minimize business risks and avoid adversely affecting land users, local communities, or host state citizens.

### METHODOLOGY

This report is based on a combination of confidential interviews, surveys, and desk research. The interviews were conducted using a standardized interview protocol, although interviewers allowed for a degree of flexibility regarding the topics covered, based on the interviewees' experiences and expertise. Thirty interviews were conducted, including one follow-up interview. Four additional persons provided information through a short and confidential written survey.

Among the interviewees and those surveyed, the countries from which experiences and insights for this report were primarily drawn were: Chad (1), the Democratic Republic of Congo (1), Ethiopia (2), Ghana (3), Indonesia (2), Laos (4), Liberia (10), Mali (1), Sierra Leone (9), South Sudan (1), Sudan (2), Uganda (2), and Zimbabwe (1). Interviewees and others surveyed also based more general insights and recommendations from experiences in other countries, including Chile, the Ivory Coast, Mongolia, Myanmar, Namibia, Nigeria, Peru, Senegal, and Venezuela. The diverse contexts and experiences of these countries render generalizations difficult; to the extent possible, we have noted in different parts of the report where the specific circumstances of a country may have influenced interviewees' experiences and suggestions.

Among the interviewees were: present or former representatives from host governments (15), external legal support providers (6), external non-legal support providers (5), the private sector (4), and civil society (1). Among the government representatives, interviewees came from line ministries focusing on agriculture or land (4), investment promotion entities (8), state legal offices (2), and the executive (1).

### REPORT STRUCTURE

The rest of the report is structured as follows:

- » Part II reviews the types of legal support available to governments, their efficacy, and issues affecting governments' access to and use of such support.
- » Part III explores whether legal support gaps exist, and assesses the extent to which governments are using legal support in practice during the different stages of a land investment.
- » Part IV concludes with good practices that different actors can take to address legal support gaps in the context of land investments.





## PART II

### LEGAL SUPPORT FOR GOVERNMENTS

#### TYPES OF LEGAL SUPPORT

In the context of land investments, governments access legal support in different forms and through different means. When accessing legal support, a government may rely primarily on in-house lawyers, procure legal support from external firms or organizations (either based in-country or overseas), or use a mix of in-house and external legal support. Governments often

pay for such assistance, whether by paying the salaries of legal employees or the fees of external lawyers. Yet at times, governments also access legal support on a pro bono basis (with the lawyer(s) providing services for free) or on a low- or reduced-cost basis. In low- and middle-income countries, governments sometimes seek and obtain funding from development organizations or similar external sources to cover the cost of legal support.

Governments usually have **in-house lawyers**, who may or may not be available to provide support for legal questions that arise in the context of land investments. In-house lawyers may work in the line ministry responsible for the investment (such as the Ministry of Agriculture for an agricultural project) and in other government entities (such as the Attorney-General's Department, the Ministry of Justice, or the Ministry of Finance). Government lawyers usually do not specialize in the legal aspects of land investments, but rather work on a wide variety of legal issues; this may include both transactional work and litigation work.

In addition to or instead of in-house lawyers, a government may procure expertise regarding land investments from **external lawyers from the country**, and/or **external lawyers based overseas**. External lawyers often come from private law firms, including from leading international firms. While private lawyers generally charge for their services, which can be expensive, some law firms and individual lawyers provide legal expertise to low- and middle-income countries on a pro bono or low-cost basis. Governments sometimes have specific law firms on retainer, or may seek out assistance for an individual transaction or project. External lawyers can also be sourced from non-

profit legal support organizations on a free or low-cost basis. External lawyers based overseas often operate on a “fly-in, fly-out” basis, visiting the country to provide advice or help with negotiations for a matter of days or weeks at a time. External legal support can also be provided by **an embedded lawyer**—usually a junior lawyer—in a relevant government agency for a sustained period of time. This may take the form of a “secondment,” whereby a lawyer employed elsewhere is transferred to work with the government for a period of time as a “seconded.” Embedded legal support may be provided by international development organizations or by a law firm on a pro bono basis.

Interviewees noted that, when selecting external lawyers, governments often rely on existing relationships or act on recommendations from staff members or other contacts. Some donors that fund legal support for partner countries may provide input into, or simply choose, which law firm or consultant is used.<sup>21</sup> At times, governments also seek assistance from non-profit “brokers” that link governments with pro bono lawyers, although such organizations may impose criteria on the types of countries they are able to assist.

**TABLE 1: SOURCES OF PRO BONO (FREE) OR SUBSIDIZED LEGAL SUPPORT<sup>22</sup>**

#### External lawyers financed by development partners

**African Legal Support Facility (ALSF)** – Provides legal support to African governments to strengthen their expertise and negotiation capacity for investment agreements, management of natural resources and contracting, and related commercial and business transactions. ALSF also grants and advances funds to cover legal advice from leading legal counsel.

**Asian Development Bank** – Provides technical assistance, including legal support customized to suit a country's needs, such as reviewing and redrafting national legislation, consulting with stakeholders, and preparing regulations to support implementation of local law.

**CONNEX Support Unit** – Links governments to multi-disciplinary experts who provide advice, expertise, and capacity development related to investor-state negotiations. CONNEX cooperates with other initiatives and partner organizations to provide expertise. Countries must email CONNEX to confirm eligibility to apply; there is no publicly available list of criteria.

**UNDP-UNEP Poverty-Environment Initiative (UN-PEI)** – Provides financial and technical support to countries, helping them integrate poverty-environment linkages into national and sub-national development planning. One example of assistance involved funding a consultant firm to help develop a template contract and Memorandum of Understanding (MOU).<sup>23</sup> A new five-year program, Poverty-Environment Action for Sustainable Development Goals, will build on and serve as the successor to UN-PEI starting in 2018.

#### External pro bono lawyers facilitated through a “broker”

**Advocates for International Development (A4ID)** – Offers a broker service that matches requests from governments and other stakeholders with pro bono lawyers who provide advice, research, drafting, representation, and training.

**International Senior Lawyers Project (ISLP)** – Links pro bono or reduced fee legal support to governments and civil society organizations to support just, accountable, and inclusive development. Support can include legal advice (including drafting of legal frameworks and documents) and capacity building.

**Investment Support Programme for Least Developed Countries (launched by the United Nations and the International Development Law Organization)** – Provides on-demand advisory and representation services and capacity building activities to Least Developed Countries (LDCs) in investment-related negotiations and dispute settlement. Multi-disciplinary teams are formed to support each LDC government requesting assistance, drawn from a roster of lawyers and other experts who will provide pro bono or reduced fee services.

Continued over »

**TABLE 1: SOURCES OF PRO BONO (FREE) OR SUBSIDIZED LEGAL SUPPORT** (CONTINUED)**Embedded secondees recruited and co-financed by the government and development partners**

*Oxford Policy Fellowship* – Matches low and middle-income governments to legally trained fellows who work in-country for two years. Fellows assist with a wide variety of tasks, such as legal research, reviewing policies, or providing capacity building. Any ministry requiring legal support can apply for a fellow. The fellow becomes a government employee, and countries must pay for their salaries and provide typical civil servant benefits.

**Non-profit legal support**

*Columbia Center on Sustainable Investment (CCSI)* – Provides assistance with policy formulation, the review and reform of countries' legal and regulatory frameworks, and with fiscal models and model contracts. Provides capacity building training for contract implementation. Work is generally provided on a pro bono or low-cost basis.

*International Institute for Sustainable Development (IISD)* – Provides advisory services and delivers training to host governments. Carries out capacity building and knowledge sharing amongst stakeholders such as policy-makers, negotiators and civil society groups. Priority is given to LDCs.

**Examples of country-specific initiatives**

*Fair Deal Sierra Leone* – Provides pro bono legal support, from the law firm Herbert Smith Freehills, to the Sierra Leonean Government in negotiating agreements with international investors, developing and reviewing legal policies for inward investment, training and providing resources for capacity building, and supporting the development of new legislation.

*Liberia Fellows Program (formerly the Scott Family Fellows program)* – Provides professionals to work as “special assistants” to Ministers, supporting them in their full range of activities so that they are more efficient and effective.

*Liberia Law Fellows Program (joint program between Washington and Lee University and the Carter Center)* – Employs recent law school graduates as fellows in government and non-governmental institutions in Liberia, working on legal reform and legal development. Although the program is running, they are not actively recruiting and have not placed a fellow for several years due to funding constraints.

This table is not comprehensive.

**BENEFITS AND LIMITATIONS OF DIFFERENT TYPES OF LEGAL SUPPORT**

Different types of legal support—whether external or in-house, provided by lawyers based overseas or in the country, or provided for a fee or pro bono—offer distinct benefits and drawbacks for governments.<sup>24</sup>

**External lawyers from overseas**

In contexts where land investments are infrequent or fairly new, external lawyers based overseas may be more likely than lawyers based within the country or government to have relevant experience negotiating investment contracts; they may also have a deeper commercial understanding of particular industries or commodities. In addition, overseas lawyers may have knowledge of how similar agreements were negotiated in other jurisdictions, of international market conditions, and of the need to protect governments' interests in the context of bilateral

investment treaties that can create additional investor protections.<sup>25</sup> In general, external lawyers, whether from overseas or within the country, are more able to specialize and thus more likely to have relevant specialized knowledge. Sourcing legal support from overseas also creates the possibility, subject to funding constraints, of accessing assistance from leading international law firms, whose resources, training, and experience may often be needed to match the might of the legal teams of well-resourced international investors negotiating with governments.

On the other hand, while overseas lawyers bring many strengths, their lack of familiarity with the country may mean that they are not always able to adequately grasp the local political context or to adapt their work to the local legal framework.<sup>26</sup> Overseas lawyers who fail to understand the local context risk producing work that is, in the words of one government representative, “not consistent with reality, and unusable to the government.”<sup>27</sup> Overseas lawyers with a long-term history of working with the government in question, however, will often be well placed to understand and respond to the local context.<sup>28</sup>



### External lawyers from the country and in-house lawyers

Because of their familiarity with the local legal and political context, lawyers from the country—whether external or in-house—are often an essential component of the government’s legal team, regardless of whether overseas lawyers are used. Lawyers will be most effective when they can adapt their advice to the local context, a point frequently highlighted by interviewees. Lawyers from the host country are generally better equipped to ensure that investment strategies, and individual deals, are adapted to domestic laws.<sup>29</sup> This adaptation can be critical for an investment’s ability to achieve its intended objectives in the country’s specific context. Local external lawyers and in-house government lawyers may also be well placed to understand the dynamics and political interplay among various relevant government agencies, the differing agendas and objectives of government representatives, any capacity challenges that will affect negotiations or implementation of investments, and the political will of the government to adequately set and enforce the terms for investments. Understanding these factors can be critical, as they can influence the design of relevant laws and policies, the conduct of negotiations, and the monitoring of projects and enforcement of applicable rules. Moreover, locally based lawyers are able to remain engaged in a close long-term relationship with the government and to provide ongoing face-to-face support as needed.<sup>30</sup>

On the other hand, one major drawback noted by interviewees in three countries is that it may be difficult to find domestic lawyers with the relevant skills and expertise to assist with certain aspects of the investment process, such as contract negotiations.<sup>31</sup> Similarly, in-house lawyers may lack relevant expertise or experience. Various causes for a lack of in-house expertise may exist; for instance, the country as a whole may have little experience hosting land investments, its legal expertise may have been decimated during a period of international armed conflict or civil war, or the scope of work covered by in-house government legal staff may be so broad that in-house staff cannot build expertise in all relevant areas. As mentioned below, it can also be difficult for governments to retain in-house lawyers with relevant specialized expertise, as they are more likely to be hired away by the private sector.

### Pro bono lawyers

There are many talented lawyers willing to provide support to governments or other stakeholders on a pro bono basis. This means that host governments may be able to receive excellent legal advice and support for no or limited costs. Pro bono lawyers may be based overseas or locally, although the pro bono culture is not as strong in many low- and middle-income countries.

Governments seeking pro bono support, however, should be clear on the support and expertise they need. At times, pro bono lawyers might agree to assist without having specialist knowledge or experience concerning land investments. While limited expertise does not preclude the provision of valuable legal support, it may increase certain risks, such as being outmaneuvered at the negotiating table by more experienced counsel acting for the investor.

In addition, lawyers procured on a pro bono basis might not always be available for future work beyond the initial task for which assistance was sought, as private lawyers’ pro bono commitments may be subject to limitations or constraints. Lawyers acting on a pro bono basis may therefore be less likely to build ongoing relationships—which can increase shared understanding and ensure a shared institutional memory and greater trust—with governments. In such circumstances, a government may need to repeatedly procure legal support from new lawyers, meaning that the previous law firm’s knowledge and experiences relating to the government’s needs or past transactions will be lost.

### ADDING VALUE BEYOND TRADITIONAL LEGAL SERVICES

While legal support to governments will usually involve strictly legal skills, such as drafting legal documents, negotiating with investors, and aligning investments with domestic laws and policies, lawyers may be able to provide additional complementary services as well. These additional contributions include assisting with organization and coordination when high-level legal experts are absent from government, helping to build the capacity of in-house lawyers and other government counterparts, and incorporating international guidelines and best practices into the terms of investment projects.

### Complementing “fly-in, fly-out” lawyers with sustained support

Overseas lawyers operating on a “fly-in, fly-out” basis may be unable to sustain the government’s progress during periods when they are not in the country. For instance, in the context of contract negotiations, one external lawyer noted that when he left the country between each round of negotiations, the government lost momentum in its preparations.<sup>32</sup> This loss of momentum, which could also happen in the context of legislative drafting, can arise for multiple reasons: the government may lack skills, experience or resources, may require interim legal support to assist with thinking through particular issues, or may be unable to achieve consensus<sup>33</sup> among government agencies with different goals and motivations. In addition, in-house lawyers or other government staff may sometimes become disengaged if external lawyers are used—whether because they believe that external lawyers have matters “under control” or because they feel excluded or unsure of their role when external lawyers are used.<sup>34</sup> One external lawyer, who was embedded within a government that lacked skills and experience after years of armed conflict, noted that, although the government had received a range of technical and legal experts, there came a point after which there was no added value of having more high-level legal experts assisting on a “fly-in, fly-out” basis; rather, more permanent and embedded engagement would have been preferable.<sup>35</sup> This sentiment was echoed by a government representative, who noted a preference for having continuously present legal support.<sup>36</sup>

Not all governments need additional long-term support to complement the external legal support they receive. Yet in some contexts, governments may benefit from additional support to coordinate projects, assist senior decision-makers, help implement the advice of high-level experts, and build the government's internal ability to sustainably manage investments.<sup>37</sup> Governments can secure this type of support in various ways: by hiring more in-house government lawyers; by embedding external lawyers within government; or by finding staff members or secondees without a legal background who are able to complement the external legal support received by the government.

### **Building the government's capacity while providing legal support**

External lawyers, especially when present and working within the host government for long periods, can build capacity by exposing the government's in-house legal staff to substantive expertise, legal strategies, or effective work practices. Augmenting capacity may be needed where the government lacks experience or expertise regarding different legal aspects of land investments. When external lawyers are able to embed themselves within governments, they may be particularly well placed to build government expertise regarding the laws, contracts, or legal documentation on which they work. Although embedded lawyers generally are not the most senior lawyers working with the government, their continuous presence affords more opportunities to work with government staff. Where relevant, a commitment to develop local skills and expertise can be included in the government's terms of engagement for an external lawyer to ensure that the lawyer has the mandate to take the time, while providing legal support, to collaborate with local counterparts and to transfer knowledge and skills.<sup>38</sup>

One lawyer who was embedded within a government agency stressed the importance of encouraging external support providers to work closely with in-house government lawyers. As the lawyer noted, this can help to provide mentorship and transfer knowledge to lawyers who will be available to the government after the external lawyer's time with the government ends; such an arrangement can also help to build institutional knowledge—for instance, regarding the intentions of the contract as drafted, which can help governments to monitor contracts.<sup>39</sup> Pairing external lawyers with government staff is unlikely to eradicate the government's need for external assistance; in many scenarios, it is more efficient to rely on specialized external assistance than to seek to develop all necessary knowledge and skills internally. This may be especially true for complex contract negotiations. Nevertheless, combining external assistance with some capacity building efforts can help the government to be better prepared, equipped, and autonomous during other stages of the investment, and to work more effectively with external support providers when relevant.

When government staff do develop specialized knowledge and skills, they may be more likely to be hired by the private sector or other international organizations, taking with them relevant institutional knowledge. Strategies may thus be needed to codify institutional knowledge, such as guides, manuals, and record-keeping systems. Mentoring a broad range of staff members, rather than focusing on a single staff member, may also help avoid or limit the loss of institutional knowledge.<sup>40</sup>

### **Calibrating investments to advance sustainable development and to avoid human rights abuses**

Interviewees seldom noted examples of lawyers explicitly advancing conceptions of sustainable development and human rights when providing legal support to governments (see discussion under “d. International guidelines and best practices,” below). External lawyers, whether from overseas or from the country, may tend to focus more on existing practices concerning land investments, and on negotiating what appears to be a commercially advantageous deal. They also may lack familiarity with sustainable development frameworks or international human rights law. Some lawyers may also resist the idea that their role includes promoting certain development or human rights objectives. Legal support providers from international development organizations (or lawyers specializing in business and human rights within law firms) may focus more on these standards generally; if so, they may be better placed to incorporate such standards into any legal support that they provide to governments.

### **ISSUES AFFECTING GOVERNMENT ACCESS AND IMPLEMENTATION OF LEGAL SUPPORT**

Governments confront a range of impediments that can prevent them from accessing or benefiting from legal support. Obstacles arise with both in-house and external lawyers, whether located in the country or overseas. In addition, political challenges and corruption can affect the extent to which governments access or effectively implement legal support.

#### **Barriers to benefiting from existing in-house expertise**

Many host governments have strong in-house legal staff with the necessary knowledge or skills<sup>41</sup> to promote the government's interests at different stages of the investment, yet who are unable to fully meet the government's legal needs regarding land investments. A common barrier is a scarcity of government lawyers, which can limit the availability of lawyers with the skills or experience needed.<sup>42</sup> For instance, one legal support provider noted that the host countries she had worked with often had impressive negotiators, but needed “five times as many” in order to meet the demand for each investment negotiation.<sup>43</sup>

“I am impressed with the quality of the [government’s] negotiators. [...] There just aren’t enough of them. They need five times as many.”

#### External legal support provider for governments

A government’s structure, and how it allocates responsibilities regarding different aspects of land investments, may also create barriers to the effective use of in-house lawyers. In some places, staff members with relevant legal expertise are located in government agencies that play only a peripheral role regarding land investments, and are thus not closely involved when their expertise is needed. For instance, a country’s legal expertise might be concentrated in a few entities, such as the Ministry of Justice or the Attorney General’s office.<sup>44</sup> Yet in some countries, line ministries like the Ministries of Agriculture or Forestry lead investment contract negotiations, including the drafting of contractual provisions and approval of the final deal, even if they lack relevant legal expertise. In one country, multiple interviewees noted that lawyers at the Ministry of Justice are required to review each contract before it is finalized, but that this review is seen as a “rubber stamping” process. The lawyer reviewing the agreement might note several issues of concern, for example, but does not work with the line ministry to refine the terms, and often will not even see a final version of the contract.<sup>45</sup> One way to expand the reach of government lawyers with relevant expertise is to “second” them to relevant state agencies or ministries, as is done occasionally in Sudan.<sup>46</sup>

In at least three countries covered by interviews and written surveys—Indonesia, South Sudan, and Sudan—a province or state, rather than the national government, will negotiate with an investor for certain investments.<sup>47</sup> In such contexts, the subnational government may have its own counsel but may also rely on advice from lawyers in the national government, which may be slow to arrive. In one example, a subnational government representative said it could take up to a month to hear back from national government lawyers located in the capital.<sup>48</sup> Such delays can put subnational governments at a disadvantage vis-à-vis investors.

#### Barriers to accessing external support

Even though in-house legal staff will not be able to meet all of a government’s highly specialized legal needs, barriers to accessing, or benefiting from, external legal support—especially from overseas experts—also exist. These include: challenges in funding external assistance; limitations that arise when relying on donor funding; a lack of awareness among government representatives of potential opportunities to access affordable legal support; limited availability of affordable support; and the potential unsustainability of relying solely on external legal support.

#### Funding challenges and related limitations

Governments seeking legal support may struggle to fund such assistance. Legal services—whether provided by in-house staff or by law firms—are expensive, and low- and middle-income governments often lack the budget to hire and retain lawyers whenever needed.

Finding consistent funding sources for external legal support is a challenge. Many governments have sought to use pre-existing relationships with donors to request funding for legal support or to be connected with legal professionals. For instance, governments have requested funding support from bilateral or regional donors, international development organizations, and international financial institutions. With support from such sources, governments have managed to procure international legal expertise while incurring little to no cost.

There are limitations, however, to relying on funding for legal support from international donors and partners. First, such requests are not always granted.<sup>49</sup> Donors and similar organizations also have limited funds, and may only be willing to provide funding where the legal support aligns with the organization’s own priorities.<sup>50</sup> Second, in some situations, government requests for funding or for expert assistance may be granted, but may take too long to be processed. This can be problematic for deals that the government is trying to conclude quickly,<sup>51</sup> which may have already advanced significantly by the time funding for legal support is available.<sup>52</sup> One interviewee, for example, described an instance in which an expert funded by a development organization was delayed due to the organization’s internal approval procedures and reportedly arrived in the country after negotiations had concluded.<sup>53</sup> Third, and more generally, a reliance on external funding is not satisfactory, as this makes governments vulnerable if they are not able to find funding for such support at key moments.

Aside from paying the full cost of external legal support or securing support from donors, governments can also source low-cost or free legal and technical support. Governments have done this, for example, through organizations that link governments to expert assistance, through non-profit organizations that provide technical assistance, and through individual law firms that are willing to offer consistent pro bono support to a particular government (see Table 1 on pages 15 and 16, above, for further information).

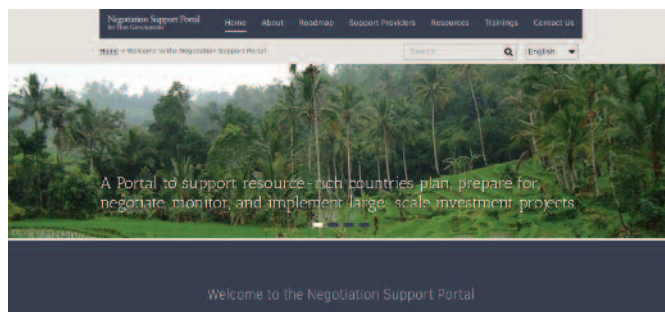
While brokers of pro bono support exist to help governments find legal support on a pro bono or low-cost basis, they might not be able to identify lawyers willing to take on every request, whether because of conflicts, timing issues, or a mismatch in expertise needed and offered. At least one organization also limits its support to governments with an acceptable record on human rights or democracy.

Some governments may not be aware about the availability of such support.<sup>54</sup> For instance, some government interviewees were unaware that law firms in various countries offer pro bono assistance, or that organizations exist that will match governments with pro bono or low-cost assistance,<sup>55</sup> including long-term embedded secondees.<sup>56</sup> Initiatives like the Negotiation Support Portal ([www.negotiationsupport.org](http://www.negotiationsupport.org)) exist to raise awareness among host governments of the legal support available on a not-for-profit basis. Yet given government representatives' reliance on their trusted networks when seeking external legal support, a more concerted effort by organizations already working with host government officials may be needed to increase the visibility of low-cost support.

### Questions of sustainability

Most interviewees recognized an ongoing need for some degree of external assistance for host governments. Two external legal support providers, for example, noted that the extremely complex contractual negotiations for land investments may always require some external legal support; just as the most sophisticated companies, and even well-resourced U.S. cities, will always use external lawyers for certain transactions, so too governments negotiating complex contracts will benefit from external assistance.<sup>57</sup> Indeed, it often makes sense to rely on external specialized advice for specific scenarios rather than to cultivate all potential areas of expertise in-house, especially when such expertise is only intermittently needed and/or is vested in individuals who may leave their positions.

Yet the aforementioned challenges of access and financing led one government interviewee to describe government reliance on external assistance as unsustainable, asserting that governments need to develop their in-house capacity.<sup>58</sup> To balance these tensions, governments can build internal skills and expertise to reduce the degree of the government's reliance on external legal support. As in-house capacity increases, government staff can take on greater roles in negotiations and at other stages of the investment process, helping to limit the government's dependence on external assistance. In-house capacity also renders external assistance more effective: for example, by enhancing the government's ability to prepare for and advance negotiations, and to monitor compliance with a contract that has been negotiated.



### Coupling legal support with other technical support and financial resources

Low- and middle-income governments that have limited legal expertise may also face shortages in non-legal skills, resources, and infrastructure needed to properly prepare for, negotiate, implement, and monitor investments. These limitations can drastically reduce the efficacy of even the most sophisticated legal advice, drafting, or representation.

Interviewees described the need for technical assistance at several different stages of the investment process:<sup>59</sup>

- » For preparation and pre-negotiation processes, interviewees representing both support providers and government spoke of governments' need for assistance with **preliminary decision-making and analysis** regarding specific investments. Government interviewees stressed the need for technical assistance with issues such as: deciding whether specific investments should be offered duty waivers or other incentives;<sup>60</sup> approving or rejecting feasibility studies and impact assessments;<sup>61</sup> and conducting due diligence on a potential investor.<sup>62</sup> One lawyer representing investors noted that some governments also needed **assistance establishing systems** to gather agricultural data<sup>63</sup> to inform investor plans and contractual negotiations. Similarly, a legal support provider recounted negotiations in which the government did not know the value of the land's resources or the likely income from the project, leaving the government "out of their depth" and unable to "truly negotiate an advantageous deal based on an informed perspective."<sup>64</sup>
- » During contract negotiations, governments need to have **industry experts** present.<sup>65</sup> One non-legal support provider noted that expertise and experience concerning the industry was needed both for the design of the contract's content and so that the government had "the self-confidence that comes with knowing terminology and knowing when the company is bluffing."<sup>66</sup> An external lawyer recommended that, where possible, such experts should be familiar with the industry and players operating specifically in the host country.<sup>67</sup> Another external lawyer noted that additional skills needed to prepare for and conduct negotiations include **fiscal modeling expertise**,<sup>68</sup> in order to model potential revenues flowing from the investment, as well as the ability to understand and explain taxation concepts to investors,<sup>69</sup> as a means of persuading them to accept certain proposals. The lawyer noted that such explanations from external experts were perceived as more objective and impartial, and hence more likely to be accepted by the investor.<sup>70</sup>
- » Once investments have been made, resources are needed to enable the government to monitor the project. One interviewee shared experiences of government offices not having basic office supplies or fuel for vehicles necessary to conduct site visits as part of the monitoring plan.<sup>71</sup> In such scenarios, interventions that address related contextual challenges may be necessary for effective outcomes, such as pairing legal support with resources that enable government agencies to adequately monitor projects.

“[...] if someone external gave an independent perspective on an issue – investors listened to that. It was perceived as more objective.”

#### External lawyer for governments

#### Political challenges to seeking and implementing advice

The provision of legal support is essentially a technical service, yet one that is greatly affected by political factors. Indeed, government decision-makers may be reluctant to even seek the external legal support that might be needed, either because they do not trust unknown legal support providers or because of concerns regarding maintaining national sovereignty or confidentiality.<sup>72</sup> When legal support is provided, it is only effective to the extent that political decision-makers decide to use it.<sup>73</sup> The government representatives that lead negotiations—and those empowered to sign or approve the contract—will ultimately decide which issues to pursue, and which issues will be closely monitored after the agreement is concluded.<sup>74</sup> In some situations, governments may have legitimate reasons for disregarding legal advice on a particular issue. In others, however, political factors can lead to situations in which, despite solid legal advice, negotiations still result in subpar outcomes for the country.

In addition, governments may also be reluctant to follow legal advice—especially from external lawyers—when they do not sufficiently trust it. Lawyers without a history of working with the government may find it more difficult to convince decision-makers regarding the merits of certain strategies or advice than a support provider with a known track record in a country who is well acquainted with the local context, political economy, and power dynamics within the government.<sup>75</sup> In particular, lawyers provided on a one-off basis through brokers of low-cost services may struggle with reticent government counterparts, who may be less likely to trust lawyers they do not know and did not choose. At times, government representatives’ reluctance to follow legal advice may also stem from their fear of making decisions that may be against the wishes of more senior government decision-makers. This can result in paralysis, stalling negotiations.<sup>76</sup> In such circumstances, lawyers can try to increase the impact of their advice by building trust with political decision-makers,<sup>77</sup> and by knowing when, and how, to raise issues with key government decision-makers.<sup>78</sup> For lawyers working with governments for the first time, trust may be hard to build from scratch; it may depend on inter-personal dynamics with key government officials.<sup>79</sup> One lawyer explained that because he was introduced to the government by a deeply trusted intermediary,<sup>80</sup> he was able to build a strong relationship with governmental decision-makers quickly. This also encouraged the government to trust other,

more junior, providers of legal support, such as secondees embedded within government, regardless of whether they too had been introduced by the respected third party.<sup>81</sup>

To the extent that legal support has the potential to help design investments that promote sustainable development and respect human rights, another political impediment may be the government’s priorities and objectives. For example, interviewees with experience in one country noted that, for a period of time, the government sought to reinvigorate its economy quickly after years of conflict.<sup>82</sup> This placed time pressures on negotiations that increased the risk of inadequately addressing certain social issues.<sup>83</sup> While a government in such a situation could understandably prioritize efforts to reinvigorate a devastated economy, the failure to address certain social issues in the context of investments has ultimately resulted in widespread grievances on the part of affected communities.

#### Corruption

In addition to political challenges, several interviewees explained that corruption can also discourage governments from implementing recommendations provided by legal support providers, or even from obtaining assistance at all. Support providers to governments and to investor companies shared accounts of illicit payments or other benefits provided by companies to government decision-makers in the context of negotiations.<sup>84</sup> Decision-makers receiving illicit benefits may be less likely to follow legal advice, less willing to push back against investors’ demands regarding key contractual terms (including regarding changes to the country’s model contract<sup>85</sup>), or less interested in properly incorporating the results of financial modeling or other research and analysis into the design of the contract.<sup>86</sup> Corruption can even cause self-interested government officials to make sure that the government has no or limited legal support during negotiations.<sup>87</sup> In one situation, an interviewee’s attempts to procure low-cost external legal support was well received by middle-level government officials but eventually vetoed by more senior government representatives; the interviewee believed that those officials stood to benefit personally from dealings with relevant investors, and did not “want lawyers coming in and identifying that people at the top are receiving benefits from the [...] company.”<sup>88</sup>

Corruption in the context of legislative drafting or contract negotiations can result in governments prioritizing the interests of some over the interests of the country and its citizens more generally. When it comes to contracts, corruption may also decrease the likelihood that parties will include clauses encouraging more responsible practices, or that any such clauses will be implemented subsequently.



Rubber tree plantation  
in Koh Samui, Thailand.

## PART III

### ARE THERE LEGAL SUPPORT GAPS?

#### ASSESSING GOVERNMENT USE AND NON-USE OF LEGAL SUPPORT

Governments use legal support differently at various stages of investment projects. This Part explores each stage of land investments in contexts where contracts are used, noting the activities involved and how legal support can be used. This Part also considers—for all stages except stage one, which was not a focus of interviews—how governments are conducting each stage of the investment in

practice, noting findings about how they access legal support for specific stages, where relevant. Governments will usually need other types of technical support in each stage as well; as discussed in Part I, such support is outside the scope of this report and not covered in depth below.

## STAGE ONE: SETTING THE LEGAL AND POLICY FRAMEWORK

In seeking to host investment projects, the government needs to assess whether the country's legal and policy frameworks will lead to projects that promote sustainable development and respect rights.<sup>89</sup> In light of this assessment, the government may decide that existing laws or policies should be revised, or new ones enacted.

Governments may use legal support to help review existing laws, and to design additional laws and policies in line with the country's broader development objectives or its national development plan. For instance, one government representative described the creation of a working group of lawyers to advise on proposed reforms of the country's land acquisition legislation,<sup>90</sup> which formed part of a broader initiative focused on protecting land rights and ensuring that the agricultural sector develops in a beneficial way for the country.<sup>91</sup>

Legal support is also occasionally used to help standardize investment-related processes. This can include, for example, drafting or helping to prepare templates of legal documentation, such as letters of intent, memoranda of understanding, and potentially model investment contracts for different sectors or commodities, which can form the basis for future negotiations. Country-specific model contracts, which have both utility and limitations, may be most effective when the government leads their development, with support from lawyers and other advisors.<sup>92</sup> Government leadership and involvement at the outset can help ensure that the model reflects the government's objectives. It also increases the likelihood that those who use the model during negotiations will understand how it is designed to operate, so that they can consider changes during negotiations without undermining the model's intentions as well as more effectively implement a resulting contract. Aside from supporting the development of templates, lawyers have also contributed to other initiatives that seek to clarify investment processes, such as the creation of investors' guides that provide explanations of legal requirements for incoming investors.<sup>93</sup>

## STAGE TWO: PRE-NEGOTIATION PROCESSES

Some governments establish a competitive tender or bidding process for investments; others wait for investors to approach the government or host community on a "first-in, first assessed" basis. Once the government has identified an investor interested in carrying out a specific investment, various processes can help to determine appropriateness and viability, as the government will want to ensure that the proposed investor meets certain qualifications and the investment meets domestic legal requirements and feasibility thresholds. These processes include feasibility studies, due diligence on the investor's capabilities and track record, baseline studies, impact assessments and accompanying management plans, land use surveys, and community consultations. Information gathered is relevant should the government proceed to negotiate an investment contract with the investor.

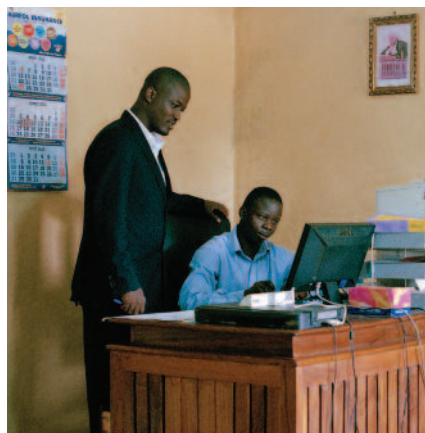
Host governments in low- and middle-income countries may not possess the requisite resources, skills or experience to conduct these processes themselves. Usually technical experts will be needed to conduct such processes; for instance, impact assessors or environmental experts may be needed to review the adequacy of an impact assessment or environmental management plan, and business experts may be needed to review the investor's feasibility study. Legal support may be less relevant, although can be useful for supporting with due diligence and in addressing any legal issues that arise. Governments also often require investors to submit project-level assessments for verification and approval.<sup>94</sup> While most of the preparatory processes will require technical, non-legal expertise, lawyers can help to determine what information is needed and which processes need to have taken place before negotiations begin.

### How are governments conducting pre-negotiation processes in practice?

In practice, interviewees reported few instances of governments accessing legal support during the pre-negotiation stage. Interviewees regularly described governments devoting insufficient attention and resources to this stage, which frequently leaves governments under-prepared for contract negotiations. Governments would often compound their disadvantage by procuring support at the last minute, or asking support providers to arrive right before negotiations, which undermined the support providers' ability to assist with advance preparations.<sup>95</sup>

“One mistake often made is waiting too late in the process to get the [legal and technical] help”

### Non-legal support provider for governments



Commercial law practice, Sierra Leone.

Of the range of preparatory processes that should occur before governments conduct negotiations or allocate permits for investments, interviewees identified due diligence of the investor as the one that governments most commonly carry out themselves.<sup>96</sup> Interviewees from several countries mentioned specific governmental approaches to conducting due diligence of investors: in one country, the Attorney General’s department uses a checklist,<sup>97</sup> while a second government works with external lawyers to develop a due diligence process.<sup>98</sup> A third country has its embassy in the investor’s home state conduct the due diligence, receiving documents provided by the investor and using internet research.<sup>99</sup> A government representative from this country noted that the government’s due diligence was its “weakest link,” explaining that internet-focused due diligence was of limited utility because companies—especially less well-known ones—could easily embellish their profiles online. According to the representative, this meant that the government would “just take their word to be true [and] give them land.”<sup>100</sup> A fourth country reportedly has international lawyers conduct the due diligence.<sup>101</sup> An interviewee from another country noted that the government did not have a legal due diligence framework, which resulted in approval of projects proposed by investors who were not equipped to adequately them carry out. As a result, these projects never took place.<sup>102</sup>

While governments usually require investors to conduct processes like impact assessments and community consultations and receive approval before the project begins,<sup>103</sup> investors sometimes do not complete these processes, or only carry them out after a contract has been signed. When governments do not require these assessments to be submitted before negotiations, or when governments approve processes that are inadequate, it leaves the government under-prepared and less equipped to negotiate a responsible contract.<sup>104</sup> As one government representative noted, “[w]e haven’t done our own analysis [and] don’t appreciate the impacts on communities [...]. The investor has done that research [...]. So the investor has the power and drives the agenda in negotiations.”<sup>105</sup>

Multiple interviewees with contract negotiation experience opined that governments are often not adequately prepared or informed before negotiations begin, and often fail to conduct the necessary processes prior to commencing negotiations.<sup>106</sup> A lack of information or preparation makes it harder to negotiate a responsible contract,<sup>107</sup> even for government officials who are otherwise effective negotiators.<sup>108</sup> It places the government at a disadvantage by allowing for greater informational asymmetry<sup>109</sup> and reducing the government’s leverage during negotiations.<sup>110</sup> Inadequate preparation can also lead to delays and can actually increase the amount of time spent negotiating contracts.<sup>111</sup>

Insufficient information sometimes stems not from poor preparation, but simply because the information that would be useful to governments is hard to find. One external lawyer, for example, said that it can be difficult for governments to get access to sufficient data to understand how other governments have addressed similar issues.<sup>112</sup> The lawyer noted that contract repositories like OpenLandContracts.org can help governments understand what other countries have included in their contracts.<sup>113</sup>

Interviewees also mentioned other reasons for the regular failure of governments to conduct adequate preparations. These included resource and skills shortages,<sup>114</sup> investors receiving special treatment when “connected” to senior government officials,<sup>115</sup> and governments being “desperate” for investments.<sup>116</sup> One embedded legal support provider noted that, in her experience, the government did not undertake any feasibility studies, environmental assessments, or other technical research in advance of negotiations. Nor did the government try to speak to communities residing on the land in question, or require companies to do so, as all land was considered to belong to the government. The interviewee was aware of only one company that sought to receive informed consent from communities, at the insistence of one of the company’s sustainability officers.<sup>117</sup>



Paralegals at work,  
Sierra Leone.



### BOX 3: COMMUNITY CONSULTATIONS IN THE CONTEXT OF INVESTOR-STATE NEGOTIATIONS: WHAT DOES INTERNATIONAL HUMAN RIGHTS LAW REQUIRE OF GOVERNMENTS, AND WHAT DO INTERNATIONAL GUIDELINES AND BEST PRACTICES RECOMMEND?

Legal support theoretically can—and ideally should—help governments identify and comply with their international legal obligations and adhere to best practices in the context of land investments. For example, consultations with communities are not simply recommended as a best practice—governments are obligated under international human rights law to carry out at least some aspects of consultation processes with communities that stand to be affected by a proposed land-based investment. Specifically, governments must respect, protect, and fulfill the human rights of individuals and communities to information, public participation, and—for indigenous and tribal peoples—free, prior, and informed consent.

- » The **right to information** is a component of the right to freedom of expression,<sup>118</sup> and has been interpreted as establishing an obligation on states to provide information of public interest upon request,<sup>119</sup> including regarding investment contracts<sup>120</sup> and the investment projects' impacts on the environment<sup>121</sup> and public health.<sup>122</sup>
- » The **right to public participation**, explicitly codified in the International Covenant on Civil and Political Rights, may also include the right of all people to effectively influence public decision-making processes regarding investments that affect them.<sup>123</sup>
- » The requirement to obtain the **free, prior, and informed consent** of indigenous and tribal peoples is expressly articulated in the International Labour Organization's Convention 169,<sup>124</sup> and also derives from various rights contained in major human rights treaties, including minority rights to enjoy culture,<sup>125</sup> freedom of religion,<sup>126</sup> and rights to self-determination,<sup>127</sup> property and resources,<sup>128</sup> and development,<sup>129</sup> among others. In determining whether or not a group is indigenous, a group's self-identification as indigenous has been held to be an "important criterion,"<sup>130</sup> even where the government does not regard the group as indigenous.

Soft law documents and guidelines resulting from multi-stakeholder negotiations also stress the importance of consulting affected community members and providing them with pertinent information before contract negotiations. For example:

- » The UN Principles for Responsible Contracts state that "consultation with the affected communities and individuals should take place before the [investment] contract is finalized."<sup>131</sup>
- » The African Union's Guiding Principles on Large Scale Land Based Investments in Africa assert that communities affected by land investments should be "provided sufficient information, consulted on their views prior to finalizing [large-scale land-based investment] agreements and [have] these views taken into consideration."<sup>132</sup>
- » The Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) underline that states should, in the context of investments in land, "safeguard against dispossession of legitimate tenure right holders,"<sup>133</sup> and "ensure that existing legitimate tenure rights and claims ... are systematically and impartially identified ... [and ensure that such] rights are not compromised" by investments.<sup>134</sup> Legitimate tenure rights may be customary and informal, and not recognized by law.<sup>135</sup> In addition, "[c]ontracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected."<sup>136</sup>

### STAGE THREE: CONTRACT NEGOTIATIONS, AND RENEGOTIATIONS

If, after conducting the processes mentioned above, the host government determines that the potential investment is acceptable, it may then need to define the terms according to which the project will be permitted to operate. Countries have varied and distinct legal approaches to regulating land investments. In a number of low- and middle-income countries, some form of investment contract will be negotiated between the government and the investor. Such agreements usually articulate binding rights and obligations between the government and the investor, making it crucial that the government's negotiating team has relevant legal expertise. Legal expertise can be particularly important if an investment treaty might apply, as treaties can elevate investor-state contracts above domestic law, increasing potential risks to the government.<sup>137</sup> In addition, if an existing contract is to be renegotiated, lawyers and other technical support providers can help governments identify parts of the contract that should or should not be renegotiated.

In some countries, the investor negotiates directly with communities to access and use their land for investments. (This is usually the case where the community formally owns the land, although the VGGT make clear that investments should respect all legitimate tenure rights, whether formally recorded or not, and that “investments should be made working in partnership with . . . local holders of tenure rights.”<sup>138</sup>) In such contexts, the government might support, facilitate, or oversee the negotiations, and can provide the community with information and advice before the negotiations begin. Governments may benefit from legal support to do this, although in most instances priority should be given to funding and ensuring legal support for the community itself. The remainder of this subsection looks at the dynamics of investor-state contract negotiations, given the prevalence of their use in certain host countries.

#### Preparing for negotiation

When a government plans to negotiate with an investor, legal support can vitally strengthen preparations. Lawyers can advise on how existing legal frameworks should be borne in mind during negotiations and can support the development of negotiation positions or strategies, based on the information gleaned from the processes carried out during the pre-negotiation stage. In addition, lawyers can help identify existing gaps in the domestic legal framework—local lawyers are particularly well placed to do so, although strong overseas lawyers can also do this—and can provide advice on best practice and industry-standard contractual clauses to fill such gaps (as well as advice on new legislation to address the gaps more comprehensively).

In-depth preparation will result in a government negotiating team that is focused on its objectives, and aware of the strengths and weaknesses in the country's bargaining position. This places the government in a strong position to negotiate a responsible contract that contains robust provisions for priority issues, while permitting them to cede ground to the investor in ways that are not overly injurious to the government's position or the public interest.

### Participating in negotiations

#### *Drafting contracts*

Accessing appropriate legal support during negotiations helps achieve contracts that meet a government's objectives for the investment and clearly articulate the rights and responsibilities of each party. Lawyers can also ensure that the contract is manageable to implement and enforce in practice.<sup>139</sup> Negotiations often involve both general discussions of issues, as well as interactions regarding the exact wording of specific clauses; lawyers can assist with both of these functions. Strong drafting skills are essential to protect the government's interests; investors may also appreciate negotiating with a government that has contract drafting expertise. One private sector interviewee preferred for governments to use lawyers during negotiations because lawyers would more “carefully” draft provisions, rather than simply refer to (and presumably adapt clauses from) previous agreements.<sup>140</sup>

#### *Maintaining organization and strategic focus within government*

Lawyers or other support providers can help governments to organize for negotiations. Even junior-level lawyers can help expedite negotiations by taking minutes of discussions, noting positions reached by parties, tracking and annotating drafts, and organizing meetings with political decision-makers. This can free up higher-level officials to focus on key issues and prioritize their time; for instance, when their perspective on a particular issue is needed before the government can agree to a provision.<sup>141</sup> This is especially useful when high-level government representatives are involved but do not have time to follow all aspects of the negotiations.<sup>142</sup>

While government entities may have different agendas when it comes to land investments, lawyers can help to ensure that the government has a unified position before the negotiations begin. This is important both during the preparations for, and the undertaking of, negotiations. In some countries, relevant ministries may not coordinate closely in the context of investment negotiations,<sup>143</sup> even where multiple ministers will ultimately sign the contract. Different types of support can help facilitate increased coordination and communication between agencies, mediating among different actors and laying the groundwork for increased consensus within the government.<sup>144</sup> While government lawyers located within a line ministry or agency may at times find it difficult to raise counterarguments to the position of more senior government actors within their own ministry, external lawyers, or government lawyers with a mandate to provide legal advice to different government entities, may feel less constrained in this regard.<sup>145</sup>

## How are governments accessing legal support for contract negotiations in practice?

### *Government use of legal support during negotiations*

Interviewees with experience in the majority<sup>146</sup> of countries principally covered by interviews were generally of the view that the host governments in those countries were not achieving optimal outcomes during negotiations with investors. While there may be many reasons for this in any particular case, the majority of these interviewees identified a lack of adequate legal support as an important factor.<sup>147</sup>

Governments often use lawyers during contract negotiations. In some situations, senior government representatives will lead negotiations<sup>148</sup> and use their lawyers as a sounding board for specific legal questions.<sup>149</sup> In other instances, lawyers—whether in-house or external—may lead the negotiations on the government’s behalf, although decision-making ultimately resides with the government. One external lawyer explained that, in a country without a model contract, he had assisted the host government client by preparing a term sheet of basic information, such as the concession’s size, location, and duration, as well as intended rents and tax exemptions. He then developed a matrix of issues to be negotiated, which, once agreed upon by the government, was shared with the investor to commence, and later to continue, negotiations.<sup>150</sup>

In some contexts, a government will be represented by its in-house legal staff at negotiations. These lawyers tend to be generalists, and may lack the relevant expertise needed to negotiate an effective investment contract.<sup>151</sup> One legal support provider observed that a government was negotiating contracts without a seasoned contract lawyer who could annotate the contract and identify any problematic

provisions.<sup>152</sup> Several interviewees noted that government lawyers tend to have gaps in their understanding of commercial or technical considerations unique to agricultural projects<sup>153</sup> and to specific commodities,<sup>154</sup> while government officials attending negotiations sometimes lack a deep understanding of technical issues such as taxation and import duties.<sup>155</sup> Yet such knowledge can be key to ensuring that they can negotiate with confidence to achieve a responsible contract.<sup>156</sup>

Language and legal translation were also mentioned by three government representatives as a challenge<sup>157</sup> that increased the possibility that the government would agree to terms it did not properly understand. Two governments reportedly struggled to draft and implement contracts in English, as most government actors in the country are not sufficiently confident in English.<sup>158</sup> For another government, problems have arisen when dealing with investors who insist on communicating with the government in a language that government representatives cannot understand. While the government uses translators in such instances, those translators tend not to specialize in legal translation.<sup>159</sup>

Governments sometimes negotiate contracts with only minimal participation by lawyers.<sup>160</sup> This is often problematic, given that lawyers have essential skills that are relevant both in drafting clear legal language and in assessing the potential risks and issues that may arise from legally binding agreements. One legal support provider who was embedded within a government ministry for a significant period of time expressed frustration at the government’s limited knowledge of how to relate to investors and how to efficiently negotiate a deal that was beneficial to both the investor and the government.<sup>161</sup>



Workers harvest oil palm fruit in Malaysia.

## BOX 4: LIBERIA'S INTER-MINISTERIAL CONCESSION COMMITTEE AND NEGOTIATION TEAM

Governments can use domestic legislation to ensure that appropriate representatives from within the government, as well as external experts where needed, are involved in preparing for and conducting negotiations. One example is Liberia's **Public Procurement and Concessions Act**, which covers the allocation of government responsibilities both for preparations and for negotiations.

Concerning preparations for negotiations, the Act sets out that an Inter-Ministerial Concessions Committee (IMCC) will be established for each proposed resource concession,<sup>162</sup> including agricultural investments.<sup>163</sup> Each IMCC is tasked with reviewing the concession procurement plans that cover pre-implementation activities<sup>164</sup> and reviewing documents associated with competitive bidding and tender processes for projects.<sup>165</sup> The IMCC is composed of senior officials from the National Investment Committee; the Ministers of Justice, Finance, Labor, Planning and Economic Affairs, and Internal Affairs; and the head of the government agency awarding the concession (for agricultural projects, this is the Minister of Agriculture), among others.<sup>166</sup>

For each concession negotiation, a Negotiation Team is created to negotiate with the highest bidder.<sup>167</sup> The Negotiation Team is constituted on the recommendation of the IMCC, comprises specified high-level officials, and reports directly to the President.<sup>168</sup> This team in turn assembles a technical team, which includes "Government employees and relevant qualified legal and technical advisors," whether for a fee or pro bono.<sup>169</sup> The Act contains comprehensive provisions that stipulate the Negotiation Team's mandate, procedures for negotiating, and a detailed list of issues that the concession contract should contain, including tax and fiscal issues, social responsibility requirements, and processes for monitoring and reporting.<sup>170</sup>

Since its enactment, the Act has facilitated investor-state concession contracts that were shaped by the input of different parts of government and external experts, and which have been used as models during subsequent negotiations.<sup>171</sup> Some interviewees familiar with the Act's implementation noted room for improvement, however. One noted that the government does not always have the resources and expertise to strictly follow each process set out in the Act.<sup>172</sup> Another explained that, in practice, the high-level government representatives are not always able to focus on details being negotiated, given their large scope of responsibilities.<sup>173</sup> Despite these challenges, the Act represents an interesting example of the transparent, structured allocation of responsibilities for different stages of the investment process, and how these can be linked with external legal and other experts.

In one of the thirteen countries principally covered by interviews, interviewees were more optimistic about how the country had performed in negotiations. That country has benefited from a combination of international and local lawyers assisting with contract negotiations, as well as embedded fellows placed in government ministries for sustained periods of time, and an engaged civil society that has closely followed negotiations and implementation of agreements.<sup>174</sup> Lawyers leading negotiations have benefitted from the trust of the President, and have earned credibility with the government's counterparties.<sup>175</sup> One investment contract, negotiated with external support over a two-year period, subsequently became a model for future negotiations. This precedent gave negotiators greater guidance on beneficial provisions for future contracts, and also increased consistency in newer contracts, which can help with monitoring later in the project cycle.

Yet there were still challenges in this country. The government's overarching emphasis on reinvigorating its economy meant that social and environmental protections were not always adequately addressed in negotiations.<sup>176</sup> One legal support provider reported regular instances of illicit payments to government representatives, who then conceded on key terms during contract negotiations.<sup>177</sup> Further, despite negotiators' intent to make the contract easy for government agencies to monitor, the government's resource shortage has constrained monitoring.<sup>178</sup>

## BOX 5: WHO NEGOTIATES ON BEHALF OF INVESTORS?

Investors in land vary, as do their approaches to procuring legal support or representation during contract negotiations. Large multinational corporations often use external lawyers, and generally also have a dedicated in-house legal team that may observe and potentially provide support during the negotiation of investment contracts.<sup>179</sup> They may also employ technical non-legal support. Sometimes, a company's commercial team will act as its primary negotiators,<sup>180</sup> with lawyers providing backup support with drafting, research, and legal advice. One government interviewee noted that, in his experience, Western companies always use lawyers, whereas companies from China may conduct negotiations without lawyers, focusing instead on ensuring the host government is committed to making the investment work.<sup>181</sup>

Investors may make use of international lawyers, in-country lawyers, or both. Their choice will depend on their needs, resources, and other factors. Some host countries or legal institutions may require investors to use local law firms for certain types of transactions, or may prohibit foreign lawyers from giving advice on local laws. Using both international and in-country lawyers can provide an investor with varied specialized expertise. One international lawyer described an experience negotiating an agricultural investment contract, during which the international lawyers on the legal team negotiated the agreement, while the local lawyers gave advice on local laws but were not active in negotiations.<sup>182</sup> A different international lawyer asserted that, in his experience, government policy required local law firms to be used, but that those lawyers did not participate actively in negotiations.<sup>183</sup> Some investors may also procure local counsel to gain influence with government, understand local dynamics, or even to help facilitate illicit payments to government officials.<sup>184</sup>

### *Who drafts the agreement?*

In multiple countries covered by interviews, interviewees described negotiation processes where the investor would prepare a first draft of the contract and then send it to the government to review.<sup>185</sup> In some of these countries, interviewees reported that the government either would accept the agreement as drafted or would request very minor changes before the agreement was signed.<sup>186</sup> For other countries, though, interviewees explained that the government would typically provide the initial language, whether with a model contract or a first draft.<sup>187</sup>

The question of who prepares the first draft of the contract is relevant to assessing whether governments are in the best position possible to use lawyers effectively and to negotiate responsible contracts. As discussed in Box 6, below, allowing an investor counterparty to draft an agreement being negotiated—or even to pick the model or precedent contract that will be used as the starting point—can lead to suboptimal outcomes. The precedent contract, or the first version of the contract if drafted completely from scratch, creates important parameters for what may be possible to achieve through negotiations. To the extent that the starting point is unfavorable to the government, it may struggle to negotiate an optimal deal. This is not always appreciated by governments, who may consider it convenient for the

investor to prepare a first draft.<sup>188</sup> Of course, a government that controls the drafting process may still find itself with a poorly negotiated contract. This could happen, for example, if the government's model contract is inadequate,<sup>189</sup> if the government's lawyers are not familiar with the domestic legal and political context or international best practice, or if government officials with ultimate authority are not inclined to listen to legal advice,<sup>190</sup> among other reasons.



## BOX 6: TAKING CONTROL OF CONTRACT DRAFTING DURING NEGOTIATIONS

Government negotiators may be more likely to achieve a responsible contract when they **take control** of contract drafting.<sup>191</sup> Specifically: (1) the contract template on which negotiations are based, if any, should have been created or selected by the government, rather than the investor;<sup>192</sup> and (2) as much as possible of the subsequent drafting or markups of the contract should be done by the government’s lawyers.

Taking control of drafting can lead to the following benefits:

- » The party that controls drafting can ensure that the contract does not place an undue amount of risk on that party.<sup>193</sup> If the government drafts the contract, it can more easily avoid inadvertently agreeing to language that is detrimental to its interests.
- » A government with a good understanding of its model contract will be in a position to adapt the model contract without losing key functions or benefits of the model.
- » A government in control of drafting the contract may be more likely to have a good understanding of how the contract is designed to work, and thus better equipped to monitor and implement it.<sup>194</sup> This can help reduce the chances that the government will inadvertently breach the contract. A government that is deeply familiar with the contract will also likely be more able to defend its interests if a dispute arises.

### *Model or template contracts*

Interviewees described multiple countries having (or developing) some form of model or template investment contract relevant to agricultural and forestry investments, although the degree to which such models are used in practice varies.<sup>195</sup> Some models were developed by international lawyers;<sup>196</sup> in one situation, a local lawyer then adjusted the model to account for the domestic legal framework.<sup>197</sup> Other models were developed by the government.<sup>198</sup> One country regularly referred to previous agreements as a model or guide to negotiations.

Various rationales exist for using a model contract. Ideally, models will make most terms non-negotiable: this bolsters the government’s bargaining position by limiting the focus of negotiations and the discretion of government negotiators.<sup>199</sup> To the extent that models are included in democratically enacted legislation, they may be subject to public debate and input, making the contracts subsequently negotiated more likely to reflect the priorities of the general public.

Models also provide guidance to less experienced government negotiators, potentially helping them to avoid drafting contracts that run counter to the government’s interests. Models can be especially helpful when the government faces human resource constraints, by reducing the time and effort that a government lawyer must spend on the negotiation.<sup>200</sup> Having a model encourages greater consistency with other contracts,<sup>201</sup> making it easier both for the government’s lawyers to review new contracts before execution and for the government to monitor and implement concluded agreements. Finally, using models—and hence adopting a consistent approach to contract negotiations—may also place investors on a more even playing field with each other, by encouraging similar terms for different investors.<sup>202</sup> In these ways, models also can serve as a “bridge” towards a governance regime in which most investment terms and requirements are set in domestic law, rather than in contracts.<sup>203</sup>

Of course, the benefits of model contracts may not always eventuate. A government negotiator may allow for unduly irresponsible provisions to be included in the negotiated contract. More generally, straying too far from the model contract may limit the model’s utility. If the quality of the model is low, the government risks repeatedly negotiating problematic agreements.<sup>204</sup>

Governments use model contracts in different ways. One government interviewee explained that the government asks the investor to submit a draft agreement that is “based on” the format of the government’s model, and will then only proceed to negotiations “if there are any issues” with the investor’s version.<sup>205</sup> In another country, the investor submits a draft, which the government then adapts in accordance with its model contract.<sup>206</sup> Another government interviewee said that his government submits its model contract to the investor to start negotiations.<sup>207</sup> In that country, there are no “red lines” or parts of the model contract that cannot be negotiated and altered,<sup>208</sup> meaning that in practice, an investor might be able to alter any term it wishes. A model by itself may therefore do no more than prompt the government regarding different issues,<sup>209</sup> and cannot act as a replacement for adequate legal and technical expertise or support. In addition, governments may not consistently use the models they have.<sup>210</sup> One government official, for example, described a model contract as “unusable,” because it was designed by international lawyers who did not adequately adapt it to the local context or legal framework, and who were unable to understand the perspective of a low-income country.<sup>211</sup>

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“[Model contracts] produced [by overseas lawyers were] not consistent with reality, and unusable to the government.”

**Government representative**

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Multiple interviewees also noted that governments often refer to “well-drafted” contracts that the government had previously negotiated for guidance in negotiating contracts with new investors,<sup>212</sup> or in developing their model agreements.<sup>213</sup> These contracts can serve a similar function to model contracts, helping to shape the structure and content of the contract under negotiation. Yet without legal support, these precedent contracts may not be used effectively. One interviewee reported a government practice of copying text from old agreements and inserting information about the project without any legal review before printing the memorandum of understanding (MOU) for signing.<sup>214</sup> Indeed, the government reportedly encountered issues during project implementation that “were not properly dealt with” in the MOU.<sup>215</sup>

### *International guidelines and best practices*

Interviewees rarely described international guidelines as playing a significant role in government approaches to contract negotiations. One government representative stated that the government sought to implement “common practices” rather than “best practices.”<sup>216</sup> A government representative from another country noted a similar sentiment, expressing a preference for best practices from comparable countries, rather than international best practices.<sup>217</sup> The representative explained that comparable country examples were regarded as more “convincing” than practices advocated by international organizations and financial institutions, which were regarded with skepticism by that particular government.<sup>218</sup>

One legal support provider noted that the International Finance Corporation’s Environmental and Social Performance Standards were one of the few international guidelines to which some governments did refer.<sup>219</sup> An external lawyer for governments also noted that international best practices can be incorporated into a contract without being explicitly mentioned; he opined that lawyers’ attempts to adopt best practices may be reflected in the choices of the terms of the contract, including the issues expressly covered and the obligations established.<sup>220</sup> One example of an international best practice that has been explicitly incorporated in contracts is the Voluntary Principles on Security and Human Rights, a voluntary standard developed by a multi-stakeholder initiative whose participants include governments, extractive companies, and civil society organizations. These standards appear in six concession contracts from Liberia relating to agricultural or forestry concessions.<sup>221</sup>

Although the VGGT provide particularly relevant guidance, they were not frequently mentioned by interviewees. One support provider regarded them as too vague for governments to implement directly during contract negotiations.<sup>222</sup> However, another interviewee’s government reportedly established a multi-stakeholder platform to implement the VGGT;<sup>223</sup> the government is now working to incorporate the VGGT into its investment approval process. The deep level of awareness that this government has of the VGGT demonstrates that, in some contexts, host governments may be more cognizant of specific international standards than some international lawyers, who may focus more on commercial considerations rather than international guidelines. This is of course not always the case. One interviewee with both government and private sector experience underlined that his government did not follow any international guidelines or best practices; instead, it merely accepted the terms offered by the investor.<sup>224</sup>

#### STAGE FOUR: IMPLEMENTATION AND MONITORING

At some point after the contract has been signed and/or all permits have been granted, the investor will be able to commence operations. A government's capacity to ensure investor compliance with the contract, as well as with domestic laws and the terms of relevant permits, is critical. This includes the government's ability to monitor the impact of project operations on the environment and on affected communities. Different government entities may be responsible for monitoring compliance on particular issues: for instance, the Ministry of Finance or a revenue authority may monitor tax compliance, while the Environmental Protection Agency may review environmental impact assessments and monitor compliance with environmental laws and management plans. A government's oversight responsibilities also include ensuring effective judicial and non-judicial grievance mechanisms for individuals and communities who may be adversely affected by project operations. The government also will need to fulfill its obligations under the contract in a timely manner.

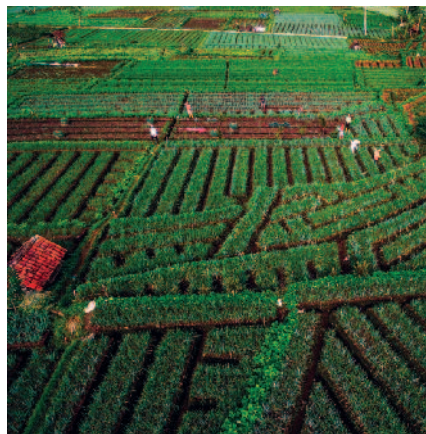
To support monitoring, lawyers can help governments identify the investor's contractual obligations to be monitored, as well as the government's obligations with which it must comply.<sup>225</sup> This may include, for example, providing a monitoring plan that lists company obligations, the manner and frequency in which compliance should be monitored, as well as supplementary information that can support monitoring efforts.<sup>226</sup> Lawyers can train or assist other government employees on specific legal issues that need to be monitored.<sup>227</sup> In some limited situations, lawyers embedded within the government can also help create more detailed monitoring systems for investment projects.<sup>228</sup> Lawyers can also help governments develop a plan to fulfill their obligations under each contract; this can include alerting relevant staff members to the government's specific contractual obligations and the timeline according to which the obligations must be fulfilled.

#### How are governments conducting monitoring in practice?

Few of the countries covered in interviews appeared to monitor investment contracts comprehensively.<sup>229</sup> One country's monitoring practice was described by an external non-legal support provider as "notoriously bad."<sup>230</sup> The government lacked resources to adequately monitor the investment, and therefore regularly relied on reports from the investor or other parties.<sup>231</sup> Even in a country where specific multi-agency coordination bodies were charged with monitoring the implementation of specific agreements, oversight was limited.<sup>232</sup> One legal support provider, for example, noted that the government generally only focused on tax collection;<sup>233</sup> it did not monitor closely for compliance with social provisions, instead relying on civil society organizations, labor unions, or communities to articulate grievances before it would investigate.<sup>234</sup>

Government representatives and lawyers present during negotiations are generally not themselves charged with monitoring duties,<sup>235</sup> although Ministries represented at negotiations sometimes do have a monitoring role.<sup>236</sup> One lawyer present at negotiations explained that he conceived of his role regarding the monitoring and implementation of the project as ensuring that the agreement could be easily monitored by the relevant government agencies.<sup>237</sup> In one case, he drafted a contract's transfer pricing provisions to be relatively simple so that government staff could monitor it.<sup>238</sup> In some situations, additional legal or technical support may be needed to help train and empower government staff to monitor and enforce contracts, or to respond to ad hoc queries that arise during the course of monitoring.<sup>239</sup>

A final weakness of governments at the implementation and monitoring stage concerns dispute resolution. One government representative noted that many disputes between governments and investors often have the potential to be resolved amicably, when the government has the confidence and capacity to understand the grievance and devise an appropriate response.<sup>240</sup> Legal support can help governments in this regard, by assisting governments to pursue any breaches of the contract by the investor, including potentially by enforcing penalties under the contract or the country's legal framework. Lawyers can also advise governments on the potential consequences of government breaches (including the potential for liability from costly investor-state dispute settlement arbitrations under a bilateral investment treaty) and on what action to take to remedy breaches and negotiate settlements with investors. Yet where governments lack skills and experience and do not seek legal advice, they may take actions that inflame rather than resolve disputes, increasing the chances that disputes will escalate to costly dispute resolution processes.<sup>241</sup> Two interviewees with experience in government also noted that states require external legal counsel for dispute resolution, including if the dispute is referred to investor-state dispute settlement.<sup>242</sup>



Farmers working in onion plantations in Argapura, Indonesia.





## PART IV

### GOOD PRACTICES

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This Part sets out good practices that host governments, donors, external legal support providers, and investors can aim to carry out, when needed, to overcome legal support gaps and to achieve more responsible land investments.

**Host governments can:**

1. **Consider all stages of the investment when identifying where legal and technical support is needed.** Some governments may benefit from a broader consideration of which tasks or stages of the investment may require assistance, regardless of whether they use in-house or external lawyers and technical experts. Governments that rely primarily on investor-state contracts for governing land investments may focus primarily on the negotiation stage when seeking legal support. Yet in the long term, ensuring more sustainable and responsible investments may require greater attention and focus on other stages of the investment. For example, a well-negotiated contract may not achieve the government's objectives if the government is not equipped to monitor it effectively; legal and technical assistance may facilitate more effective monitoring.
2. **Seek external support at the early stages of planning for an investment.** Legal support will be most effective when provided in a timely manner. Governments that can anticipate future needs for legal support, and connect with support providers accordingly, may be better positioned than those that wait until the last minute to request assistance. External lawyers and other experts who are procured well in advance of negotiations will be able to more effectively assist the government in those preparations, including in developing strategic objectives for the project; this can be instrumental in achieving desired outcomes from a negotiation.
3. **Select legal support providers who collectively have the range of knowledge and skills needed for the particular task.** Depending on the task and the government's objectives, relevant knowledge and skills that might be needed may include: knowledge of the industry or commodity relevant to the proposed investment; familiarity with relevant international guidance and best practice standards; expertise and experience with certain aspects of the investment preparation process, such as drafting laws, conducting due diligence on investors, negotiating contracts, or devising monitoring strategies for government agencies; and an understanding of the local legal and political context.
4. **Identify ways to ensure that government lawyers and staff with relevant technical expertise can meaningfully apply that expertise in negotiations and at other relevant stages of the investment.** In some contexts, governments do not fully benefit from internal expertise during negotiations, not because they lack expertise, but because the in-house lawyers and other staff with relevant knowledge and skills are located in ministries or agencies that are not closely involved in negotiations. Some governments have successfully revised their policies and practices for preparing for an investment and conducting negotiations so that the negotiation teams include staff with relevant expertise from across the government.

5. **Collaborate closely with any external lawyers used, exposing them to all relevant government actors and perspectives.**

External lawyers will be most efficient and effective when they understand the government's needs and objectives, including any differing opinions held by relevant government officials. Governments could seek to include external lawyers during internal deliberations; lawyers will then be better attuned to competing concerns and better equipped to provide constructive solutions consistent with the government's objectives. Similarly, during contract negotiations, having external lawyers present during all interactions with investors allows the lawyers to help the government evaluate the investor's position and determine how to proceed.

6. **Approach external legal and other technical support as an opportunity to build government capacity.**

While some processes may always benefit from specialized external assistance, many others can be carried out by government staff with relevant skills and expertise. Governments seeking to build the capacity of in-house staff could explore mechanisms to do so during the provision of external legal support. Aside from requesting trainings, governments can also, for example, encourage informal mentoring, require that certain government lawyers or staff be in the room during all negotiations, or encourage external lawyers to work with government staff between negotiation sessions (including remotely if needed).

7. **Incorporate relevant guidelines and best practice standards in the planning, negotiating, and monitoring of land investments.**

Although not all international guidance will resonate perfectly with governments, incorporating guidelines focused on land investments can increase the likelihood that investments will contribute to the country's development objectives and can help avoid preventable problems. Governments can ask legal support providers, whether in-house or external, to help align laws, policies, or contracts with guidance like the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT).

**Donors can:**

1. **Fund different types of legal support based on the needs of each recipient government.** Recipient countries have very varied needs with respect to legal support for land investments. The types of legal assistance needed will depend entirely on the nature of the investment and on in-house staffs and skills. Depending on the circumstances, governments may benefit from external legal support for specific negotiations, transactions, or activities; legal support embedded within government entities; long-term capacity building on legal issues for government staff; and/or remote advisory services. Donor assistance with legal support will be most effective when interventions are tailored to the specific needs of recipient governments. In addition, donors can seek to facilitate legal support that has the dual objectives of both meeting the current legal needs of governments and building government capacity concurrently.

2. **Consider facilitating legal support for multiple stages of the investment, as needed.** Donors asked to fund legal support during one investment stage can work with the government to determine whether the government has additional needs at other stages that would influence the effectiveness of any interventions. For example, procuring an external lawyer may assist the government in negotiating more effectively, but the government may remain ill equipped to implement and monitor the agreement subsequently. While remaining sensitive and responsive to the government's stated needs, donors can suggest additional modes of support. This could include, for example, coupling negotiation assistance with capacity building on monitoring, and ensuring that the government staff tasked with monitoring a negotiated contract have the financial means to seek clarifications from the lawyers who assisted with negotiations as needed. More generally, donors can seek to strengthen their support for policy, preparatory, and monitoring stages. In some contexts, such support might include assisting governments to move towards more legislative, rather than contractual, regimes for governing investment.
3. **Raise awareness among host governments of the different types of support available, including low-cost or no-fee support.** Donors working with governments can connect government representatives with relevant organizations and initiatives that assist governments in procuring low-cost or no-fee legal and technical support. Many of these low-cost providers can be found on [NegotiationSupport.org](https://www.negotiationsupport.org). Moreover, because government representatives often rely on their trusted networks to recommend external lawyers and support providers, donors can help governments to build working relationships with lawyers and other support providers, so that governments have a pool of trusted advisors when preparing for an investment.
4. **Facilitate various complementary types of support that can comprehensively meet a host government's different needs.** In addition to funding legal support, donors could consider funding related non-legal technical support in order to increase the effectiveness of legal support. Depending on the circumstances and need, non-legal support might be provided by, for example: business or economic experts to assist with fiscal modeling; industry or commodity experts; technical experts to conduct due diligence on investors and to help review impact assessments and feasibility studies; and anthropologists or community experts to assist with meaningful community engagement. When necessary, legal and technical assistance can also be accompanied by financial resources that enable the government to effectively implement and act on the assistance received. Multiple donors working with the same country could coordinate funding of legal or non-legal support in order to address government needs more efficiently and comprehensively.
5. **Sensitize governments, lawyers, and other support providers regarding the value and importance of following guidelines and best practices in the provision of legal support tied to land investments.** Donors facilitating legal support to low- and middle-income governments can seek to ensure that governments and support providers consider and incorporate, as appropriate, international guidelines such as the VGGT in the government's planning, negotiations, and monitoring of investments. This could be done, for example, by funding trainings and educational materials for governments and support providers that focus on incorporating guidelines during the provision of legal support during specific investment stages. Donors helping to connect governments with lawyers could also seek out those who have demonstrated expertise in this area. In some cases, it may be appropriate to pair external commercial lawyers with lawyers or experts who have expertise in sustainable development, human rights, and/or the management of social impacts.

#### External support providers, including brokers of low-cost legal and technical support, can:

1. **Place external support providers in a strong position to improve outcomes.** When necessary, organizations providing low-cost support can help their lawyers or technical experts to build trust with relevant government actors. This may include ensuring that lawyers and experts are adequately briefed regarding dynamics within government, or arranging for persons with influence to endorse and introduce the practitioner to senior government representatives. Organizations brokering external assistance or directly providing assistance also can support their providers in developing important skills to complement their traditional legal expertise, such as facilitating dialogue and consensus among government entities, or lawyering strategies in low-governance contexts.
2. **Provide support that is relevant to the local context.** When coming from outside the host country, providers can take care to provide assistance that is tailored to the local context. This may require, for example, learning about local approaches to certain issues (such as customary land tenure); allowing sufficient time within the host country to familiarize with the context; and/or partnering with local lawyers or advisors. When asked to develop a particular output, like a model contract or a checklist for negotiations, drafts should be based on detailed consultation and collaboration with government representatives and local advisors. This can help to ensure that the output, and its use by governments, is appropriate and effective.

3. **Support the development of expertise within government, where possible and feasible.** External support providers can often provide additional interventions, concurrent to the requested support, to help build the government's capacity. Capacity support may encompass, for example, providing specific trainings to government counterparts, ensuring that government lawyers and representatives are always in the room during negotiations, having external lawyers work with in-house government lawyers and other relevant staff between negotiation sessions, or explicitly mentoring government staff.
4. **Be aware of, and suggest incorporating, relevant international guidance and best practice standards.** The most appropriate type of lawyer or advisor for any specific task will be determined by the government's needs. For complex contract negotiations, lawyers and technical experts need to have a wide range of skills and experience. Yet lawyers and experts advising governments are not always familiar with relevant international guidelines, such as the VGGT, which introduces both a potential weakness in the final agreement and a missed opportunity to align the investment with best practices. Partnering with lawyers or experts who have different skillsets and substantive expertise can help; for example, organizations brokering legal support may wish to pair commercial lawyers or experts with other experts familiar with international guidance.

#### Investors can:

1. **Assess whether capacity gaps in government might lead to the negotiation of investment contracts that increase business risks, for instance by resulting in projects that adversely affect land users, local communities, or host state citizens.** A government with limited legal support may be more likely to agree to contractual provisions that are, directly or indirectly, against the interests of its citizens. A government with low capacity to monitor contract implementation may also be less able to step in quickly to address community grievances that could spiral into larger conflict. Investors negotiating with such governments can assess the potential implications of those limitations, and can seek to address—rather than exploit—those limitations through careful contract drafting. When the government's negotiating team does not include a lawyer, investors can urge the government to use lawyers throughout the negotiations of any legally binding documents.
2. **Incorporate relevant guidelines and best practice standards in investments processes, as well as in any contracts with governments.** Incorporating best practice guidelines into both investment projects and investment contracts can help avoid preventable problems. Among other guidance, investors could usefully consider how to incorporate the VGGT, as well as the UN Principles for Responsible Contracts and the OECD Guidelines for Multinational Enterprises.



Felled timber in Thailand.

## ENDNOTES

1. There is no definitive accounting of the number of land investments concluded in the past two decades, or the amount of land covered by the investments. The most comprehensive mapping of deals (self-described as “inherently unreliable”) has collected information about 1,500 concluded deals since 2000 covering over 50 million hectares of land. <http://landmatrix.org/en/>. The term “global land rush” has been used by academics, international finance institutions, and activists alike. For a sampling, see e.g., Jampel Dell’Angelo, Paolo D’Odorico, and Maria Cristina Rulli, “Threats to sustainable development posed by land and water grabbing,” *Current Opinion in Environmental Sustainability* (2017); Rabah Arezki, Klaus Deininger, and Harris Selod, “What drives the global land rush?” IMF Working Paper (2011); Oxfam, Press Release, “Murder and eviction: the global land rush enters new more violent phase,” Sept. 26, 2016.
2. Guidance to encourage more responsible land and agricultural investments include, for example: Organisation for Economic Co-operation and Development and the Food and Agriculture Organization of the United Nations, OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016); 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); United States Agency for International Development, Operational Guidelines for Responsible Land-Based Investment (2015); African Union Commission, the African Development Bank, and the United Nations Economic Commission for Africa, Guiding Principles on Large Scale Land Based Investments in Africa (2014); Committee on World Food Security, Principles for Responsible Investment in Agriculture and Food Systems (2014); French Agency for Development, Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights (2014); Food and Agriculture Organization of the United Nations and the Committee on World Food Security, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012); United Nations, Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge (2009).
3. In some countries, investors seeking to conduct agricultural investments will purchase the land on which the investment will take place; such contexts were not covered by the interviews and are thus outside the scope of this report.
4. Lorenzo Cotula, “Addressing the Human Rights Impacts of ‘Land Grabbing,’” European Parliament Directorate-General for External Policies (2014), p. 14; see also OpenLandContracts.org, where investor-state contracts for agriculture are overwhelmingly from Sub-Saharan African countries and Cambodia (although the selection is also strongly influenced by levels of transparency and public disclosure).
5. For example, in Ghana, the majority of land is held customarily by clans, families, and individuals, and most contracts that allocate land to investors are thus undertaken by communities. However, one example of a contract between the government and an investor is the asset sale and purchase agreement that the Ghanaian government concluded with an investor for the purchase of an industrial plantation to be used for rubber and oil palm. OpenLandContracts.org, “Asset Sale and Purchase Agreement Between The Government of the Republic of Ghana and SOCFINAF S.A.,” ocds-591adf-9505117998, (February 4, 2015) <http://openlandcontracts.org/contract/ocds-591adf-9505117998/view/>.
6. For example, most agribusiness investments and contracts in Latin America involve contracts with individual land-owners, rather than the state. However, many of these states still retain control of forest resources, and investors in forestry operations generally must receive a concession or other right to operate from the state. Global Forest Atlas, “Regional Forest Governance in the Amazon Basin,” Yale School of Forestry and Environmental Studies, <https://globalforestatlas.yale.edu/amazon/forest-governance> (see individual descriptions of states available through this link).
7. At the time of writing, OpenLandContracts.org lists 30 investor-state contracts in Liberia for either agricultural or forestry operations, with the earliest contract on the site dating back to 1949. This does not include the earliest contract signed with Firestone in the 1920s, but does include a later version. Although not every contract on the website is still in operation, the authors estimate that most are.
8. Lowenstein, Allard K. International Human Rights Clinic at Yale Law School, “Governance of Agricultural Concessions in Liberia: Analysis and Discussion of Possible Reforms,” (March 13, 2017), p. 5. (Citing Civil Society Coalition Statement on Oil Palm Concessions in Liberia, p. 3, Save My Future Foundation & Sustainable Development Institute (2014); Chelsea Keyser, Good Laws, Weak Implementation, p. 1, U.S. Agency For International Development (Nov. 2013), [http://pdf.usaid.gov/pdf\\_docs/PA00M7RK.pdf](http://pdf.usaid.gov/pdf_docs/PA00M7RK.pdf); Who Owns the World’s Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights, p. 18, Rights And Resources Initiative (Sept. 2015), [https://rightsandresources.org/wp-content/uploads/GlobalBaseline\\_web.pdf](https://rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf). The estimates for land concessioned for resource investments include extractive concessions.
9. OpenLandContracts.org, “Liberia, Golden Veroleum (Liberia) Inc., Concession Agreement” ocds-591adf-5399370669, (August 16, 2010), <http://openlandcontracts.org/contract/ocds-591adf-5399370669/view#/pdf/page/22/annotation/7012>; OpenLandContracts.org, “Liberia, Sime Darby Plantation (Liberia) Inc., Concession Agreement” ocds-591adf-3371037354, (June 3, 2009), <http://openlandcontracts.org/contract/ocds-591adf-3371037354/view#/pdf/page/25/annotation/5846>.
10. Liberia, Agricultural Sectors, available at: <https://www.export.gov/article?id=Liberia-Agricultural-Sectors> (last visited Feb 14, 2018).
11. See, e.g., Liberia Central Bank, Annual Report 2016, p. 35 (noting that rubber comprised 34% of total export value), available at: <https://www.cbl.org.lr/doc/2016%20Annual%20Report%20for%20website.pdf>; see also Center for International Development at Harvard University, “Atlas of Economic Complexity,” <http://atlas.cid.harvard.edu/> (showing that in 2016, 10.24% of Liberia’s exports were attributable to rubber).
12. See, e.g., Forests and Forestry, available at: <https://opendevelopmentcambodia.net/topics/forests-and-forestry/> (last visited Feb 14, 2018). (“Large-scale plantation forestry income accounted for \$390 million in 2011, or 3.2% of GDP. Rubber and palm oil, the key tree products in Cambodia, were the first and second biggest export products by value in 2011. The area under rubber has grown markedly, especially within economic land concessions . . . By mid-2017, [there were] . . . 433,827 hectares [of rubber plantations].”) (internal citations omitted).
13. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 3.1, 5.3.
14. 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) (reviewing deals in Ethiopia, Ghana, and Tanzania, and noting an apparent slow down); but see Kerstin Nolte et al., *International Land Deals for Agriculture: Fresh insights from the Land Matrix: Analytical Report II* (2016), 12 (noting slower growth in known deals since 2012, but asserting that this slower growth may be attributable to “a time lag in the availability of information” and explaining that a similar slowdown in growth that had been found in an earlier report had disappeared as more information was gathered.)
15. Interview with government representative, July 26, 2017.
16. Interview with external legal secondee, April 11, 2017; interview with external legal support provider, April 13, 2017; interview with external lawyer representing investors, August 8, 2017; interview with government representative, May 11, 2017.
17. One legal support provider also noted a recent uptick in country requests for assistance with the design of outgrower or contract-farming schemes, including schemes not linked to an overarching investor-state contract. Interview with external legal support provider, April 13, 2017.
18. See, e.g., The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (the VGGT), the Committee on Food Security’s Principles on Responsible Investment in Agricultural and Food Systems, the United Nations Guiding Principles on Business and Human Rights, and the annexed Principles of Responsible Contracts.
19. For instance, while international best practices and guidelines call for meaningful consultation with affected communities, deals are still regularly negotiated behind closed doors and without the knowledge or participation of communities that stand to be affected by the project. For example, interviewees described a lack of adequate community engagement in Ethiopia, Indonesia, Liberia, and Zimbabwe. (In Chad, the DRC, and Sierra Leone, interviewees spoke of some community involvement in negotiations or consultations.) Further, while various guidelines call for transparency, contracts are very rarely disclosed to the public, and may not even be shared throughout government. In addition, while international best practices and guidelines exhort companies not to seek exemptions from domestic laws, contracts continue to include clauses that do exactly that. For instance, a review of publicly available contracts featured on OpenLandContracts.org revealed that three countries have signed contracts with some form of stabilization clause since 2011 (when the most recent version of the OECD Guidelines for Multinational Enterprises, exhorting against stabilization clauses, was published). There was no indication that the recommendation in the OECD Guidelines for Multinational Enterprises to not use stabilization clauses has consistently influenced contracts subsequently negotiated.

20. For a discussion of how the human rights to information, public participation, and free, prior, and informed consent apply to the negotiation of investor-state contracts, see Szoke-Burke, S., and Cordes, K., *Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts* (forthcoming, 2018).
21. Interview with government representative, March 28, 2017; interview with government representative, April 12, 2017; interview with private sector representative and former government employee, May 1, 2017.
22. See also the list of support providers at the Negotiation Support Portal: <http://negotiationsupport.org/providers>. Other organizations and initiatives that have provided or funded legal support for governments include the Tony Blair Institute for Global Change, the United Nations Development Programme, and the World Bank. Bilateral government aid agencies and donors may also fund or provide legal support. Other relevant initiatives that are, or appear to be, no longer active include the Environmental Governance and Mainstreaming Project (which ran in Sierra Leone), Liberian Law fellowships funded by McCall MacBain Foundation and Humanity United, and the UK-Sierra Leone Pro Bono Network.
23. Interview with government representative, July 20, 2017.
24. These issues are also explored in Background Paper, Second Workshop on Contract Negotiation Support for Developing Host Countries, Vale Columbia Center on Sustainable International Investment and Humboldt-Viadrina School of Governance (July 18-19, 2012) [http://ccsi.columbia.edu/files/2014/01/Background\\_Paper\\_for\\_July\\_18-19\\_Negotiation\\_Assistance\\_Workshop.pdf](http://ccsi.columbia.edu/files/2014/01/Background_Paper_for_July_18-19_Negotiation_Assistance_Workshop.pdf).
25. For further information about investment treaties, their interactions with investor-state contracts, and the potential implications for government, see Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, *Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections*, Columbia Center on Sustainable Investment (March 2016) [http://ccsi.columbia.edu/files/2016/03/CCSI\\_Land-deal-dilemmas.pdf](http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf).
26. Interview with government representative, July 20, 2017; survey response, May 16, 2017.
27. Interview with government representative, July 20, 2017.
28. Interview with government representative, July 20, 2017.
29. Interview with external lawyer representing investors, August 8, 2017; interview with government representative, July 20, 2017.
30. While this closeness will generally be beneficial, one non-legal support provider noted that close relationships between external lawyers from the country and government officials could also increase the chances of corruption or conflict of interest; this could be more likely to occur, for instance, in a country with weak rule of law.
31. Interview with external legal fellow, July 26, 2017: "Local lawyers did help in negotiations but didn't have the expertise to negotiate agricultural contracts;" interview with government representative, July 26, 2017; interview with private sector representative and former government employee, May 1, 2017.
32. Interview with external lawyer, March 29, 2017: "In between meetings, there were no sustained activities to resolve issues or push things forward."
33. Interview with non-legal support provider to government, August 23, 2016: "The outside non-local advisor can speak to each agency so as to generate a consensus before negotiations. A local person can't do it because they might be beholden to one particular agency."
34. Comment from legal support provider and former external legal fellow, January 27, 2018.
35. Interview with external legal fellow, June 8, 2017: "There were a lot of World Bank [...] experts, but there was a point at which more experts did not add more value, and it would be better to have permanent, more embedded engagements from a few people."
36. Interview with government representative, July 20, 2017: "The government relies on international assistance from ODA to provide legal support, but they would prefer having someone embedded in the government who is continuously present."
37. For instance, embedded legal support providers can educate non-legal government staff about the lawyers' role and the sorts of issues that will usually require the government to seek legal advice. Comment from legal support provider and former external legal fellow, January 27, 2018.
38. Comment from legal support provider and former external legal fellow, January 27, 2018.
39. Interview with external legal fellow, July 26, 2017: "There's no reason why a fellow should be negotiating without having a local lawyer there to mentor. Otherwise it is irresponsible. [You] need to have external lawyers always being accompanied by local lawyers to transfer knowledge. Also, local lawyers need to know the intent of the [contractual] provisions – this is invaluable as the agreements are implemented and enforced."
40. Comment from legal support provider and former external legal fellow, January 27, 2018.
41. Interview with government representative, April 12, 2017; interview with non-legal support provider to government, August 23, 2016; interview with private sector representative and former non-legal support provider to government, May 15, 2017.
42. Interview with government representative, May 11, 2017; interview with external legal support provider, April 13, 2017: "I am impressed with the quality of the [government's] negotiators. [...] There just aren't enough of them. They need five times as many."
43. Interview with external legal support provider, April 13, 2017.
44. Interview with external legal secondee, April 11, 2017; interview with non-legal support provider, March 30, 2017; interview with external lawyer representing investors, August 8, 2017; survey responses, May 16, 2017; interview with private sector representative and former non-legal support provider to government, May 15, 2017: "My recollection is that there was no clear involvement of the Attorney General's office or the Ministry of Finance (which have good legal capacity). Rather, it was dealt with and managed by the Ministry of Agriculture. [...] I don't think they had any lawyers. So, the government was receiving no legal advice from within the country, let alone from lawyers outside the country."
45. Interview with external legal secondee, April 11, 2017.
46. Survey response, May 16, 2017: "the government has [...] legal counsel who participate in negotiation and monitoring[.] This legal counsel is seconded from the ministry of justice to provide legal service[s] for all government institution[s]."
47. Interview with government representative, July 26, 2017; interview with civil society representative, March 30, 2017; survey response, May 16, 2017.
48. Interview with government representative, July 26, 2017.
49. Interview with government representative, June 21, 2017.
50. Interview with government representative, June 21, 2017.
51. Interview with external legal fellow, June 8, 2017.
52. Interview with government representative, March 28, 2017.
53. Interview with external lawyer, November 29, 2017.
54. Background Paper, Second Workshop on Contract Negotiation Support for Developing Host Countries, Vale Columbia Center on Sustainable International Investment and Humboldt-Viadrina School of Governance, p. 9.
55. Interview with government representative, July 26, 2017; interview with government representative, May 3, 2017.
56. Interview with government representative, July 20, 2017.
57. Interview with external lawyer, November 29, 2017; interview with legal support provider, May 10, 2017.
58. Interview with government representative, May 11, 2017.
59. Such assistance is also undoubtedly needed even earlier, when governments set the legal and policy framework more generally, but this was not the focus of interviews conducted.
60. Interview with government representative, May 3, 2017: "We need to be able to determine whether an investment is worth offering incentives, duty waivers, etc. We lack expertise and experience."
61. Interview with government representative, July 20, 2017: "The person who certifies in Ministry of Agriculture may not have sufficient competency to approve [the feasibility study] or [the] EIA. Hence, they need expert help to develop the techniques and document standards for agricultural work. The whole picture needs to be understood, not just the contract itself."
62. Interview with government representative, May 11, 2017.
63. Interview with external lawyer representing investors, August 8, 2017.
64. Interview with external legal fellow, July 26, 2017.
65. Interview with external non-legal support provider to government, August 23, 2016; interview with external lawyer, November 29, 2017.
66. Interview with external non-legal support provider to government, August 23, 2016.

67. Interview with external lawyer, November 29, 2017.
68. Interview with external lawyer, March 29, 2017: "There was a perceived need for fiscal modelling, to provide advice on the impact of difficult provisions of the contract. Sometimes this need was met."
69. Interview with external lawyer, March 29, 2017.
70. Interview with external lawyer, March 29, 2017: "It was helpful if someone external gave an independent perspective on an issue – investors listened to that. It was perceived as more objective."
71. Interview with external legal fellow, June 8, 2017.
72. Background Paper, Second Workshop on Contract Negotiation Support for Developing Host Countries, Vale Columbia Center on Sustainable International Investment and Humboldt-Viadrina School of Governance, pp. 9-10.
73. Interview with government representative, June 21, 2017; interview with external legal fellow, July 26, 2017.
74. Interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017; interview with external lawyer, March 29, 2017; interview with external lawyer, November 29, 2017; interview with external legal support provider, April 13, 2017.
75. Interview with non-legal support provider, March 30, 2017.
76. Interview with external lawyer, March 29, 2017.
77. Interview with external legal fellow, June 8, 2017; interview with non-legal support provider, March 30, 2017.
78. Interview with external legal fellow, June 8, 2017: "It is important to make connections with advisors and know how to bring attention to a political decision maker. ... at some point you need to recognize you are dealing with politicians."; interview with external lawyer, November 29, 2017; interview with non-legal support provider, March 30, 2017.
79. Interview with external lawyer, November 29, 2017.
80. Interview with external lawyer, November 29, 2017.
81. Interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017.
82. Interview with external legal fellow, June 8, 2017; interview; interview with external legal fellow, July 26, 2017.
83. Interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017.
84. Interview with external lawyer representing investors, August 8, 2017; interview with external legal fellow, July 26, 2017; interview with non-legal support provider, March 30, 2017; interview with government representative, July 15, 2016.
85. Interview with external lawyer representing investors, August 8, 2017: "The government gives us a model contract. But if you have enough clout along with money, you can have enough say in what you want changed in the contract."
86. Interview with external legal fellow, July 26, 2017.
87. Interview with government representative, July 26, 2017. Background Paper, Second Workshop on Contract Negotiation Support for Developing Host Countries, Vale Columbia Center on Sustainable International Investment and Humboldt-Viadrina School of Governance, p. 9: "in cases of weak governance and corruption, government officials prefer to maintain full control over the process to ensure maximum discretionary authority in the decision-making process rather than to call on external advisors who might limit opportunities for pay-offs. This would also suggest that, if they do employ advisors, corrupt government officials would prefer partial targeted assistance rather than support over the entire process, which would make pay-offs more difficult."
88. Interview with government representative, July 26, 2017.
89. For further discussion about stage one, see Negotiation Support Portal, "Setting the Legal and Policy Framework," <http://negotiationsupport.org/roadmap/setting-legal-and-policy-framework>
90. Interview with government representative, July 14, 2016: "Working groups including attorneys from different land sector fields are constituted who then work through [the legislation] provision by provision."
91. Interview with government representative, July 14, 2016.
92. Comment from non-legal support provider, January 3, 2018.
93. Interview with external legal secondee, April 11, 2017.
94. Interview with external legal support provider, April 13, 2017. According to one study of 39 large-scale and mature agribusiness investments in sub-Saharan Africa and Southeast Asia, for example, around 70% of agricultural investors undertook environmental impact assessments, with 49% producing an environmental management plan. Investors cited host government pressure and the requirements of external certification processes as two key reasons for carrying out such processes. World Bank and UNCTAD, *The Practice of Responsible Investment Principle in Larger-Scale Agricultural Investments* (April 2014), Table 2.1, p. 10.
95. Interview with non-legal support provider to government, August 23, 2016: "One mistake often made is waiting too late in the process to get the help. For instance, in one case I was going to a country to work on a mining agreement. Before I was about to leave, I got a telex saying I should delay by a week or two because investor had postponed their negotiations. I suggested that I come anyway and prepare for the negotiation with the negotiating team."
96. Interview with government representative, May 11, 2017; interview with government representative, June 20, 2017; interview with external legal support provider, April 13, 2017.
97. Interview with government representative, June 20, 2017.
98. Interview with non-legal support provider, August 31, 2016.
99. Interview with government representative, May 11, 2017.
100. Interview with government representative, May 11, 2017: "When a potential investor arrives at our office, we ask for company records and contact our own foreign embassies in the home country to ask if the information the company provided us was accurate. But it is easy for a company to embellish [its] profile on the internet. We have not done enough due diligence. Globally-known companies, we can research like that, but smaller, lesser-known companies, they don't have much information on their website, so you just take their word to be true [and] give them land."
101. Interview with external legal fellow, July 26, 2017: "International lawyers [acting] on behalf of the government did all of the due diligence on the background of the investor."
102. Interview with private sector representative and former government employee, May 1, 2017.
103. Interview with government representative, July 20, 2017; interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017; interview with government representative, July 20, 2017.
104. Interview with external legal support provider, April 13, 2017.
105. Interview with government representative, April 12, 2017: "In our procurement structure we have a process [including identifying an asset to offer for concessioning/investment; receiving a concession certificate; assessing the benefits and drawbacks of the potential investment]. If that is done, then the legal elements are less evasive, because more things have been thought through. Financial modeling, land rights, all would inform the bid process. It limits the number of grey areas to be negotiated when investors put in bids. We have this legal framework in place but have not really used it. The government is bound to follow this process but it doesn't happen."
106. Interview with government representative, April 12, 2017: "What I have always advocated is that governments need more than just legal technical assistance. [...] Governments would be at less of a disadvantage if they would invest effort in better preparations before negotiations, before putting investment assets out for availability"; interview with government representative, May 11, 2017: "The first step that we need help with is screening the potential company or individual investor. This needs to be supported by analysis – [we need to] use every [...] source of information to do critical due diligence"; interview with government representative, April 13, 2017: "One major challenge in negotiations is the issue of feasibility studies. If we do them we have more leverage to attract investment. But we do not have resources to do feasibility studies before the tendering process"; interview with external legal fellow, July 26, 2017; interview with external legal fellow, June 8, 2017.
107. Interview with government representative, August 17, 2016; interview with government representative, May 11, 2017; interview with government representative, April 12, 2017; interview with government representative, April 13, 2017; interview with external legal fellow, July 26, 2017.
108. Interview with external legal fellow, June 8, 2017.

109. Interview with government representative, April 12, 2017.
110. Interview with government representative, April 13, 2017.
111. Interview with government representative, April 12, 2017; interview with non-legal support provider to government, August 23, 2016.
112. Interview with external lawyer, March 29, 2017. See also interview with external legal fellow, June 8, 2017: "It was not just a matter of no access to high-end technical expertise - there was a lack of basic data."
113. Interview with external lawyer, March 29, 2017.
114. Interview with external legal support provider, April 13, 2017; interview with government representative, April 13, 2017 (describing plans to set up a national fund to finance feasibility studies for various types of projects, but noting challenges in finding seed money); interview with government representative, July 26, 2017 (explaining that the government had commissioned experts from universities within the country to conduct feasibility studies, but that their research and assessments tended to be of an inadequate quality).
115. Interview with non-legal support provider, March 30, 2017; interview with private sector representative and former government employee, May 1, 2017; interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017.
116. Interview with government representative, April 12, 2017; interview with external legal fellow, July 26, 2017; interview with private sector representative and former government employee, May 1, 2017.
117. Interview with external legal fellow, July 26, 2017.
118. International Covenant on Civil and Political Rights (ICCPR), Art. 19.2.
119. *Case of Claude Reyes v. Chile*, 2006 Inter-American Court of Human Rights (ser. C) No. 151, 19 September 2006, 41 (applying Art 9(1) of the American Convention on Human Rights, which uses identical language to the ICCPR).
120. *Case of Claude Reyes v. Chile*, supra, para. 73.
121. *Case of Claude Reyes v. Chile*, supra, para. 73; Mrs Fatma Zohra Ksentini, Special Rapporteur to the Commission on Human Rights, *Human Rights and The Environment*, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9, paras. 180, 203-216.
122. Committee on Economic, Social and Cultural Rights, *General Comment 14 on the Right to Health*, U.N. Doc. E/C.12/2000/4 (2000), paras. 8, 11, 44.
123. ICCPR, Art. 25(a). See also UN Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life, para. 40, UN Doc. E/C.12/GC/21 (21 Dec. 2009) (each person has the right "[t]o take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life"); Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/23/36 (11 Mar. 2013), para. 39 ("participatory processes must be meaningful for those living in poverty and they should be able to exert influence over the final outcome. They should be included in all stages of the relevant decision-making processes so that they have the chance to set priorities or question the agenda in fundamental ways.").
124. International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries* ("ILO C169"), June 27, 1989, 1650 U.N.T.S 383, Art 16(2).
125. *Ángela Poma Poma v. Peru*, *Human Rights Committee, Communication No. 1457/2006*, 27 March 2009, U.N. Doc. CCPR/C/95/D/1457/2006, para. 7.7; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples' Rights, No. 276/2003 (Feb. 4, 2010), para. 251.
126. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, supra, para. 173.
127. International Law Association, Resolution No. 5/2012: *Rights of Indigenous Peoples*, section I, para. 5 (concluding that states are obliged by "customary and applicable convention international law" to ensure FPIC and the rights to participation and consultation as a prerogative of the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government); Cathal Doyle and Jill Cariño, *Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector* (2013), <http://www.ecojesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>.
128. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, supra, paras. 162, 238, 268, 291.
129. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, supra, paras. 291, 298.
130. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, supra, para. 157.
131. *Principles for Responsible Contracts*, supra, Principle 7, at 24.
132. African Union, African Development Bank and United Nations Economic Commission for Africa, *Guiding Principles on Large Scale Land Based Investments in Africa* (2014), Principle 9, at 15. See also p. 13: "In order that decisions on LSLBI respond to local and national development priorities, devolution of decision-making authority to appropriate levels, meaningful participation by those affected by the investments in decision-making are required along with transparency throughout the negotiation, approval, contracting and implementation process."
133. FAO, *Voluntary Guidelines On The Responsible Governance Of Tenure Of Land, Fisheries And Forests In The Context Of National Food Security* (2012) VGGT, para. 12.4.
134. VGGT, para. 12.10.
135. VGGT, paras.12.10, 3.1.
136. VGGT, para. 12.11.
137. Cordes, Johnson, and Szoke-Burke, *Land Deal Dilemmas*, pp. 17-18.
138. VGGT, paras. 12.4, 3A, 3.1(1); and 3B(6).
139. Interview with external lawyer, November 29, 2017.
140. Interview with private sector representative and former government employee, July 25, 2017: "I have raised this concern - that lawyers are needed to properly do the contracts. But people will complain that this is expensive and cost thousands of dollars. However, I think that we must always be careful and let the lawyers draft it in their own legal language."
141. Interview with external legal fellow, July 26, 2017.
142. Interview with external lawyer, March 29, 2017: "The [participating government representatives were] very high-level people but they don't have time to focus on details of each agreement and give input."
143. Interview with external lawyer, March 29, 2017: "Some ministries may have their own agenda that is not shared by the government as a whole. As a consequence, we receive mixed messages. It is hard to decide who our client is or which point of view we should follow in that situation." See also Background Paper, Second Workshop on Contract Negotiation Support for Developing Host Countries, Vale Columbia Center on Sustainable International Investment and Humboldt-Viadrina School of Governance, p. 9: "Some ministries may want ownership over particular deals, and may therefore be reluctant to coordinate and collaborate with other ministries. They may also be less inclined to reach out for external assistance."
144. Interview with non-legal support provider to government, August 23, 2016; interview with external lawyer, November 29, 2017.
145. Interview with non-legal support provider to government, August 23, 2016.
146. DRC, Ethiopia, Ghana, Indonesia, Laos, Sierra Leone, South Sudan, and Zimbabwe.
147. Interview with government representative, May 3, 2017; interview with government representative, July 15, 2016; interview with non-legal support provider, March 30, 2017; interview with non-legal support provider, August 31, 2016; interview with government representative, August 17, 2016; interview with civil society representative, March 30, 2017; interview with private sector representative and former government employee, May 1, 2017; interview with government representative, May 11, 2017; interview with government representative, July 26, 2017; interview with government representative, June 20, 2017; interview with private sector representative and former government employee, July 25, 2017.
148. Interview with external legal secondee, April 11, 2017.
149. See, e.g., Raja Kaul and Antoine Heuty, *Getting a Better Deal from the Extractive Sector Concession Negotiation in Liberia, 2006-2008*, Revenue Watch Institute (2009) p. 55, <https://resourcegovernance.org/sites/default/files/documents/rwi-getting-a-better-deal-final0226.pdf>: "The [external] technical advisors limited themselves to providing advice, support and input to the Government's [in-house] negotiating teams. The Government's teams were responsible for all of the negotiations with ArcelorMittal and Firestone. With support from [their] advisors, the negotiating teams made all of the decisions on substantive issues, compromises and strategy."



150. Interview with external lawyer, March 29, 2017; interview with external legal fellow, July 26, 2017: "We prepared the agenda before negotiations: [we] would agree on the types of issues that would be discussed over the days, and how long they would spend discussing it. We put together a type of "term sheet" containing tables, and for each provision we would have government position and company position and then whether or not we had reached agreement."
151. Interview with government representative, July 15, 2016; interview with private sector representative and former government employee, May 1, 2017; interview with government representative, July 26, 2017.
152. Interview with external legal seconded, April 11, 2017.
153. Interview with private sector representative and former government employee, July 25, 2017; interview with government representative, July 20, 2017.
154. Interview with external lawyer, November 29, 2017.
155. Interview with external lawyer representing investors, August 8, 2017; interview with external lawyer, November 29, 2017.
156. Interview with non-legal support provider to government, August 23, 2016.
157. Interview with government representative, July 20, 2017; interview with government representative, July 26, 2017; survey response, May 16, 2017.
158. Interview with government representative, July 20, 2017; survey response, May 16, 2017.
159. Interview with government representative, July 26, 2017.
160. Interview with government representative, May 3, 2017; interview with non-legal support provider, August 31, 2016; interview with private sector representative and former government employee, July 25, 2017; survey response, May 16, 2017.
161. Interview with external legal seconded, April 11, 2017.
162. Amendment and Restatement of the Public Procurement and Concessions Act 2005 of Liberia, s 81(1).
163. *Ibid*, s 73(1)(g).
164. *Ibid*, s 79(1).
165. *Ibid*, s 81(2).
166. *Ibid*, s 81(1).
167. *Ibid*, s 118(5).
168. *Ibid*, s 118(5). The Negotiation Team comprises the head of the government agency awarding the concession, the chairperson of the National Investment Commission, the Minister of Justice, the Minister of Finance, and three persons designated by the President (including two cabinet members).
169. *Ibid*, s 118(6).
170. *Ibid*, s 119.
171. Interview with external lawyer, March 29, 2017; interview with government representative, April 12, 2017.
172. Interview with government representative, April 12, 2017.
173. Interview with external lawyer, March 29, 2017.
174. Interview with external legal fellow, July 26, 2017; interview with external legal fellow, June 8, 2017.
175. Interview with external lawyer, November 29, 2017.
176. Interview with external legal fellow, June 8, 2017.
177. Interview with external legal fellow, July 26, 2017.
178. Interview with external legal fellow, June 8, 2017.
179. Interview with external lawyer, November 29, 2017; interview with external lawyer representing investors, August 8, 2017: "[There were six] lawyers from my law firm plus two local lawyers. [...] They were giving us advice for the local laws. Just advisory – [they] weren't active in the negotiations. The investor also had in-house counsel, but their role was to coordinate with us, not to negotiate with the government. They were not present in the negotiation."
180. Interview with private sector representative and former non-legal support provider to government, May 15, 2017: "For our company, senior management was the face to government, but lawyers would review contracts behind the scenes. Never in front of the negotiation team."
181. Interview with government representative, May 11, 2017: "Chinese investors bring one English speaking person[, even if that person has] zero background in law [...]. They just want someone [who can] speak [...] English. They care less about the contract and more about government's commitment to make the investment work. [...] Western companies always have lawyers; they have confidence in the use of expertise."
182. Interview with external lawyer representing investors, August 8, 2017.
183. Interview with external lawyer, March 29, 2017: "[The investor] had local law firms representing them because the government required local lawyers under the Bar rules, but they did not participate and did not know specifics."
184. Comment from non-legal support provider, January 3, 2018.
185. Interview with government representative, May 11, 2017; interview with government representative, June 21, 2017; interview with government representative, June 20, 2017; interview with private sector representative and former government employee, July 25, 2017; interview with government representative, July 26, 2017; interview with government representative, May 3, 2017; interview with government representative, May, 2017; interview with private sector representative and former government employee, May 1, 2017.
186. Interview with government representative, July 26, 2017; interview with government representative, May 3, 2017; interview with government representative, May, 2017; interview with private sector representative and former government employee, May 1, 2017.
187. Interview with government representative, May 11, 2017; interview with government representative, June 21, 2017; interview with government representative, June 20, 2017; interview with private sector representative and former government employee, July 25, 2017.
188. Comment from legal support provider and former external legal fellow, January 27, 2018.
189. Interview with government representative, May 11, 2017.
190. Interview with government representative, July 20, 2017.
191. Salacuse, J, "Your Draft or Mine?" *Negotiation Journal* (October, 1989), p. 338.
192. Salacuse, J, "Your Draft or Mine?", p. 338, citing Pengilly, W., "International Franchising Arrangements and Problems in Their Negotiation," *Northwestern Journal of International Law & Business* Vol. 7 Issue 2 (Fall 1985), p. 194.
193. Craver, Charles B., *Effective Legal Negotiation and Settlement*, 7th ed. (2011), pp. 140 and 160.
194. Salacuse, J, "Your Draft or Mine?", p. 338.
195. Interview with external lawyer representing investors, August 8, 2017; interview with government representative, May 11, 2017; interview with government representative, June 20, 2017; interview with government representative, July 20, 2017; interview with government representative, April 12, 2017; interview with government representative, May 3, 2017.
196. Interview with external legal seconded, April 11, 2017.
197. Interview with government representative, April 12, 2017; interview with government representative, July 20, 2017.
198. Interview with external legal fellow, June 8, 2017; interview with government representative, March 29, 2017; interview with government representative, June 20, 2017; interview with government representative, May 11, 2017: "They may be using a model to which they compare draft contracts, but they need assistance developing a better model."
199. David Kienzler et al, Natural Resource Contracts as a Tool for Managing the Mining Sector, Columbia Center on Sustainable Investment (June 2015), pp. 30-31, <http://ccsi.columbia.edu/files/2015/07/Natural-Resource-Contracts-as-a-Tool-for-Managing-the-Mining-Sector.pdf>.
200. Interview with non-legal support provider, August 31, 2016.
201. Interview with non-legal support provider, August 31, 2016.
202. Interview with non-legal support provider, August 31, 2016.
203. David Kienzler et al, Natural Resource Contracts as a Tool for Managing the Mining Sector, p. 30.
204. Interview with government representative, May 11, 2017: "If you can bring standard, manual, guidelines from other comparable countries, that would be very useful."

205. Interview with government representative, May 3, 2017: “the investor submits a draft MOU based on the standard format of model MOU, then the government reviews. Then if there are any issues, the investor is invited to a panel discussion to negotiate the MOU.”
206. Interview with government representative, May 11, 2017.
207. Interview with government representative, July 20, 2017.
208. Interview with government representative, July 20, 2017: “There are no parts of the template which are non-negotiable. The contract does not provide a fixed formula, just an outline that must be negotiated.”
209. Interview with government representative, March 29, 2017: “The MOUs [...] will contain provisions on company access to water, incentives, government and company obligations regarding Corporate Social Responsibility.” Interview with government representative, June 21, 2017: “The investor signs standard terms with the [investment commission], which are non-negotiable. If there is local participation or contribution to the investment, the investors get some incentives, for example, duty exemptions, grace periods, tax holidays, which are fixed and consistently applied to all investors.”
210. Interview with external legal secondee, April 11, 2017; interview with government representative, June 20, 2017: “The lease signed between the government and investor is a standard document [...] Most of the time however, the company provides the draft, so the [Attorney-General] will just review to see if the Government’s interest is protected.”
211. Interview with government representative, July 20, 2017: “ODA will hire external counsel to draft a template, but because he/she is operating externally they are not aware of local legislation and circumstances, and will see things from the perspective of a developed country. Hence the work that is produced is not consistent with reality, and unusable to the government. The government then needs to work further to try and contextualize the draft contract to suit their law and the existing conditions.” On the other hand, a support provider in a different country described a more successful scenario, in which an international law firm had developed both a model contract and a checklist for the government department in using the model in negotiations, and also provided trainings for the department to ensure in-house understanding of how the model worked. Interview with non-legal support provider, March 30, 2017.
212. Interview with external lawyer, March 29, 2017; interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017; interview with government representative, June 20, 2017.
213. Interview with government representative, April 12, 2017. Apart from their own models and prior agreements, host governments also review contracts from other countries. Interview with government representative, March 28, 2017; interview with private sector representative and former non-legal support provider to government, May 15, 2017.
214. Interview with private sector representative and former government employee, July 25, 2017. “There are issues in relation to MOUs that have been signed, in that these are not properly drafted. Technocrats within the Ministry drafted it themselves, after referring to copies of old documents. Certain information was inserted into them and printed for signing. Later during implementation there are issues that have not been properly dealt with. [Lawyers] are not consulted in the drafting of the MOUs.”
215. Interview with private sector representative and former government employee, July 25, 2017.
216. Interview with government representative, August 17, 2016.
217. Interview with government representative, May 11, 2017.
218. Interview with government representative, May 11, 2017.
219. Interview with external legal support provider, April 13, 2017.
220. Comment from external lawyer, January 23, 2018.
221. OpenLandContracts.org, “Liberia, ADA Commercial Inc., Concession Contract” (April 5, 2008), Art. 7.6; OpenLandContracts.org, “Liberia, Cavalla Rubber Corporation (Liberia) Inc., Concession Agreement” (January 21, 2011), Art. 10.3; OpenLandContracts.org, “Liberia, Liberia Forest Products Incorporated, Investment Agreement” (December 21, 2007), Art. 8.2; OpenLandContracts.org, “Liberia, LIBINC Oil Palm Inc., Concession Agreement” (December 28, 2007), Art. 7.5; OpenLandContracts.org, “Liberia, Maryland Oil Palm Plantation, Concession Agreement” (March 3, 2011), Art. 10.3.
- These contracts can be found at [OpenLandContracts.org](http://www.openlandcontracts.org): <http://www.openlandcontracts.org/search?q=%22voluntary+principles%22>. The enforceability of contractual commitments to comply with standards will depend on both: (i) how the obligation to comply with the standard is expressed in the contract; and (ii) whether the standards themselves are sufficiently concrete as to create clear obligations for parties agreeing to comply with them.
222. Interview with external legal support provider, April 13, 2017.
223. Interview with government representative, May 3, 2017: “Pursuant to the Voluntary Guidelines on the Governance of Tenure, we constituted a national body in charge of monitoring all investments: a Multi-stakeholder platform.”
224. Interview with private sector representative and former government employee, May 1, 2017.
225. Interview with government representative, July 15, 2016; interview with external legal fellow, July 26, 2017.
226. Interview with external lawyer, November 29, 2017: “We did provide a spreadsheet where [the government] had to look to find information – to help them when they were monitoring.”
227. Interview with external lawyer, November 29, 2017: “Don’t use outside counsel for [administration and enforcement] – build capacity [so that the government] could actually monitor it. Work out a mechanism to make it easier to administer. But they should also be able to reach out to an expert as needed.”
228. Interview with external legal fellow, July 26, 2017.
229. Interview with external legal secondee, April 11, 2017: “I could speculate that they don’t have good investor after care, monitoring of contract terms (and probably no systematized way of monitoring compliance and enforcing breaches).” Interview with non-legal support provider, August 31, 2016: “I would say virtually no monitoring takes place. It appears to me that they find out if the project isn’t going out according to plan when land sits idle for long enough that government is notified, or the company has gone under or left the country.” Interview with private sector representative and former government employee, May 1, 2017: “Actually this is one problem that [the country’s investment promotion entity] has: it doesn’t have a monitoring and evaluation framework in place – everything is still ad hoc.” Interview with government representative, July 26, 2017: “Our project is new. Starting next year. So, we are thinking about land leases but don’t yet have any monitoring and evaluation practices.” Interview with private sector representative and former non-legal support provider to government, May 15, 2017: “Even if you are able to negotiate and get a wonderful agreement, the execution capacity is lacking for governments. Not necessarily a good monitoring system.” Interview with non-legal support provider, March 30, 2017.
230. Interview with non-legal support provider, March 30, 2017.
231. Interview with non-legal support provider, August 31, 2016.
232. Interview with external legal fellow, July 26, 2017; interview with government representative, April 12, 2017.
233. Interview with external legal fellow, July 26, 2017.
234. Interview with external legal fellow, July 26, 2017.
235. Interview with government representative, May, 2017.
236. Interview with government representative, May 3, 2017: “Members of the negotiating team are part of the multi-stakeholder [group] that monitors the investment. The Minister of Agriculture is the chair of the [group].”
237. Interview with external lawyer, November 29, 2017.
238. Interview with external lawyer, November 29, 2017.
239. Interview with non-legal support provider, August 31, 2016; interview with external lawyer, November 29, 2017.
240. Interview with government representative, June 21, 2017: “Many disputes could have been amicably resolved, but due to lack of capacity it blows up unnecessarily [...]. But even if we build capacity, it is useless if the political will to use it is not there.”
241. Interview with private sector representative and former non-legal support provider to government, May 15, 2017.
242. Interview with private sector representative and former government employee, May 1, 2017; interview with government representative, June 20, 2017.



Oil palm plantation  
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**Columbia Center on  
Sustainable Investment**

Jerome Greene Hall  
435 West 116th Street  
New York, NY 10027  
Phone: +1(212) 854-1830  
Fax: +1(212) 854-7946

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