

Land deal dilemmas: Grievances, human rights, and investor protections

Training Module

This training module was prepared by the Columbia Center on Sustainable Investment (CCSI). It comprises:

1. PowerPoint slides for presentation of *Land deal dilemmas: Grievances, human rights, and investor protections* (in .pptx and .pdf form)
2. Accompanying notes for the presentation
3. Exercise: Options for resolving land grievances (versions for participants and for trainer)

All components except the PowerPoint slides are included in this document. We are happy to provide the PowerPoint slides upon request; please email ccsi@law.columbia.edu.

Training objective:

Land-based investments can create significant grievances for local individuals or communities, and host governments seeking to address those grievances must navigate a complicated landscape of legal obligations and pragmatic considerations. This training module covers lessons from CCSI's recent report, *Land deal dilemmas: Grievances, human rights, and investor protections*. It can be used for a range of audiences, including to train government representatives, donors, community members, civil society representatives, or other relevant stakeholders. It aims to familiarize participants with: (1) common grievances that can arise from land-based investments; (2) the legal obligations relevant for governments confronting such grievances; and (3) practical solutions for governments to address such grievances.

More information:

For more information, please see Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, *Land deal dilemmas: Grievances, human rights, and investor protections* (2016). The report and other materials are available at:

<http://ccsi.columbia.edu/work/projects/land-grievances/>

You are welcome to use this training module so long as you attribute it properly. If you have any questions about these materials or their use, please contact ccsi@law.columbia.edu.

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Materials needed for the training:

- Projector, or print-outs of the PowerPoint slides
- Print-outs of the exercise for participants

How to use this training module:

The presentation provided with this module covers an overview of: grievances tied to land-based investments, legal obligations that are relevant for host governments confronting these “land grievances,” and practical solutions for host governments to address such grievances. Depending on the background and interests of training participants, the presentation can also be tailored to focus on certain topics. A few suggested approaches:

- Entire presentation: For audiences not familiar with the content of this training. If using the entire presentation, the following schedule could be followed:
 - Slides 1-4: Land-based investments and land grievances
 - Facilitated discussion, tailored to training participants’ interests and experience
 - Slides 5-20: Legal obligations, frameworks, and constraints
 - Slides 21-54: Specific and general options for addressing land grievances
 - Exercise: Options for resolving land grievances
- Understanding legal obligations in the context of land-based investments: For audiences primarily interested in understanding relevant legal frameworks, obligations, and constraints as they relate to land-based investments. This could entail:
 - Slides 1, 5-20, 54: Legal obligations, frameworks, and constraints
 - Note that for audiences seeking a deeper understanding of this topic, supplementary slides on treaty coverage, substantive standards, arbitration proceedings, and case examples would be useful.
- Addressing land grievances: For audiences familiar with legal constraints and interested in understanding options for addressing land grievances. This could entail:
 - Slides 1-4: Land-based investments and land grievances
 - Facilitated discussion, tailored to training participants’ interests and experience
 - Slides 21-54: Specific and general options for addressing land grievances
 - Exercise: Options for resolving land grievances

Land deal dilemmas

Grievances, human rights,
and investor protections



Columbia Center
on Sustainable Investment

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Land-based investments

- 🔥 **“Global land rush” to lease or purchase large tracts of land**
- 🔥 **Some governments regard land-based investments as potential vehicles for accelerating national development**
- 🔥 **Investor interest in these acquisitions:**
 - 🔥 Commercial/Financial
 - 🔥 Food security/Other
- 🔥 **Note: Some projects never implemented, or have failed in early stages**

Land grievances

- 🔥 Displacement, lack of consultation or FPIC, inadequate compensation, forced evictions, negative impacts on livelihoods and wellbeing
- 🔥 Negative effects on the environment or cultural sites
- 🔥 Failure to realize expected or promised benefits
- 🔥 Violence, inappropriate detention or arrests, and
- 🔥 Corruption, failure to comply with legal requirements, or a lack of transparency

Case study: Kuala Lumpur Kepong Berhad (KLK) in Papua New Guinea

- 2012, Malaysian investor. Leases covered over 38,000 hectares of land. Planned use: oil palm plantations.
- Communities' protests centered on claims of customary ownership of the land.
- Interim injunction restrained activities on the land; leases were subsequently quashed.
- KLK: "without the acceptance and co-operation of the customary land owners ..., there will be no end to challenges over [its] right to operate"



Governments' legal obligations

- 🔥 Legal obligations might constrain how a government addresses land grievances, or might create potential liability risks tied to a government's efforts to address grievances.
- 🔥 Relevant obligations include those created under:
 - 🔥 International investment law (IIL)
 - 🔥 International human rights law (IHRL)
 - 🔥 Domestic law
 - 🔥 Investor-state contracts (when used)

III: Non-discrimination provisions

- 🔥 **GENERAL RULE:** Requires treatment of foreign investors that is “**no less favorable**” than treatment of domestic or other foreign investors
- 🔥 Can potentially bar both intentional and unintentional discrimination
- 🔥 Use of MFN to create “supertreaties”

III: Expropriation

- 🔥 **GENERAL RULE:** The government has the right to expropriate foreign investment, but expropriation must be
 - 🔥 done for a public purpose,
 - 🔥 in accordance with the law, and
 - 🔥 accompanied by “prompt, adequate and effective” payment of compensation.
- 🔥 Expropriation may be direct or indirect.

III: FET obligation

- 🔥 **GENERAL RULE:** A state must accord investors treatment that is “fair and equitable”
- 🔥 Has become the key question in investment treaties. What does this mean?
 - 🔥 *A range of approaches*
 - 🔥 *An autonomous standard that includes protection of investors’ “legitimate expectations”(?), or*
 - 🔥 *More narrowly tied to customary international law*

IIL: FPS obligation

- 🔥 **GENERAL RULE:** Governments must protect against harms caused by non-governmental actors
 - 🔥 Some interpretations: protect against any harm, including changes in legal framework
 - 🔥 Other interpretations: protect only against physical harm

III.L: Umbrella clause

- 🔥 **GENERAL RULE:** Requires compliance with “any obligation” owed to the investor; depending on the treaty and/or interpretation of it, it may cover
 - 🔥 Only obligations specifically entered into between the state and investor in a written contract, or
 - 🔥 More broadly, “any” obligation owed by the government, including those “assumed” under generally applicable laws or regulations, or even under other sources of international law

III: Redress mechanisms

- 🔥 International investment arbitration (also known as investor-state dispute settlement or ISDS)
- 🔥 Investors generally do not have to exhaust domestic remedies
- 🔥 States face a risk of high monetary awards for breach of obligations
- 🔥 Investment treaties and dispute resolution may be relevant even when not anticipated

IHRL: Obligations & responsibilities

- 🔥 Governments must:
 - 🔥 Respect human rights (by refraining from violating them),
 - 🔥 Protect human rights (by preventing third parties from violating them)
 - 🔥 Fulfill human rights (by taking steps, when applicable, to progressively realize them)
- 🔥 Soft law: UN Guiding Principles on Business and Human Rights
 - 🔥 Governments must respect and protect rights
 - 🔥 Business enterprises have responsibilities to respect rights
 - 🔥 Access to remedy

IHRL: Right to property

- 🔥 No codified general right to *land*, but codified right to *property*.
- 🔥 Can usually be limited by actions “in the public interest”
- 🔥 Can land-based investments be considered in the public interest?
 - 🔥 Example: *Tsilhqot'in Nation v. British Columbia*
 - 🔥 Example: *Sawhoyamaxa Indigenous Community v. Paraguay*

IHRL: Right to FPIC

- 🔥 Requirement to consult and cooperate in good faith with indigenous peoples to obtain their FPIC before:
 - 🔥 relocating them;
 - 🔥 approving any project affecting their lands, territories, or resources; or
 - 🔥 adopting and implementing legislative or administrative measures that may affect them.
- 🔥 FPIC increasingly seen as best practice for non-indigenous peoples, as well. See, for example, FPIC requirement in RSPO Principles & Criteria.

IHRL: Rights to housing, food, water, health, healthy environment

- 🔥 Refrain from interfering with existing access to resources necessary for fulfillment of these rights.
- 🔥 Prevent third parties (like investors) from interfering with such access.
- 🔥 Some of these rights, and particularly the right to housing, are closely tied to the general prohibition of forced eviction.

IHRL: Rights to life, liberty, freedom of assembly and expression, etc.

- 💧 Sometimes at risk when the government or private security forces respond to efforts by community members or land rights defenders to draw attention to negative impacts of an investment.
- 💧 Right to liberty and security of person prohibits arbitrary arrest or detention.
- 💧 Right to peaceful assembly includes the right to participate in peaceful meetings or protests.
- 💧 Right to freedom of expression also includes a right of access to information held by public bodies.

IHRL: Labor rights

- 🔥 The right to just and favorable conditions of work includes requirements for fair wages and safe and healthy working conditions.
- 🔥 The right to form and join trade unions and the right to freedom of association cover workers' rights to join unions to protect their interests.

IHRL: Redress mechanisms

- 🔥 Regional human rights courts, regional human rights commissions, and complaints mechanisms tied to specific treaties.
- 🔥 Differ from investment arbitration processes in two important ways:
 - 🔥 Generally require claimants to first exhaust available domestic remedies.
 - 🔥 Monetary awards, when provided, generally not nearly as high as seen in investment law disputes.

Domestic & contractual legal obligations

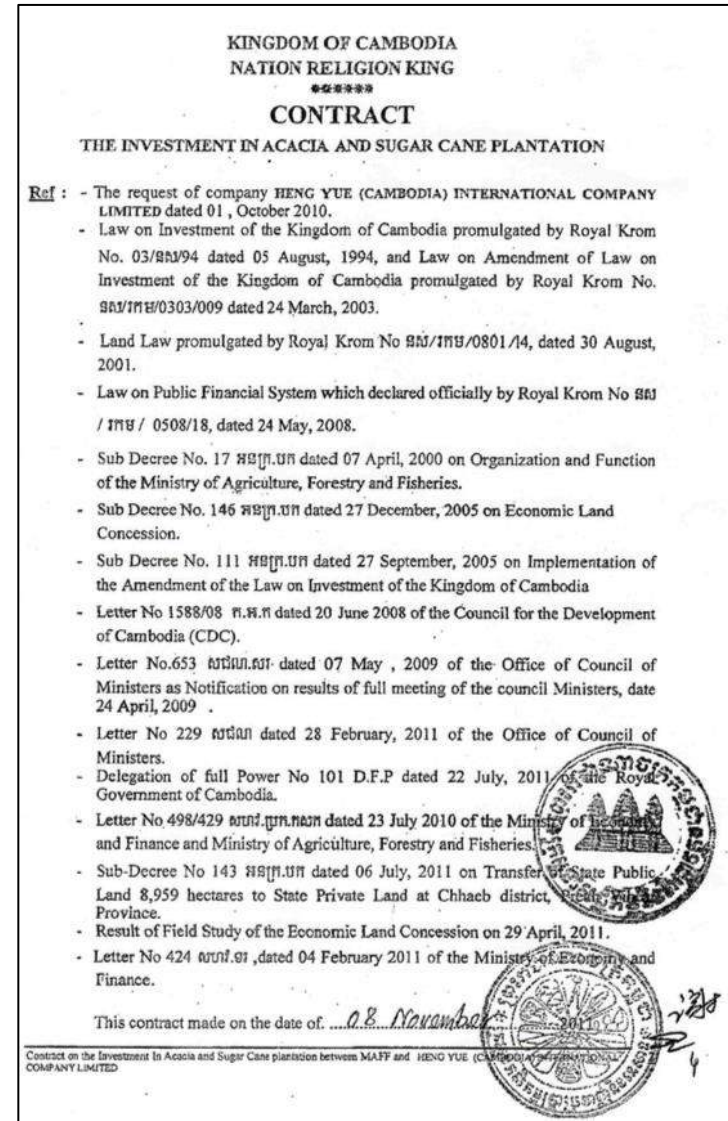
🔥 Domestic law: Obligations for governments and investors

🔥 Investor-state contracts

🔥 Allocate risk and define rights and obligations

🔥 Stabilization clauses

🔥 Dispute resolution



Interaction between legal obligations

- 🔥 Contracts generally subordinate to domestic law, but (1) stabilization clauses seek to change that and (2) international investment law can elevate contractual obligations to international law level
- 🔥 IIL effectively creates new property rights that may not exist under domestic law?
- 🔥 Tensions and potential conflicts between international human rights law and investment contracts, and between international human rights law and international investment law

Options for addressing land grievances

- 🔥 **The importance of conducting a legal assessment**

- 🔥 **Specific options:**

Specific actions that a host government can take when distinct grievances are triggered by a particular investment or investor

- 🔥 **General options:**

Actions that a host government can take to improve its overarching approach to addressing land grievances or to minimize its liability under international investment treaties

- 🔥 **Accompanying considerations for each option, including potential risks. At times, more than one option appropriate.**

Specific options

- 🔥 **Requesting Investor Action**
- 🔥 **Shaping or Reshaping Concession Boundaries**
- 🔥 **Facilitating Dispute Resolution Processes for Affected Individuals or Communities**
- 🔥 **Restituting Property to Displaced Individuals or Communities**
- 🔥 **Compensating Affected Individuals or Communities**
- 🔥 **Renegotiating with the Investor**
- 🔥 **Terminating an Investor-State Contract**
- 🔥 **Revoking or Terminating Authorizations Necessary for Investor Operations**

Requesting investor action 1

🔥 Case study: Liberia



Requesting investor action 2

- 🔥 **What type of requests might a government make?**
- 🔥 **How would requesting investor action help?**
 - 🔥 Pragmatic / efficient way to find solutions
 - 🔥 Avoiding renegotiation or termination
- 🔥 **Why might an investor want to comply?**
 - 🔥 “Social license to operate”
 - 🔥 Conflicts increase risks
 - 🔥 Investor commitments (certification bodies, internal policies, financiers)

Requesting investor action 3

🔥 Potential risks related to requesting investor action?

- 🔥 Liability?
- 🔥 Reputation?
- 🔥 Dependence on the voluntary actions of the investor

🔥 When is this option appropriate?



- 🔥 Technically no violation of law or contract
- 🔥 Can be more effectively resolved by the investor
- 🔥 Investor willing

Shaping or reshaping concession boundaries 1

🔥 Shaping boundaries (example of vague lease provision)

herein contained, the Cooperative and the Company hereby agree:

1. The Lease. (a) The Cooperative hereby agrees to lease to the Company one or more parcels of forested land within the Cooperative Territory with an aggregate area of no less than 600,000 hectares (with further extension to 1,000,000 hectares). The Cooperative shall use its commercially reasonable best efforts to provide the Company with a legal description of the Cooperative Territory and/or its boundaries. Upon receipt of such information, the Company shall use its commercially reasonable best efforts to perform a land survey of the Cooperative Territory and to compare the results of such land survey to maps of such territory prepared by the United Nations and/or archived in the United Kingdom. Upon completion of such land survey and comparison, the Cooperative and the Company shall, in good faith, determine the actual parcel or parcels within the Cooperative Territory to be leased by the Cooperative to the Company (hereinafter, the "Leased Land"), a legal description of which shall be annexed to this Lease and made a part hereof (hereinafter, the "Addendum").

 , *Uosia Ramkalla* 

🔥 Reshaping concession boundaries

Shaping or reshaping concession boundaries 2

- 🔥 **Benefits of shaping or reshaping concession boundaries**
 - 🔥 Avoid or mitigate negative impacts
 - 🔥 Avoid negotiation of a contract amendment, or renegotiation
 - 🔥 Reduce investor-community conflict
 - 🔥 Can sometimes be done with minimal impact on the investor
 - 🔥 Helps ensure compliance with investor's development commitments
 - 🔥 Seeking FPIC

Shaping or reshaping concession boundaries 3

- 🔥 **Potential risks of shaping or reshaping concession boundaries**
 - 🔥 Government may not be aware of potential grievances in time
 - 🔥 Government may not have sufficient scope to avoid impacts on all persons
 - 🔥 Reshaping relies on investor agreeing; might require renegotiation
 - 🔥 Reputational risks for the government
 - 🔥 Land recovered for aggrieved communities might be inadequate
- 🔥 **When is re/shaping appropriate?**

Shaping or reshaping concession boundaries 4

- 🔥 Coordinating with a community-driven land protection process (ex: Namati approach)
- 🔥 Stage 1: Laying the groundwork:
- 🔥 Stage 2: Ensuring good governance
- 🔥 Stage 3: Documenting communities' land claims
- 🔥 Stage 4: Formal government registration
- 🔥 Stage 5: Preparing communities to prosper



Monitor
Evaluate
Assess
Impacts
Learn

Facilitating dispute resolution processes 1

- 🔥 Non-judicial public institutions
- 🔥 Mediation and facilitation
- 🔥 Project-level grievance mechanisms
- 🔥 External grievance mechanisms



Facilitating dispute resolution processes 2

🔥 Necessary elements

- 🔥 Legitimate, accessible, predictable, equitable, and transparent
- 🔥 Rights-compatible
- 🔥 Gender considerations
- 🔥 Remedies: proportionate and made in consultation with wronged person

🔥 What are the benefits of a DR process?

- 🔥 Resolve grievances in a timely manner
- 🔥 Ensure that wrongs are remedied
- 🔥 Limit or mitigate public outrage, protest, or even violent conflict
- 🔥 Satisfy governments' obligations to provide effective remedy

Facilitating dispute resolution processes 3

- 🔥 **Project-level grievance mechanisms and external mechanisms**
- 🔥 **Other external accountability processes**
- 🔥 **Potential risks of establishing, requiring, or facilitating access to a DR process?**

Restituting property 1

- 🔥 **What is restitution?**
- 🔥 **When is restitution appropriate?**
 - 🔥 Property- or land-related violations of human rights
 - 🔥 Especially re indigenous land use
 - 🔥 Also, when investment concludes (or fails) and land is still inhabitable
- 🔥 **Restitution is not always possible**
 - 🔥 Multiple community claims
 - 🔥 Land may be uninhabitable
 - 🔥 Land expropriated for a public purpose
- 🔥 **Compensation as an additional or alternative remedy**

Restituting property 2

- 🔥 **What are the potential risks of restitution as a remedy?**
 - 🔥 Risks of breaching investment treaty obligations
 - 🔥 Expropriation
 - 🔥 Fair and equitable treatment
 - 🔥 Discrimination
- 🔥 **Determine whether the investor has valid rights to the land. If so, follow expropriation requirements set by domestic and international law.**

Compensation 1

- 🔥 **What is “compensation”?**
- 🔥 **What are the limitations of compensation as a remedy?**
 - 🔥 Unlikely to comprehensively remedy certain grievances
 - 🔥 Resettled communities lose economic, social, cultural, and other networks when forced off land
 - 🔥 First consider whether restitution is possible
- 🔥 **When is compensation appropriate?**
 - 🔥 Environmental impacts
 - 🔥 Violations of human rights
 - 🔥 Displacement (both voluntary and involuntary) +/- restitution
 - 🔥 Avoid “violate and compensate” approach

Compensation 2

🔥 Who should be compensated?

- 🔥 Legitimate rights to the land in question
- 🔥 Absence of formal legal title should not bar affected persons from receiving compensation

🔥 Should compensation be in kind or financial?

- 🔥 Context of displacement
 - 🔥 In-kind compensation often preferable to cash compensation (cash transfers the risks to recipients)

Compensation 3

🔥 **How to determine compensation: (i) consultation**

- 🔥 Tailoring remedy to wronged person's needs
- 🔥 Minimize risks of future conflict, or litigation
- 🔥 Gender

🔥 **How to determine compensation: (ii) calculation of quantum**

- 🔥 Place those wronged in a position that is as favorable as, or more favorable than, before the wrong
- 🔥 Security of tenure, adequate housing, access to necessary services
- 🔥 Basic Principles and Guidelines on Development-Based Evictions and Displacement criteria
- 🔥 Not just market value

Compensation 4

🔥 Who pays?

- 🔥 Government is the primary bearer of human rights obligations
- 🔥 In practice, governments may shift burden onto investors

🔥 The need for grievance mechanisms, monitoring, and evaluation

🔥 What are the potential risks of providing compensation?

- 🔥 Undervaluing of property
- 🔥 Compensation not always appropriate
- 🔥 “Resettle and compensate” approach can inflame community discontent; reputational risks for governments
- 🔥 Impoverishment of resettled communities

Renegotiating with the investor 1

- 🔥 In some cases, mandatory (as set out in the contract)
- 🔥 Absent such language, renegotiation requests may not be met with the desired response



Renegotiating with the investor 2

🔥 **When might an investor be willing to renegotiate?**

- 🔥 Investor with other interests in the country
- 🔥 Public pressure, and credible documentation of issues
- 🔥 Less likely where:
 - 🔥 Significant home country support
 - 🔥 Access to investor-state arbitration under an investment treaty

🔥 **What potential risks arise from renegotiation?**

- 🔥 Political pressure or sovereign action to force renegotiation can lead to liability risks under international investment law

Terminating an investor-state contract 1

- 🔥 **What are the benefits of contract termination?**
- 🔥 **What are the potential risks related to contract termination?**
 - 🔥 May be politically undesirable
 - 🔥 Potential for legal action (domestic or ISDS)
 - 🔥 Diplomatic pressure

Terminating an investor-state contract 2

- 🔥 **Exposure to liability under international investment treaties?**
 - 🔥 Was the contract terminated using powers and authority available to a normal contracting party (as opposed to a government entity)?
 - 🔥 Does the applicable treaty contain an “umbrella clause?”
- 🔥 **When should a government consider taking this option?**

Revoking authorizations necessary for operations 1

- 🔥 What are the benefits of revoking authorizations?
- 🔥 What are the potential negative consequences?

Revoking authorizations necessary for operations 2

- 🔥 When is revoking an authorization an appropriate option?
 - 🔥 When dictated by domestic law;
 - 🔥 When required to fulfill human rights obligations
 - 🔥 When necessary to address the grievances, and allowed under the domestic legal framework
- 🔥 What arguments might an investor make if a permit is revoked?
 - 🔥 Non-discrimination
 - 🔥 Fair and equitable treatment
 - 🔥 Prohibition on uncompensated expropriations
 - 🔥 Umbrella clause

General options

- 🔥 **Developing a national strategy for legal and policy reform**
- 🔥 **Adopting changes in the law**
- 🔥 **Requesting an advisory opinion from a human rights tribunal or body**
- 🔥 **Interpreting investment treaties**
- 🔥 **Declining to conclude new treaties, and terminating or not renewing existing treaties**

National policy strategies

- 🔥 What is a NAP?
- 🔥 What legal or practical force do national policy strategies have?
- 🔥 What are the potential risks of developing a national policy strategy?

Adopting changes in the law

🔥 **When should a government consider taking this option?**

- 🔥 Grievances reveal need for reform
- 🔥 National policy process (such as a NAP) reveals a need for reform
- 🔥 Opinion from a human rights tribunal
- 🔥 New international instruments, standards, or best practices

🔥 **What are the potential risks of adopting this option?**

- 🔥 Political opposition and domestic legal challenges
- 🔥 When negative impacts on investors, potential claims for:
 - 🔥 Violating stabilization clause
 - 🔥 Violating fair and equitable treatment obligation
 - 🔥 Discrimination
 - 🔥 Illegal expropriation

Advisory opinions 1

- 🔥 **Persuasive, not binding**
- 🔥 **Clarifying international legal rights and corresponding governmental obligations**
- 🔥 **Might give pause to investors contemplating a claim?**
- 🔥 **Inter-American Court of Human Rights**
 - 🔥 Opinions on compatibility of domestic laws with the American Convention or other treaties concerning the protection of human rights
- 🔥 **African Court on Human and Peoples' Rights**
 - 🔥 Opinions “on any legal matter” relating to the Charter or any other relevant human rights instruments

Advisory opinions 2

- 🔥 **Options for countries without regional courts?**
 - 🔥 Human Rights Council's Universal Periodic Review (UPR)
 - 🔥 Encouraging domestic litigation
- 🔥 **Potential risks of seeking an advisory opinion or other recommendation?**

Interpreting investment treaties 1

- 🔥 “Subsequent agreement” and “subsequent practice”
- 🔥 What legal force do “subsequent agreement” and “subsequent practice” have?



Interpreting investment treaties 2

- 🔥 **Clarifies vaguely worded provisions, which are otherwise vulnerable to broad interpretations by tribunals**
- 🔥 **When is this an appropriate option?**
 - 🔥 When ambiguity in treaty provisions leaves a government exposed to potentially significant litigation and liability
- 🔥 **How do governments create “subsequent agreement” and “subsequent practice”?**
 - 🔥 Publishing communications
 - 🔥 Posting interpretative statements on a website
 - 🔥 Monitoring statements and practice of other states
 - 🔥 Disclosing submissions to investment arbitrations
 - 🔥 Participating as a non-disputing state party
 - 🔥 Noting disagreements with tribunal interpretations

Declining to conclude new treaties, terminating or not renewing existing treaties

- 🔥 **Limitations**

- 🔥 Vulnerability to claims and liability under existing treaties
- 🔥 Survival clauses

- 🔥 **What are the potential consequences or risks relating to this option?**

- 🔥 **Usefulness of analyzing costs/benefits of existing or future international investment treaties**

Conclusion

- 🔥 Importance of addressing grievances
- 🔥 Governments face a complex web of legal obligations, which can constrain options for responding to grievances
- 🔥 Options may carry risks, but the risk of doing nothing may be greater—for all stakeholders

Thank you

- 🔥 *Land deal dilemmas: Grievances, human rights, and investor protections* full report and other materials available at:
ccsi.columbia.edu/work/projects/land-grievances/



Land deal dilemmas: Grievances, human rights, and investor protections

Notes for training module slides

Slide 1

Title slide

Slide 2

Land-based investments (agriculture and forestry)

- An increase in land-based investments since the mid-2000s, and particularly after the 2007-2008 food price crisis, has led to what has been described as a “global land rush”: efforts by private investors or government entities to lease or purchase large tracts of land. Leases, when used, are often for long periods of time – for example, 25 to 99 years.
- Particularly in low- and middle-income countries, some governments have regarded land-based investments as potential vehicles for accelerating national development, and have sought such investment in order to increase capital flows, create jobs, enable technology transfer, or catalyze more productive agricultural operations.
- Investors are often interested in such transactions primarily for commercial motives, but at times have also been driven by other reasons, such as food security concerns.
- Research shows that the acquisition of land for large-scale investments does not always translate into actual operations (some projects never implemented, while other projects may fail in early stages). However, even failed projects can have on-the-ground impacts.

Slide 3

Land grievances

- Land-based investments can create significant grievances for local individuals or communities adversely affected by the investment, including related to the following issues:
 - Displacement and related issues, such as: a lack of consultation or free, prior, and informed consent; a failure to provide sufficient (or any) compensation; forced evictions; and correlated negative impacts on livelihoods and wellbeing when displacement occurs;
 - Negative effects on the environment or cultural sites;

- Failure to realize expected or promised benefits from projects, including benefits related to jobs, local infrastructure, or the provision of education or electricity;
- Violence, ranging from physical assaults to killings, as well as repression of protests and inappropriate detention or arrests; and
- Corruption, failure to comply with legal requirements, or a lack of transparency

Slide 4

Case study: KLK in Papua New Guinea

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

Slide 5

Governments' legal obligations

- Host governments seeking to address land grievances must navigate a complicated landscape of legal obligations and pragmatic considerations. Legal obligations might constrain how a government addresses land grievances, or create potential liability risks tied to its efforts to address grievances.
- Relevant legal obligations include:
 - International investment law obligations to protect investors.
 - International human rights law obligations.
 - Obligations under domestic law.
 - When used, obligations under investor-state contracts.
- Will briefly discuss some of the core obligations under these different legal frameworks.
- Important to note that while understanding the risks that arise under different legal regimes (and particularly those arising under investment treaties) can help a government better assess its options for addressing land grievances, such risks should not dissuade a government from taking good faith actions designed to address the grievances of its citizens.

Slide 6

III: Non-discrimination provisions

- National treatment prevents more favorable treatment of domestic investors.
- Most-favored nation (MFN) treatment prevents more favorable treatment of other foreign investors.
- A number of tribunals have determined that these provisions bar both discrimination in law and in fact and, similarly, both intentional and unintentional discrimination.
- A key question in determining liability will be whether investors/investments receiving different treatment are “like” (for example, are producers/exporters of flowers “like” producers/exporters of oil?).
- According to a number of tribunals, the MFN obligation can also be used to import more favorable substantive and/or procedural provisions from other investment treaties.
- Some treaties include exceptions to these obligations.
- The obligations may apply on a pre- or post-establishment basis.

Slide 7

III: Expropriation

- The general rule is that, to constitute an expropriation, the government measure must take or effectively take all or substantially all of the value of the investment; the key question then becomes – what is the investment? The whole project (for example, the concession and all of its associated rights), or a smaller slice of it (for example, the right to a particular contract termination procedure).
- Expropriation may be direct (for example, outright seizure of the property), or indirect (for example, a government action, such as a regulatory measure, that has the effect of expropriating the property, and that is not considered legitimate).

Slide 8

III: FET obligation

- This standard is the one on which investors most commonly base their claims, and the one on which they most commonly prevail.
- There is significant uncertainty about what this standard means.
- There are two main views of the standard: one is that it is an “autonomous” standard of protection; the other is that it enshrines the minimum standard of treatment under customary international law. The second standard is generally considered to be narrower than the first, though some tribunals do not draw a distinction.

Slide 9

III: FPS obligation

- This obligation has been interpreted narrowly by some tribunals and broadly by others.
- The broader interpretation – which is one that would protect investors against harms caused by legal changes – is similar to the FET obligation.
- The FPS obligation can be used to, for example, challenge the government for failing to stop protests/trespassing/squatting by third persons.

Slide 10

III: Umbrella clause

- Interpretation of this standard varies significantly among cases; some of the differences are due to different language used in the treaties, while other differences are due to the different views adopted/held by arbitrators.
- Unlike the other standards, for which liability generally only attaches for conduct taken by the government in its sovereign capacity, investors can use the umbrella clause to challenge conduct taken by government actors in their commercial capacities.

Slide 11

III: Redress mechanisms

- Unlike other international economic treaties (most notably the WTO agreements), investment treaties give private actors – i.e., covered investors – the right to sue governments for treaty breach and to recover damages for those breaches.
- These suits are brought in investor-state arbitration. In investor-state arbitration, proceedings are decided by private arbitrators that are typically appointed by the disputing parties.
- Unlike human rights treaties, there is generally no requirement that investors must exhaust domestic remedies before bringing claims.
- Damage awards can be significant (even ranging into the billions of dollars); the costs of litigating the proceedings have been found to be roughly \$5 million per case for government defendants.
- Arbitral awards are largely shielded from appeal or other challenge in domestic courts, and are meant to be easily enforced by the prevailing party.
- Investment treaties and dispute resolution under them may be relevant even when not anticipated, given the ability of some investors to (re)structure operations to gain protection of applicable treaties, for example, through “forum shopping” or “roundtripping.”

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IHRL: Obligations and responsibilities

- Governments have three types of human rights obligations: to respect human rights (by refraining from violating them), to protect human rights (by preventing third parties from violating them), and to fulfill human rights (by taking steps, when applicable, to progressively realize them).
- Soft law as seen in UN Guiding Principles on Business and Human Rights notes that:
 - Governments have obligations to respect and protect rights, and
 - Business enterprises have responsibilities to respect rights.
 - In addition, access to remedy is an important part of the UN Business and Human Rights framework, and is something that can/should be provided by governments as well as companies.

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IHRL: Right to property

- No general codified right to *land* in international human rights law, but there is a right to *property*, which includes the right not to be arbitrarily deprived of property.
- This right can generally be limited for actions that are “in the public interest.”
- Can land-based investments be considered in the public interest? Might depend on context and jurisdiction.
 - Domestic legal frameworks will generally define what is in the public interest. VGGT note the importance of defining “public purpose” in domestic law to allow for judicial review of actions to deprive persons of property (Art. 16.1).
 - Laws vary, and there are also examples of courts expressing divergent opinions on whether and how the taking of land for private investment can constitute a public purpose.
 - Example: *Tsilhqot’in Nation v. British Columbia*: Supreme Court of Canada noted that logging concession could be a public interest objective overriding Aboriginal title, but held in that case that the logging was not in the public interest and had an impact on title that was disproportionate to economic benefits that would accrue to state/society.
 - Example: *Sawhoyamaxa Indigenous Community v. Paraguay*: Inter-American Court of Human Rights rejected argument that allocation of *indigenous* land for purposes of investment constituted a public purpose.

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IHRL: Right to FPIC (Free, prior, and informed consent)

- This right requires governments to consult and cooperate in good faith with indigenous peoples to obtain their free, prior, and informed consent before:
 - relocating them;
 - approving any project affecting their lands, territories, or resources;
 - or adopting and implementing legislative or administrative measures that may affect them.
- Government measures that violate this right include allowing a land-based investment to displace indigenous peoples without their consent, regardless of whether such peoples hold formal title to the land.
 - Such an action might also violate the right of minorities to enjoy their own culture, which includes protections of land use or ownership where the culture is closely tied to the land.
- FPIC increasingly seen as best practice for non-indigenous peoples, too. See, for example, FPIC requirement applying to local communities in RSPO Principles & Criteria.

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IHRL: Rights to housing, food, water, health, healthy environment

- Among other obligations, these rights generally require that governments refrain from interfering with existing access to resources necessary for fulfillment of these rights, as well as prevent third parties (like investors) from interfering with such access.

- Example: the right to food is realized when individuals have access to adequate food or the means for procuring food, such as to land and other productive resources. A government's interference with access to land used to grow food, or its failure to prevent an investor from interfering with such access, might thus constitute a violation of the right.
- Some of these rights, and particularly the right to housing, are closely tied to the general prohibition of forced eviction, which forbids the coerced or involuntary displacement of individuals or communities from their home or lands without appropriate protection.

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IHRL: Rights to life, liberty, freedom of assembly and expression, etc.

- In the context of land-based investments, these rights are sometimes at risk when the government or private security forces respond to efforts by community members or land rights defenders to draw attention to negative impacts of an investment.
- Right to liberty and security of person prohibits arbitrary arrest or detention.
- Right to peaceful assembly includes the right to participate in peaceful meetings or protests.
- Right to freedom of expression, which covers the freedom to seek, receive, and impart information, including a right of access to information held by public bodies.

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IHRL: Labor rights

- The right to just and favorable conditions of work, which includes requirements for fair wages and safe and healthy working conditions.
- The right to form and join trade unions and the right to freedom of association cover workers' rights to join unions to protect their interests.

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IHRL: Redress mechanisms

- Instead of the dispute-specific tribunals created under investment treaties, human rights redress mechanisms are provided through more established forums: regional human rights courts, regional human rights commissions, and complaints mechanisms tied to specific treaties.
- These human rights fora differ from investment arbitration processes in two important ways:
 - They generally require claimants to first exhaust available domestic remedies.
 - Monetary awards, when provided, generally not nearly as high as seen in investment law disputes.

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Domestic & contractual legal constraints for governments

- Domestic legal frameworks shape how land-based investments are undertaken and regulated. Unlike international law, domestic law frequently creates legal obligations for investors (and governments), rather than just for governments.

- Legal obligations may also arise from the investor-state contracts entered into between the government and the investor. Among the many types of rights/obligations provided in such contracts, two issues that are of particular note for our discussion:
 - (i) stabilization clauses, seeking to shield the investor from having to comply with changes in the law or from having to incur the costs of complying with changes in the law, and
 - (ii) dispute resolution provisions requiring arbitration under the same or similar rules that govern investor-state arbitrations arising from investment treaties.
 - While only an investor can bring a claim for breach of an investment treaty obligation, either the investor or the government can bring a claim in domestic courts or under commercial arbitration for breach of a contractual obligation (depending on the dispute resolution provisions in the investor-state contract).

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Interaction between legal obligations

- Governments' obligations under these different legal frameworks and agreements interact in complex ways. They may, at times, also conflict.
 - Domestic law vs. the contract
 - Investor-state contracts are generally subordinate to domestic law. However, if the contract has a stabilization clause, investor may be excepted from having to comply with or incur the costs of relevant changes to the law.
 - This may be acceptable in some jurisdictions. In others, a court might deem such a clause to be invalid and unenforceable on grounds that it violates the constitutional separation of powers or improperly restricts the government's power to act in the public interest.
 - Domestic law vs. the contract in the context of international investment law
 - IIL can potentially shield a contractual clause from challenges that, under domestic law, might have been successful.
 - For example, even if a domestic court deems a stabilization clause invalid, an investment arbitration tribunal may hold the government to those promises and enforce them under the umbrella clause and/or fair and equitable treatment obligation.
- International investment treaties are sometimes interpreted as effectively creating new property rights that might not exist under domestic law.
 - Some tribunals interpreting the "fair and equitable treatment" obligation have determined that investors' rights *and* mere "legitimate expectations" are protected against subsequent government interference.
 - An investor can be found to not possess a valid property right under domestic law, but a tribunal could still conclude that the investor had formed "expectations" that should be protected. This essentially turns these expectations into new and enforceable property rights.

- This differs from the traditional approach under international law, which recognizes the power of domestic systems to define whether and to what extent a property right exists.
- Even where contract was illegal under domestic law, a tribunal could find that it created a legitimate expectation. (Less likely to happen where corruption or fraud is involved). For example, it could potentially happen if the entity that signed the contract did not have authority to do so, or if necessary procedures were not followed.¹
- Potential conflicts/tensions between obligations under international human rights law and obligations under an investor-state contract.
 - Example 1: a contract granting a concession that displaces land users and violates their rights to food or housing would place the government's human rights obligations in conflict with its contractual obligations.
 - Example 2: a broadly framed stabilization clause in an investor-state contract may be in tension with a government's human rights obligations if it limits the applicability to the underlying investment of new laws or policies necessary to respect, protect, or fulfill human rights.²
- Potential tensions between obligations under international human rights law and obligations under investment treaties?

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Options for addressing land grievances

- Land-based investments can provoke a range of grievances. A government's efforts to respond may be constrained by:
 - various legal frameworks.
 - political considerations (for example, commercial reputation with investors, desires of citizens, etcetera).
- To address potential legal constraints, a useful first step is to conduct a legal assessment of the position of the government, the investor, and any affected community members. This can include reviewing the government's obligations under domestic law, any investor-state contract, international investment law, and international human rights law, and identifying any tensions or inconsistencies that may exist between these different types of obligations. Awareness of these different obligations will help the government in assessing suitable options in a given situation.
- Specific options: the specific actions that a host government can take when distinct grievances are triggered by a particular investment or investor.
- General options: the actions a host government can take to improve its overarching approach to addressing land grievances or to minimize its liability under international investment treaties.

¹ See, for example, *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award (March 3, 2010), ¶¶ 171-184; *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶¶ 212-236.

² U.N. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, Principle 4, at 12, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011). See also the Commentary to Principle 4, at 14.

- Each option carries its own risks, and should only be employed when appropriate.
 - In some cases, some of these options might create risks of liability under investment law or inflame already existing tensions among local community members.
 - Being aware of the benefits, drawbacks, and risks of each option can support governments in making informed and appropriate decisions.
- At times, more than one option appropriate or necessary.

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Specific options

- Requesting Investor Action
- Shaping or Reshaping Concession Boundaries
- Facilitating Dispute Resolution Processes for Affected Individuals or Communities
- Restituting Property to Displaced Individuals or Communities
- Compensating Affected Individuals or Communities
- Renegotiating with the Investor
- Terminating an Investor-State Contract
- Revoking or Terminating Authorizations Necessary for Investor Operations

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Requesting investor action 1

- *A government can ask an investor to modify its actual or planned operations to help address related grievances. When the investor is exercising rights given to it under a contract, license, or other authorization, such a request would be for voluntary action.*
- *Case study: Liberia*
 - Grievances have arisen as investors seek to expand operations within concession areas onto land claimed by communities.
 - These grievances have led to conflict, violence, advocacy campaigns against the investors, and a request from an outside certification body to halt further expansion while complaints were investigated.
 - In one case, the President also made a commitment during a meeting with communities that no further expansion of one company's operations onto lands claimed by the community would occur without the affected community's approval. The relevant concession agreements, however, which arguably covered the land in question, provided no recognition of customary ownership rights, excepting tribal reserves of land. The story is still playing out, but gives an example of (1) the difficult situations in which governments find themselves, and (2) a potential situation in which a government request for voluntary investor action (receiving consent before expansion) might be a pragmatic option.

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Requesting investor action 2

- What type of requests might a government make?

- Example: a government could ask an investor to not commence new operations on land within the concession area until receiving permission from or reaching an agreement with any affected persons.
- Example: a government could ask an investor to provide any benefits that it had described to community members but not fulfilled (even if there were no legally binding obligations to provide such benefits).
- Note that to the extent that operations violate law or contractual obligations, the government has much greater scope to force/require the investor to take remedial actions.
- How would requesting investor action help?
 - It may be a pragmatic (and efficient) way to find solutions for grievances. For example, an investor may be better placed to address certain grievances.
 - If an investor agrees to take certain requested actions, this could help redress grievances while avoiding a need to renegotiate or end the investment.
- Why might an investor want to comply?
 - In some contexts, a “social license to operate” may be as important as the legal contract for ensuring a favorable operating environment.
 - Conflicts with community may increase financial or other risks
 - Investor may have other relevant commitments, such as through certification bodies or its own company policies, that would encourage it to comply with government requests to assist in addressing land grievances. Example: RSPO requirement that a company’s land use not diminish existing land use rights without FPIC. A refusal to do so may pose reputational or other risks.

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Requesting investor action 3

- What are the potential risks related to requesting investor action?
 - Requesting the investor to take, or refrain from taking, certain actions is likely permissible under international law. Some investment arbitration tribunals, however, have found governments liable for efforts to force or pressure investors into giving up their *contractual rights*.
 - Depending on the request, or how frequently a government makes such requests, this strategy may pose reputational risks for the country. While a government should not be faulted for taking steps to protect the rights of its citizens, repeated requests that are taken as demands contravening relevant investment agreements could make potential investors wary.
 - Yet another risk of this strategy arises from its dependence on the voluntary actions of the investor. This strategy therefore might not be appropriate when the government needs to ensure that the investor takes or refrains from taking certain actions, such as when the grievances relate to human rights abuses. It also might not be appropriate when grievances require more comprehensive solutions involving more than one investor. In these cases, other options might be more suitable, such as renegotiating a contract or adopting changes in the law (both will be discussed later on).

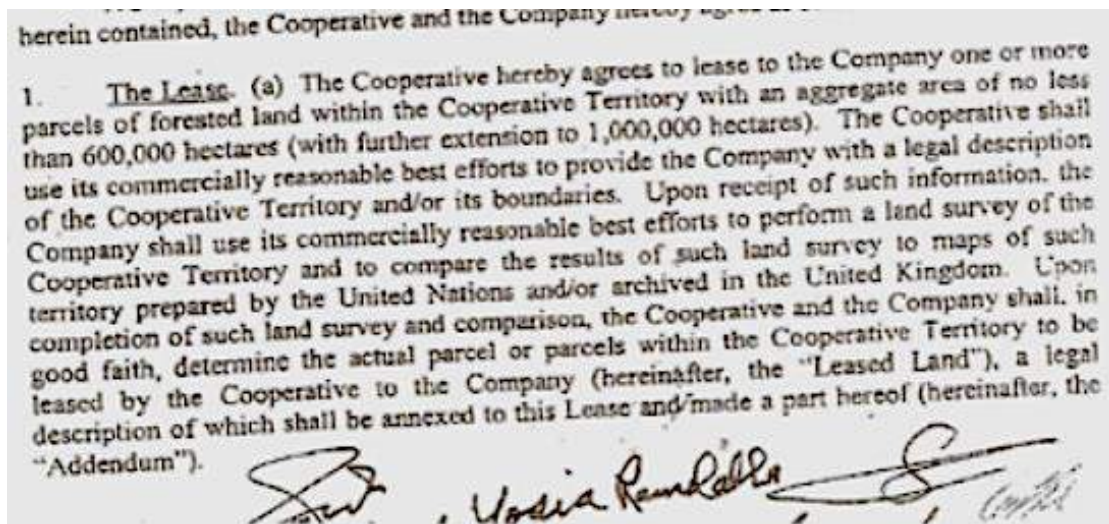
- When is this option appropriate?
 - When grievances are the result of operations that are not technically violations of the law or the investor-state contract. (To the extent that operations violate law or contractual obligations, the government has much greater scope to force the investor to take remedial actions.)
 - When the grievance could be more effectively resolved by the investor than by the government.
 - When the investor agrees that the requested action would make good business sense or aligns with standards to which it has already committed, whether voluntary or binding in nature. (Legal or reputational risk might be mitigated in such circumstances.)

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Shaping or reshaping concession boundaries 1

- *When a government is bound by an investment contract that does not explicitly delineate the specific boundaries of the land the investor will use, the government may be able to shape concession boundaries in a way that minimizes negative impacts on local communities and thus reduces grievances. When the concession boundaries have already been established, a government may seek to “reshape” the boundaries to help address grievances over land allocation.*
- Shaping concession boundaries
 - Most investor-state contracts provide specific information about the boundaries of a concession.
 - In some situations, however, a contract may have been concluded without explicit agreement on the final area to be used by the investor for operations under the agreement.
 - When the exact area is not defined, national law or policies may provide a more explicit process to define the boundaries of land that can be used,³ or the contract itself may describe the process that will be followed.
 - The window of opportunity for this approach is generally limited: there may be some space for maneuvering after a contract has been concluded but before the concession boundaries have been delineated.
 - Example: Lease Agreement between Mukaya Payam Cooperative (a territorial subdivision of South Sudan) and Nile Trading & Development. The investor is to undertake a land survey and compare it with certain maps, after which the parties will “in good faith” determine the actual lands to be leased.

³ For example, in Cameroon, a Consultative Committee makes recommendations on the land to be allocated to an investor; these recommendations are sent to the relevant authority granting the concession. Concessions greater than 100 hectares must be signed by the President.



- Reshaping concession boundaries:
 - Relevant when the boundaries of a concession have already been delineated.
 - Many large concessions provide much more land than is necessary for operations, and an investor may not intend to use all of its allocated land.
 - Particularly if an investor has already decided to not use some land within the concession area, there may be an opportunity for the government to ask the investor to reshape the concession boundaries to carve out certain unused areas.
 - The government might need to offer some sort of benefit (such as alternative land).
 - If an investor agrees, this can be documented in a side letter or an amendment to the contract, or may require the renegotiation of the contract itself.

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Shaping or reshaping concession boundaries 2

- Benefits of shaping or reshaping concession boundaries
 - Shaping boundaries can help to delineate areas in a way that avoids or mitigates negative impacts and accompanying grievances. The survey process itself may alert the government to issues of which it may not have been aware or concerned at the time of the contract negotiations.
 - Shaping boundaries can also help the government avoid the need to seek a negotiation of a contract amendment, or even a renegotiation of the contract, either of which may require the government to give up other points in return, or could create risks related to government obligations under an investment treaty. Shaping boundaries with an eye to minimizing grievances may also appeal to the investor, by helping prevent future community conflicts and avoidable risks.
 - Reshaping can be beneficial when use of certain parts of the concession area is strongly contested. Carving such parts out (with or without additional land to replace it) may help reduce investor-community conflict.

- Particularly if the land tied to the grievances is unlikely to be used by the investor, relinquishing it can help address both operational and reputational risks with minimal impact on the investor.
- Investors may also be interested in re/shaping if it reduces rental fees (where fees are paid on the entire concession area), or helps ensure compliance with development commitments (when the contract obliges the investor to develop a certain percentage of the land by a certain date).
- (Re)shaping boundaries also creates the opportunity to seek and obtain the free, prior, and informed consent (FPIC) of potentially affected individuals or communities. Even when not required, a proper FPIC process constitutes best practice and helps to reduce avoidable risks. Obtaining FPIC, and undertaking community consultation more generally, provides useful insight for the government and investor on how best to shape or reshape boundaries to minimize future problems while also diminishing existing tensions by demonstrating respect for peoples' land and their claims to that land.

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Shaping or reshaping concession boundaries 3

- Potential risks of shaping or reshaping concession boundaries
 - The narrow situations in which this option applies reduces the likelihood that a government would be aware of potential grievances in time to take appropriate steps.
 - The government may not have sufficient scope within the established process to shape the boundaries in a way that fully respects the rights of individuals or communities that stand to be affected. For example, the scale of the land promised might be so vast that the government is unable to find a sufficient amount that is truly unencumbered and does not require displacement of communities.
 - Reshaping is more risky. Requesting reshaping is an example of requesting investor action (discussed earlier).
 - Reshaping can also lead to a formal agreement or renegotiation of the contract, which will be discussed later in this presentation.
 - If the government seeks to use this option repeatedly, or at a large scale, this strategy could create reputational risks for the government, affecting future investors' perceptions of the operating environment.
 - The land that aggrieved individuals or communities recover through reshaping might be inadequate, or less optimal than the land remaining within the concession.
- When is re/shaping appropriate
 - Shaping: generally when:
 - the investor-state contract does not provide explicit boundaries of the land to be leased or used,
 - the government and investor have not yet agreed to the specific boundaries, and
 - the relevant process established by domestic law or by contract provides an opportunity for the government to shape boundaries.

- Reshaping has fewer time constraints, but may carry greater risks, as it was likely not contemplated when the contract was negotiated.
 - More feasible when it is in the investor's interests.
 - More feasible when the investor is not tied to the land in question and is amenable to receiving replacement land.

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Shaping or reshaping concession boundaries 4

- Governments considering the shaping or reshaping of concession boundaries should do so in consultation with, and with the consent of, affected individuals or communities. When there is a lack of clarity regarding the community's boundaries, this might be done in coordination with a community-driven land protection process, such as the approach supported by Namati. The stages of such a process include:
 - Stage 1: Laying the groundwork:
 - Help community members plan for the future and understand the benefits of seeking formal documentation of their land rights.
 - Valuation exercises (land, resources, replacement costs).
 - Legal education on all relevant laws and policies.
 - Community organizing to ensure participation in all community land protection activities and spread information.
 - Stage 2: Ensuring good governance of community lands and natural resources:
 - Creation, community ratification, implementation and enforcement of community by-laws for community land governance and natural resources management.
 - Creating systems for transparent financial management, to create systems for equitable and transparent management of revenue generated from community lands and resources.
 - Election and training of a representative "Land Governance Council".
 - Stage 3: Documenting communities' land claims:
 - Participatory map-making.
 - Boundary harmonization and land conflict resolution.
 - Inter-community MOU-signing and boundary marking, witnessed and signed by leaders from each community, relevant government officials, and hundreds of community members.
 - Recording of agreed boundaries and other spatial information using GPS, survey, or other techniques.
 - Stage 4: Completion of formal government registration procedures:
 - Communities and facilitators submit all necessary paperwork to government agencies and apply to receive a title, deed or certificate of registration for their community land claims.
 - Stage 5: Preparing communities to prosper. Trainings on:
 - Livelihood diversification, to support communities to earn a sustainable income off their land.
 - Community planning, to support communities to plan for their own future development.
 - Negotiation, to prepare communities to negotiate with investors or other outsiders seeking land.
 - Ecosystem regeneration, to ensure a thriving natural environment and promote sustainable land and natural resource use.

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Facilitating dispute resolution processes 1

- *A government can facilitate efforts to resolve disputes or grievances in many ways, including through establishing, supporting, or facilitating access to dispute resolution processes for affected individuals or communities.*
- What are dispute resolution processes? Procedures used to help resolve a grievance, dispute, or claim. Aside from courts and tribunals, non-judicial processes can also help. Four types particularly relevant for land grievances:
 - Non-judicial public institutions that can receive or investigate complaints, (Example: Cambodia's Cadastral Commission);
 - Government-supported mediation and facilitation between communities and companies;
 - Project-level grievance mechanisms, which are generally established by the investor, either voluntarily or in compliance with government requirements; and
 - External grievance mechanisms, such as those provided by multi-stakeholder initiatives or certification schemes or by development finance institutions.

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Facilitating dispute resolution processes 2

- What elements should be included in a DR process?
 - To ensure compatibility with human rights, dispute resolution processes should comply with the effectiveness criteria for non-judicial grievance mechanisms set out in the UN Guiding Principles on Business and Human Rights. This means that processes should be legitimate, accessible, predictable, equitable, and transparent.
 - They also should be rights-compatible. Outcomes and remedies should be aligned with human rights norms, and should evolve and improve over time.
 - Considerations regarding gender must also be factored into the design, as women and girls often face additional barriers in accessing dispute resolution processes.
 - Remedies awarded through such processes must also be appropriately tailored and proportionate to the specific concern. As with compensation, to be discussed later on, remedies should be determined in consultation with affected persons.
- What are the benefits of a dispute resolution process?
 - They can resolve grievances in a timely manner.
 - They can help ensure that past wrongs are remedied.
 - Resolving grievances quickly can help limit or mitigate public outrage, protest, or even violent conflict. In turn, this may reduce operational, financial, and reputational risks for the government and the investor.
 - They can satisfy governments' obligations to take steps to provide access to effective remedy for business-related human rights abuses.

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Facilitating dispute resolution processes 3

- Should a government require or encourage project-level grievance mechanisms, or facilitate the use of external mechanisms?
 - Project-level grievance mechanisms may use conciliation, negotiation, or more adjudicatory processes,
 - They often can resolve disputes in a more efficient manner than court processes while also removing from the government the operational burden of hearing complaints.
 - Governments should encourage investors to develop their own project-level grievance mechanisms to complement existing state-based dispute resolution processes.
 - In some circumstances, governments might consider requiring investors to establish them.
 - They should not, however, preclude individuals from accessing domestic courts or other forums for seeking redress.
- Other external accountability processes:
 - Grievance mechanisms provided by multi-stakeholder initiatives and certification schemes, like the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council
 - Complaints processes offered by development finance institutions, such as the International Finance Corporation (IFC).
 - When the investor is a member of, certified by, or has received funding from such entities, these external mechanisms will generally be an option for individuals or communities harmed by an investment. To help resolve grievances, a government can try to facilitate access to applicable mechanisms.
- Potential risks of establishing, requiring, or facilitating access to a dispute resolution process?
 - Poorly designed non-judicial dispute resolution processes might fall short of human rights norms. For example, a government-implemented grievance mechanism should meet the criteria articulated in the UN Guiding Principles on Business and Human Rights, discussed earlier, and in particular should not supplant or preclude access to judicial or other non-judicial mechanisms.
 - The dispute resolution process might not effectively resolve grievances, or might not be used by aggrieved persons. For example, a mechanism that excludes legitimate complainants or is hard to access may be ineffective. Those aggrieved may decide not to pursue a remedy through a dispute resolution process if the remedies offered are inadequate, or if engaging with the process precludes pursuit of claims in other legal forums.
 - Project-level grievance mechanisms, in particular, run the risk that the relevant investor may become unable or unwilling to maintain the requisite level of resources and engagement for the mechanism to operate effectively.
 - Efforts to establish, require, or facilitate access to a dispute resolution process are not likely to implicate an investment treaty obligation, but some situations might raise risks.

- Example: if requiring an investor to establish a grievance mechanism is contrary to an already existing commitment given by the government, this requirement could be considered problematic.
- Example: if a public institution were to impose a solution to address land grievances that was contrary to the investor's protected interests, a government might confront tensions in seeking to implement that solution while also meeting its obligations under an applicable investment treaty.
- If a government's efforts to facilitate access to existing grievance mechanisms are seen as encouraging opposition to the project or frustrating the investment's operations, an investor might also argue that the government's actions violated its obligations under the fair and equitable treatment standard, full protection and security obligation, or other treaty commitment.

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Restituting property to displaced individuals or communities 1

- *When grievances relate to the loss of land or property, restitution to those who lost their land may be one of the most effective remedies that a government can employ.*
- What is restitution?
 - A measure to restore, for a wronged person, the situation that existed before the wrongful act was carried out. While restitution can include a range of actions, our discussion will focus on restitution as the return of land or property to displaced individuals and communities.
- When is restitution appropriate?
 - Restitution is the most appropriate remedy for property- or land-related violations of human rights, to which other remedies like compensation are secondary alternatives.⁴ This is because the negative impacts of being displaced are often very severe.
 - Accordingly, when rights violations are involved, a government should assess whether restitution is possible before considering alternatives like compensation.
 - Restitution is particularly important when indigenous peoples' land has been taken without their free, prior, and informed consent.⁵
 - Restitution may also be appropriate if an investment concludes (or fails) and the land is left in an inhabitable condition.
 - Note that there may be multiple community claims to the same plot of land, which require careful mediation.
- Restitution is not always possible.

⁴ *Factory at Chorzów*, Merits, 1928 P.C.I.J (ser. A) No. 17, at 48; U.N. Principles on Housing and Property Restitution for Refugees and Displaced Persons, Principle 2.2.

⁵ The U.N. Declaration on the Rights of Indigenous Peoples emphasizes that dispossessed indigenous peoples should be granted "the option of return," and that restitution should be provided for indigenous "cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." See U.N.G.A Res. 61/295, Declaration on the Rights of Indigenous Peoples, arts. 10 and 11(2) (Oct. 2, 2007).

- Land may have been destroyed or rendered uninhabitable by the investment.
- It will likely not be possible if the land was expropriated for a public purpose. Note: whether the taking of land to facilitate a private investment can constitute a public purpose will depend on national laws and the contextual situation.
- Where restitution cannot entirely remedy the wrong, compensation should be used as an additional or alternative remedy.

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Restituting property to displaced individuals or communities 2

- What are the potential risks of restitution as a remedy?
 - Risks of restituting land that has already been allocated to an investor. An investor, for example, might argue that the government's decision to grant restitution contravenes investor protections under a treaty by:
 - Constituting an *expropriation* of the investment;
 - Breaching the investor's right to *fair and equitable treatment* by violating a legitimate expectation that it would have unrestricted and continuing access to the land; or
 - Impacting more on that investor than on other businesses and therefore constituting *discrimination*.
- A government seeking to take land from an investor and return it to displaced individuals or communities should first determine whether the investor in fact has valid rights to the land. If so, the government should follow requirements set by domestic and international law regarding expropriation of property.

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Compensating affected individuals or communities 1

- *Providing compensation is one way in which a government, as well as investors, may seek to alleviate land grievances.*
- What is "compensation"?
 - In this context, it means the payment of money and/or the allocation of land or other goods and services as a means of acknowledging and remedying a harm, such as displacement.
- What are the limitations of compensation as a remedy?
 - Compensation is unlikely to provide a comprehensive remedy for certain grievances, such as those arising from forced evictions and accompanying human rights violations.
 - It will almost always fall short for resettled communities because of the many economic, social, cultural, and other networks that are broken when a community is forced off its land. The destruction of these networks can impoverish those resettled in ways that extend beyond simply losing a real property asset.
 - For this reason, a government seeking to redress grievances stemming from forced evictions and resettlement should first consider whether restitution of the taken land is possible, as discussed earlier.
- When is compensation appropriate?

- Compensation might be offered to amend for negative environmental impacts causing harm to communities, or for unwarranted detentions of individuals protesting an investment.
- When compensation is provided to address violations of human rights, its provision will not necessarily absolve a government of its legal obligations, but may form an important part of the remedy for such violations.
- Compensation is commonly considered as a strategy for addressing displacement (both voluntary and involuntary) from land, and related grievances, where restitution is not possible.
- Even when restitution occurs, compensation may also be necessary to address other losses suffered by those forcibly resettled.
- When grievances concern an investment's future effects, and those concerned remain living on their land, compensation should not be viewed as a means of "paying a penalty" for future human rights violations, such as those linked to forced evictions. However, providing adequate compensation can be an appropriate remedy when the taking of land is deemed to be for a public purpose. In such cases, compensation provided as part of a resettlement action plan may be a precondition for the legality of the expropriation.

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Compensating affected individuals or communities 2

- Who should be compensated?
 - A government should compensate all individuals or communities with legitimate rights to the land in question, regardless of whether they have formal legal documentation.
- Should compensation be in kind or financial?
 - The governing rule is that compensation should be determined in consultation with those receiving it.
 - When displacement from land has occurred, in-kind compensation—in the form of replacement property, public services, and infrastructure—should generally be the primary form of compensation allocated.
 - In-kind compensation is preferable to cash compensation, which transfers the risks associated with acquiring replacement land, housing, and infrastructure onto the individuals or communities being resettled.
 - Additional arrangements that can be included in a "compensation package" to communities include state-funded pensions, increased access to health care, and community development programs.

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Compensating affected individuals or communities 3

- How to determine compensation: (i) consultation
 - A government should consult with the affected individuals or community when determining the form and amount of compensation.
 - Doing so will help incorporate the perspective of those who have been wronged, which has many advantages.

- Incorporating the perspective of those who have been wronged can help tailor the remedy to their needs.
 - It may also help to avoid future community grievances, conflict, or litigation.
- Consultation processes should ensure opportunities for women and other non-dominant groups within a community to provide input. Gender-sensitive consultative strategies include researching the times and locations that suit women's availability, anonymous voting on proposals to facilitate participation free of influence, and expressly requiring women to be included in meetings of community leaders.
- How to determine compensation: (ii) calculation of quantum
 - Where land cannot be returned, individuals who have lost land should be compensated with land commensurate in quality, size, and value, or better. Such land should be accompanied by security of tenure, as well as adequate housing and access to necessary services.
 - The Basic Principles and Guidelines on Development-Based Evictions and Displacement recommend that, at a minimum, a government must provide displaced individuals with "safe and secure access to:
 - (a) essential food, potable water and sanitation;
 - (b) basic shelter and housing;
 - (c) appropriate clothing;
 - (d) essential medical services;
 - (e) livelihood sources;
 - (f) fodder for livestock and access to common property resources previously depended upon; and
 - (g) education for children and childcare facilities." (para 52)
 - When providing compensation, a government should seek to place those wronged in a position that is as favorable as, or better than, the position they were in before the land was taken.
 - Compensating for market value of land generally is not enough. A government should also look at improvements, and any lost personal property, economic analyses of land-derived income, and the cultural, economic, and other benefits provided by the land. Many domestic laws regarding compensation for resettlement fall short of this standard.

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Compensating affected individuals or communities 4

- Who pays?
 - Compensation for displacement is usually the government's responsibility. Under international law, the government is the primary bearer of human rights obligations, while many domestic laws also place the responsibility to compensate on the government.
 - In practice, however, governments may shift the burden of compensation onto investors, for instance, as part of the costs of land leases. When finance-related standards, such as the IFC Performance Standards on Environmental and Social Sustainability or the Equator

Principles, apply to an investment, investors may also have to supplement compensation amounts to ensure that those international standards are met.

- The need for grievance mechanisms, monitoring, and evaluation
 - Compensation must be monitored and evaluated to track its impact, as well as to ensure it is granted in its entirety in a timely manner. This can be done by independent state institutions, such as human rights commissions or land boards.
 - Government decisions regarding compensation should also be subject to judicial review, ensuring that decisions are reasonable and accountable. For communities lacking easy access to judicial institutions, other government- or investor-operated grievance mechanisms whose procedures are tailored to community contexts may also be needed.
- What are the potential risks of providing compensation for displacement from land?
 - Property or resources lost through displacement may be undervalued, resulting in inadequate compensation for those displaced.
 - Without obtaining FPIC, a government seeking to “resettle and compensate” may violate its legal obligations under international human rights law, which could result in findings of legal liability for violations of international human rights law.
 - Inadequate compensation, or a “resettle and compensate” approach can also inflame community discontent, leading to demonstrations or conflict. In turn, this could pose reputational risks for governments to the extent that conflicts create the impression of an unstable business environment.
 - Because compensation is generally incapable of fully replenishing what a community loses when it is transplanted, a displaced community is likely to become impoverished. This can lead to lower socioeconomic indicators and greater demand for public services and development programs.

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Renegotiating with the investor 1

- *Grievances arising from existing land-based investments may, in certain cases, arise from the legal terms of the investor-state contract or the scope of the investor’s rights and obligations under that contract. In such cases, renegotiation of the investor-state contract to alter those rights or obligations may help address the grievances.*
- Renegotiation is not uncommon for long-term contracts.
- In some cases, the contract will specify circumstances in which renegotiation is mandatory. Absent such language, renegotiation requests may not be met with the desired response, particularly if the investor is reluctant to give up what it sees as validly secured legal rights.

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Renegotiating with the investor 2

- When might an investor be willing to renegotiate?

- Efforts to understand the investor's strategy and culture can be helpful for assessing whether it might agree to a renegotiation request.
 - An investor with other interests in the country may be more willing to renegotiate and less likely to seek arbitration, as it has some incentive to maintain its relationship with the government.
 - An investor also might be more amenable to renegotiation if there has been public pressure around the investment, and credible documentation of issues related to it.
 - Conversely, an investor with significant home country support may be less interested in renegotiating, relying instead on such support to pressure the host government to revoke its request.
 - An investor that has access to investor-state arbitration under an investment treaty might have less incentive to renegotiate.
- What potential risks arise from this option?
 - If a government seeks to renegotiate the investor-state contract, and the investor does not wish to cooperate, a government might try to exercise political pressure and take or threaten sovereign action (such as a change in the law to accomplish what the renegotiation had aimed to achieve).
 - Investment arbitration tribunals have held governments liable under international investment treaties for using government powers to compel investors to give up their *contractual rights*.
 - To the extent possible, a government seeking to renegotiate should try to do so using only the weight that a normal contracting party would use.

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Terminating an investor-state contract 1

- *The terms of the contract and domestic law will typically specify the grounds on which parties may or must terminate the contract and the remedies, if any, for taking such action. One important consideration for a government considering contract termination is whether international investment treaties affect its exposure to claims and liabilities.*
- What are the benefits of contract termination?
 - Termination allows a government to exit a controversial arrangement tainted by fraud or corruption, or to put an end to an unproductive relationship in which the investor fails to fulfill its obligations.
- Even if not entitled to terminate the contract, a government may nevertheless determine that maintaining the deal is not in its best interests and seek to terminate the deal, paying compensation as required by applicable law.
- What are the potential risks related to contract termination?
 - Termination may be politically undesirable
 - For example, it may be opposed by the investor, government officials and entities in support of the project, project employees, individuals and entities that generate revenue based on supplying goods or services to the investor, and individuals and entities that depend on inputs produced by the investor.
 - Some of these stakeholders may bring legal action against the government regarding the decision.

- If the investor is a foreign investor:
 - The investor's home government may use diplomatic channels to question or seek reversal of the decision to terminate.
 - If there is an international investment treaty in place that covers the investor, the investor may also seek to bring an investor-state arbitration claim to challenge the termination.

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Terminating an investor-state contract 2

- Assessing whether contract termination exposes the government to claims and liability under international investment treaties:
 - One key consideration: was the contract terminated using powers and authority available to a normal contracting party (as opposed to a government entity)?
 - A government's breach of an investor-state contract will not usually constitute a breach of international law if the government was acting as any normal contracting party.
 - If, however, the government terminated the contract through an exercise of sovereign powers (for example, by passing a decree or law, or issuing a judicial decision, declaring the contract void), then that exercise of sovereign powers could potentially give rise to an international law violation under the FET obligation or obligation to provide adequate compensation for an expropriation.
 - A second key consideration: does the applicable treaty contain an "umbrella clause"?
 - The majority view among arbitrators is that the umbrella clause allows covered foreign investors to bring claims against host governments for contract violations (including unlawful termination) even when the government has not exercised any sovereign powers.
- When should a government consider taking this option?
 - In some cases, grievances may be so severe, as well as difficult to remedy while the investment continues, that cancellation of the investor-state contract appears to be the best option.
 - The government should consider:
 - What is justified under the circumstances, and
 - What is permitted under the contract and the law governing its interpretation (though the government may be required to provide a remedy to the investor even where termination is justified).
 - A government might also exercise its sovereign authority to terminate an investor-state contract.
 - Example: A court may rule that a contract is void under domestic law. Such decisions, however, are not immune from arbitration claims.

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Revoking or terminating authorizations necessary for investor operations 1

- What are the benefits of revoking authorizations?

- Revoking authorizations may help address the relevant grievance.
- If done in accordance with applicable substantive and procedural requirements, it helps to affirm the rule of law and the government's commitment to hold investors to their legal obligations.
- In case of fraud or other harms, a subsequent reissuance to another investor may produce a more positive outcome.
- What are the potential negative consequences?
 - May prompt negative political and legal reactions at the domestic level by those who would be negatively affected by the revocation. For example, the investor may contest the action through legal and/or political avenues; those who rely on the operation of the investment project for employment, sales revenue, or supply of inputs, may protest any decision that stops or halts operations.
 - The government may face diplomatic pressure, as well as investor-state arbitration claims challenging the permit revocation. The investor might, for example, argue that the revocation violated various obligations or prohibitions under the treaty.

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Revoking or terminating authorizations necessary for investor operations 2

- When is revoking an authorization an appropriate option?
 - Most appropriate when:
 - Revocation is dictated by domestic law;
 - Revocation is required in order to fulfill the government's obligations under international human rights law; or
 - Revocation is necessary to address the grievances (or the circumstances giving rise to them), and allowed under the domestic legal framework.
 - Even when the appropriate course of action under domestic law or international human rights law is relatively clear, it will be difficult to know in advance whether that action will trigger an investment treaty claim and liability.
- What arguments might an investor make if a permit is revoked?
 - Non-discrimination obligations: for example, if the activities of other domestic or foreign permit-holders also gave rise to grievances or were not conducted in strict compliance with the law, but those permit holders were nevertheless allowed to continue operating, the investor whose permit was revoked might argue that the revocation decision violated the investment treaty's national treatment or most-favored nation obligations.
 - Fair and equitable treatment obligation: for example, if the permit was terminated without due process, the investor might argue that this breached the FET obligation. Or if the investor's obligations under the permit had been interpreted and applied in a particular way and then, due to a change in administrative policy or judicial doctrine, were subsequently interpreted to impose more stringent requirements on the investor, the investor might argue that the shift violated its "legitimate expectations".

- Prohibition on uncompensated expropriations: for example, the investor may argue that revocation of the permit destroyed the value of its investment in the country, constituting an indirect expropriation.
- Umbrella clause: for example, the investor may argue that the decision to revoke the permit violated the government's obligations to the investor under the umbrella clause, thereby asking the tribunal to rule on the scope of the government's and investor's respective rights and obligations with respect to termination.

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General options

- When governments become aware of potential land grievances that may arise in the future, they may be interested in exploring ways to improve their overarching approach to addressing such grievances or to minimize their general liability under investment treaties.
- General options
 - Developing a national policy strategy for legal and policy reform
 - Adopting changes in the law
 - Requesting an advisory opinion from a human rights tribunal or body
 - Interpreting investment treaties
 - Declining to conclude new treaties, and terminating or not renewing existing treaties

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National policy strategies

- *Land grievances will often center on issues that require comprehensive solutions, such as through law or policy reform. A government may undertake a national policy strategy process to determine how laws and policies can better protect against the negative impacts of investors or other business operations.*
- One process that a government can pursue is to develop a national action plan on business and human rights (NAP), which will help the government to determine what reforms are needed. A NAP:
 - Is a national policy strategy developed by a government that sets out how it will protect against adverse human rights impacts by business enterprises.
 - Is not a law, but rather a process by which the government determines the laws or policies needed to ensure that it is comprehensively preventing, mitigating, and remedying adverse impacts of business on human rights.
 - Can include a national baseline assessment ("NBA"), which is a means of taking stock of existing laws and policies that currently address the human rights impacts of business operations.
- What legal or practical force do national policy strategies have?
 - Usually no legal force. They are intended to guide the government's strategy regarding legal and policy reform.
 - They may catalyze legal and policy reform. Can also improve coordination amongst different government departments, which can enhance the government's ability to regulate investments.

- A national policy strategy process may also affect an investor's "legitimate expectations" regarding how its investment might be affected by human rights issues. This could provide useful context for an investment arbitration tribunal if an investor brought a dispute tied to the impacts of such reform – it could help the government to illustrate its reforms were reasonable, legitimate, and considered.
- What are the potential risks of developing a national policy strategy?
 - If the process leads to changes to the law, a negatively affected investor may seek to argue that the changes breach various governmental obligations under an investment treaty.
 - However, the process of undertaking a national policy strategy does not, in itself, raise these risks.

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Adopting changes in the law

- *Where grievances are caused by a gap in the domestic legal framework, (or a failure to enforce it), or by laws which may create or exacerbate grievances, changes to the legal framework may be appropriate or necessary.*
- The establishment of a robust and equitable legal framework capable of equitably governing rights over and use of land is an ongoing process.
 - It involves various constituents and institutions that refine, amend, modify, and even repeal standards and rules over time.
 - While there are some limits on that flexibility (for example, constitutional and international restraints), significant latitude remains for governments to adopt and change their laws, including to address grievances arising from land-based investments.
- When should a government consider taking this option?
 - Where a need for reform is clear based on the grievances that have arisen from land-based investments. Especially when a law causes or augments the grievances.
 - Where a national policy process (such as a NAP) reveals a need for reform.
 - Where an opinion from a human rights tribunal reveals that a country's domestic laws are incompatible with its human rights commitments.
 - Following the establishment of new international instruments, standards, or best practices concerning investments.
- What are the potential risks of adopting this option?
 - Changes to the law may prompt political opposition and legal challenges, for example, from those who may be negatively affected by the changes.
 - Changes to the law may be challenged by an investor as violating a stabilization provision (or as not applying due to such a provision) in the investor-state contract.
 - Even if a domestic court might deem the stabilization clause invalid, an investment arbitration tribunal interpreting a contract with such a clause may adopt a different view, enforcing it under the umbrella clause and/or fair and equitable treatment obligation.
 - Changes to the law may be challenged by an investor as violating investor protections under an international investment treaty.

- For example, an investor might argue that such changes breach the fair and equitable treatment obligation by violating a legitimate expectation that relevant laws and policies would not change, constitute discrimination by affecting the investor more than other businesses, or amount to an expropriation of the investment.

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Requesting an advisory opinion from a human rights tribunal or body 1

- *Seeking an advisory opinion from a human rights tribunal can provide greater clarity on how a government can manage a potential conflict between its human rights duties and its obligations under international investment law.*
- What is an advisory opinion?
 - Advisory opinions are interpretations of specific legal questions. They do not require an existing dispute, and can consider hypothetical questions.
 - Government (and other bodies) can request advisory opinions from regional human rights courts.
- What legal force do advisory opinions have?
 - Persuasive, not binding.
- What practical force could an advisory opinion have?
 - Provides greater clarity on governmental legal obligations.
 - Would not shield the government from liability under international investment law, but may give pause to investors contemplating a claim to an investment arbitration tribunal
 - Particularly if the government publicly acknowledges the advisory opinion and transparently sets out to comply with it.
 - May create doubts as to an investor's chances of success, lower its expectations regarding the amount of compensation it might receive if successful, or raise its reputational risks if it were to proceed.
- What questions can be the subject of an advisory opinion?
 - Inter-American Court of Human Rights
 - Questions regarding the compatibility of its own domestic laws with the American Convention on Human Rights or with other treaties concerning the protection of human rights in the American states.
 - Example: A government could ask the Court whether implementing a proposed law to comply with an investment treaty or investor-state contract is compatible with its human rights obligations.
 - The Court can exercise its discretion not to offer an advisory opinion.
 - A state can also request "advisory services" from the Inter-American Commission on Human Rights. Such advice is often initially communicated privately to the state, but can be made public.
 - African Court on Human and Peoples' Rights
 - Eligible government can seek an advisory opinion "on any legal matter relating to the Charter or any other relevant human

rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the [African] Commission [on Human and Peoples' Rights]."

- Likely broader than the Inter-American Court's jurisdiction. "Any legal matter" likely includes conflicts between the Charter and international investment treaties/ investor-state contracts/ government policies/ executive action relating to an investment.
- The Court's advisory jurisdiction is relatively untested, and it is therefore difficult to predict the likelihood of its granting a request for an advisory opinion.
- Members of the African Union may be able to request an advisory opinion from the African Commission on Human and Peoples' Rights as well, although this has not yet been attempted.

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Requesting an advisory opinion from a human rights tribunal or body 2

- What options exist for countries without regional courts?
 - Universal Periodic Review (UPR)
 - UN member states can seek support or advice from other member states using the Human Rights Council's Universal Periodic Review (UPR) process, through which Council members evaluate the government's human rights performance and offer recommendations.
 - During the UPR, the government will submit a national report, which can include a request for assistance, including on resolving human rights problems.
 - Any recommendations received in response would not be legally binding, and likely would not be accompanied by extensive analysis. Yet they potentially could strengthen the perceived legitimacy of government efforts to protect human rights in such contexts or provide new ideas for ways to address land grievances.
 - Encouraging domestic litigation
 - Governments can obtain further clarity on the human rights impacts of granting specific concessions by encouraging, facilitating, or simply not challenging domestic court claims brought against the government by individuals alleging human rights violations.
 - This may not always be politically desirable, as litigation can create reputational and legal risks.
 - May be suitable, for example, where a newly elected government inherits grievances based on policies or administrative decisions made by the former administration with which it also has concerns.
- What are the potential risks of seeking an advisory opinion or other recommendation?
 - Advisory opinions are not the final resolution of specific conflicts.

- There is no certainty that a request for an advisory opinion will be granted.
- Advisory opinions generally take years, rather than months, to be produced.
- An advisory opinion may not dissuade an investor from initiating an investor-state arbitration. Especially for investors that are not concerned with their international reputation.
- If an investor does proceed with a claim, the investment arbitration tribunal may not place much weight on the advisory opinion. They are generally not bound to follow a human rights court's advisory opinion.

Slide 50

Interpreting investment treaties 1

- *A host government that foresees potential conflicts with investors regarding efforts to address land grievances may wish to assess how its investment treaty obligations would be interpreted in any future disputes brought before an investment arbitration tribunal.*
- A host government cannot unilaterally change these obligations (except by pulling out of a treaty altogether), but it can take steps to assist future tribunals in interpreting such obligations.
- Two important mechanisms available to governments to help influence tribunal interpretations are through establishing “subsequent agreement” and “subsequent practice” on the meaning of its treaties.
- What is meant by “subsequent agreement” and “subsequent practice”?
 - Tribunals interpreting an international investment treaty must take into account:
 - Any subsequent agreement by the parties to the treaty regarding its meaning, and
 - Any subsequent government practices in interpreting and applying the treaty that establish a shared understanding of that instrument.
 - “Subsequent agreement”:
 - If the parties to the treaty expressly agree on an interpretation of a vague provision (through a diplomatic note or joint statement), that agreed interpretation must be considered by investment arbitration tribunals.
 - Example: in 2001 the parties to the North American Free Trade Agreement issued a joint interpretation to clarify the meaning of NAFTA's fair and equitable treatment obligation.
 - “Subsequent practice”:
 - after an international investment treaty has come into force, if the officials of both state parties to the treaty make statements or take actions reflecting a certain shared understanding of the agreement, that shared understanding must be considered by investment arbitration tribunals. Subsequent practice includes:
 - externally oriented conduct -- official acts, statements and voting at the international level,
 - internal legislative, executive and judicial acts
 - certain “practices by non-state entities.”

- The value of a subsequent act depends on the extent to which it establishes “common understanding of the parties as to the meaning of the [treaty’s] terms.”
- What legal force do “subsequent agreement” and “subsequent practice” have?
 - Subsequent agreements and subsequent practice can help add clarity to vaguely worded clauses, but are generally not presumed to amend or modify the treaty.
 - They are not necessarily conclusive/ binding on issues of interpretation. Generally, tribunals are not bound by them, but must take subsequent agreement and practice into account along with other means of treaty interpretation. Some international investment treaties, however, specify that subsequent agreements by the treaty parties are expressly binding on investment arbitration tribunals.
 - Even when there is no joint agreement on an issue of interpretation, *unilateral statements and conduct* by government officials clarifying and elaborating on the government’s understanding of its treaty provisions may still be relevant for shaping interpretation of those treaties.

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Interpreting investment treaties 2

- How would this option help?
 - Clarifies vaguely worded provisions, which are otherwise vulnerable to broad interpretations by tribunals. Such broad interpretations might not have been intended by parties, and might create greater risks of liability for good faith actions taken by a government to address land grievances.
 - Can be used to provide needed clarification on issues such as the non-discrimination obligation, the meaning of the fair and equitable treatment obligation, the scope of the umbrella clause, and, more generally, the relationship between international human rights law and international investment law.
- When is this an appropriate option?
 - When ambiguity in international investment treaty provisions leaves a government exposed to potentially significant litigation and liability, the government should consider clarifying the meaning of such provisions by establishing subsequent agreement and subsequent practice.
- How do governments create “subsequent agreement” and “subsequent practice”?
 - Alone and with other countries, a government can:
 - Unilaterally communicate its understanding of vague or uncertain treaty provisions to the public, or posting interpretative statements on a website;
 - Monitor statements and practice of other parties to its treaties to identify areas of agreement and disagreement; and
 - Cooperate with other states to establish and issue joint statements clarifying ambiguous language.
 - In disputes, a government can:

- Remain informed on the interpretation and application of its treaties;
- Make its submissions, which constitute state practice, public;
- Participate as a non-disputing state party in disputes arising under its treaties; and
- Make clear when it disagrees with interpretations given by tribunals.
- In addition, in its future treaties, a government can insert provisions:
 - Ensuring that joint interpretations on some or all issues are binding on tribunals;
 - Encouraging (or requiring) state parties to consult and cooperate to resolve ambiguities on questions of interpretation and/or application; and
 - Requiring that the home state or other non-disputing state parties (1) are notified of claims filed under their treaties, (2) receive documents submitted to and issued by tribunals, and (3) can make submissions to tribunals on issues of treaty interpretation.
- Note that tribunals tend to discount the weight of governments' statements regarding their understanding of treaty provisions when made in the context of disputes. Where possible, a government should seek to clarify ambiguities before claims arise.

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Declining to conclude new treaties, and terminating or not renewing existing treaties

- *International investment treaties can constrain a government's ability to address land grievances through actions that affect the rights or expectations of foreign investors without fear of incurring potentially significant litigation costs and liabilities. A government may thus wish to consider whether the costs of such treaties outweigh their benefits and, if so, to seek to minimize or avoid those costs.*
- What are the limitations of this option?
 - Declining to conclude / terminating / declining to renew investment treaties will not necessarily eliminate the costs of these treaties.
 - Not concluding new international investment treaties:
 - Government will still be vulnerable to claims and liability under existing ones. Given the ability of investors to structure their investments in order to gain protection of investment treaties, this limitation is greater than it may first appear.
 - Termination:
 - International investment treaties typically have survival clauses stating that, if a government decides to terminate the agreement, the treaty (and its investor-state arbitration provisions) will remain in force for a set period, which may range from 10 to 20 years. So, a terminating government will still be subject to claims and potential liability for a significant length of time.

- However, a government can agree with the other state party to first amend the treaty to remove the survival clause, and then terminate the treaty.
- What are the potential consequences or risks relating to this option?
 - Strategies toward existing and future international investment treaties have encountered some resistance from home countries
 - Note that some governments have expressed concerns that not having treaties with investor-state arbitration provisions will (1) increase likelihood that an investor's home state will use diplomatic pressure to press for resolution of disputes in favor of their investors, and/or (2) harm (or not help) ability to attract foreign investment.
 - However, (1) home states may use diplomatic pressure even where investor-state protections do exist, and (2) data is inconclusive on whether international investment treaties actually influence investors' decisions on whether and where to invest.
 - Example: foreign direct investment in South Africa and Indonesia rose in the year following those countries' respective announcements that they were terminating existing bilateral investment treaties.
- When is this an appropriate option?
 - It is always useful for governments to analyze whether the costs of existing or future international investment treaties outweigh their benefits.
 - A government that is concerned about the implications of its international investment treaties for its ability to effectively address land grievances could consider the economic and political benefits and costs of existing treaties and their potential termination.

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Conclusion

- Addressing grievances is important. Good reasons to do so – accountability and responsiveness, reduction of risks associated with community conflict, etc.
- Governments face a complex web of legal obligations, which can constrain options for responding to grievances.
 - Such risks are not reason to preclude democratic responsiveness or good faith actions designed to comply with human rights obligations.
 - Rather, analyzing its legal obligations is simply a useful first step for a government seeking to protect its citizens against the negative impacts of land-based investments.
- Options may carry risks, but the risk of doing nothing may be greater—for all stakeholders.

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Final slide

Exercise: Options for resolving land grievances

Instructions

Three brief scenarios are provided below. Participants are to (i) carry out a brief assessment of the government's relevant obligations under international law, domestic law, and any investor-state contract, as well as potential legal issues or liabilities arising in the scenario; and (ii) identify potentially relevant options available to a government seeking to appropriately respond to the grievance, and explain why such options are appropriate or why they might raise certain risks.

The responses provided in this trainer's guide discuss potentially available options for governments that have already signed a concession agreement with an investor, and that subsequently seek to ensure that grievances of affected community members are adequately addressed, ideally in compliance with the government's complex set of international, domestic, and contractual obligations. The listing of different options should not be taken as legal advice: each option carries its own set of legal risks and governments should seek legal advice before adopting any of the measures listed below. The responses also are not comprehensive, but are provided to help guide the trainer's facilitation of the discussion.

Suggested time: 30 minutes for participants to review the questions in small groups. 30 minutes for the instructor to lead an interactive discussion of the responses with all participants.

Scenario One

A host government recently granted a concession for a 15,000-hectare sugar plantation to an investor via an investor-state contract. The investor is incorporated domestically, but its parent company has headquarters in another country that has entered into a bilateral investment treaty with the host government. The contract was concluded despite the concession area being larger than the maximum size allowed by law, and allegations that the investor might not have followed certain procedures regarding public consultation and impact assessments that are established in regulations as prerequisites for the granting of such concessions. Since conclusion of the contract (which includes a stabilization provision), the investor also has not yet obtained all of the necessary approvals required by the country's Land Act and its Environmental Management Act. However, the investor has begun the process of surveying the land within the concession area and has announced plans to commence land clearing within the next few months.

Members of a community living on land coming within the concession boundaries have raised concerns about the impact the concession would have, as they would likely be forced off the land to make room for the investor's operations. Multiple community members have spoken publicly, in meetings and protests, about their worries that they will lose their access to farmland and other resources that they rely on for their food security; some members have also voiced concerns that they will be evicted from their homes, or will no longer be able to

access their primary water sources, which are situated within the concession area. They also assert that these potential impacts would have been revealed if public consultations had occurred. The government now seeks to resolve the community's grievances.

Scenario Two

Ten years ago, in compliance with domestic law, the government entered into an investor-state contract with a foreign investor for a 20,000-acre rubber plantation. There is no operative investment treaty between the host government and the investor's home government. Nearby communities are now claiming that runoff from the plantation has polluted local water sources, rendering their water unfit for drinking or farming, and that they have no other options for accessing alternative supplies of adequate water. Representatives of the communities have explained these problems to local leaders, and have asserted that so far the investor has been unwilling to listen to their concerns. The investor appears to be in compliance with all domestic laws and contractual obligations, and the contract does not mention water issues. The government now seeks to respond to the communities' concerns.

Scenario Three

The government has granted a concession to an investor for the purposes of growing *jatropha curcas*, which will be used to generate biofuels. The granting of the concession was done in compliance with domestic laws, and the investor is covered by the investor protections contained in an applicable investment treaty. After the concession was granted, a report by a credible investigative journalist revealed that, last year in a neighboring country, the investor cleared and planted on land outside agreed concession areas, and engaged private security contractors who violently assaulted community members found trespassing on the investor's land. The report has generated significant concern among communities close to the concession area. The government had been unaware of such allegations, and now seeks to respond to the communities' concerns about the investor's poor track record during previous projects.

Exercise: Options for resolving land grievances

Trainer's Guide

Instructions

Three brief scenarios are provided below. Participants are to (i) carry out a brief assessment of the government's relevant obligations under international law, domestic law, and any investor-state contract, as well as potential legal issues or liabilities arising in the scenario; and (ii) identify potentially relevant options available to a government seeking to appropriately respond to the grievance, and explain why such options are appropriate or why they might raise certain risks.

The responses provided in this trainer's guide discuss potentially available options for governments that have already signed a concession agreement with an investor, and that subsequently seek to ensure that grievances of affected community members are adequately addressed, ideally in compliance with the government's complex set of international, domestic, and contractual obligations. The listing of different options should not be taken as legal advice: each option carries its own set of legal risks and governments should seek legal advice before adopting any of the measures listed below. The responses also are not comprehensive, but are provided to help guide the trainer's facilitation of the discussion.

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A host government recently granted a concession for a 15,000-hectare sugar plantation to an investor via an investor-state contract. The investor is incorporated domestically, but its parent company has headquarters in another country that has entered into a bilateral investment treaty with the host government. The contract was concluded despite the concession area being larger than the maximum size allowed by law, and allegations that the investor might not have followed certain procedures regarding public consultation and impact assessments that are established in regulations as prerequisites for the granting of such concessions. Since conclusion of the contract (which includes a stabilization provision), the investor also has not yet obtained all of the necessary approvals required by the country's Land Act and its Environmental Management Act. However, the investor has begun the process of surveying the land within the concession area and has announced plans to commence land clearing within the next few months.

Members of a community living on land coming within the concession boundaries have raised concerns about the impact the concession would have, as they would likely be forced off the

land to make room for the investor's operations. Multiple community members have spoken publicly, in meetings and protests, about their worries that they will lose their access to farmland and other resources that they rely on for their food security; some members have also voiced concerns that they will be evicted from their homes, or will no longer be able to access their primary water sources, which are situated within the concession area. They also assert that these potential impacts would have been revealed if public consultations had occurred. The government now seeks to resolve the community's grievances.

Note: This scenario includes grievances related to the government's decision-making process and the potential impacts of a land-based investment; it also raises questions about what the investor has acquired and what protections it may have.

Suggested response:

Legal assessment:

This can include reviewing the government's obligations under domestic law, any investor-state contract, international investment law, and international human rights law, and identifying any tensions or inconsistencies that may exist between these different types of obligations, and determining if they were complied with. This can also include reviewing the investor's obligations, rights, and protections.

Note that the below explanations are provided for illustrative purposes to facilitate the discussion. More information would be needed for robust assessments, and the descriptions below are not the only legal obligations that might be implicated, nor the only claims that an investor, community, or other affected stakeholder might make.

- *Domestic law:* the investor's possible failure to follow all required procedures, and the fact that the size of the concession exceeds the maximum size allowed by law, might mean that the government's granting of the concession was invalid under domestic law. In addition, and setting aside the possibility that the concession might be invalid, the investor's failure to obtain all necessary approvals since conclusion of the investor-state contract means that it has not yet satisfied applicable extra-contractual legal requirements. While the scenario does not explain why the investor has not obtained all necessary approvals, or whether the contract included assurances that all necessary authorizations would be provided to the investor, the investor should not commence operations without requisite approvals.
- *International investment law:* given that the contract might be invalid and the investor has not yet received all requisite approvals, there may be questions about what rights the investor has actually obtained that would be protected under the bilateral investment treaty. However, depending on the obligations contained within the treaty, certain approaches by the host government to address grievances could give rise to claims by the investor regarding breach of treaty obligations. For example, if the treaty contains a fair and equitable treatment obligation, the investor might attempt to rely on the initial granting of the concession as the basis for a "legitimate expectation" that the investment would be allowed to proceed, and may thus seek to bring a claim to an investment arbitration tribunal if the host government takes actions that negatively affect the investor's planned operations. Or if a court determines that the investor-state contract was invalid, the investor might argue that this constitutes an illegal expropriation, a violation of the fair and equitable treatment obligation, or a violation of the umbrella clause. If, additionally, the government seeks to adopt a regulation requiring that community members be granted rights of transit across the concession in order to access their water sources, the investor might argue that this constitutes an expropriation, or violates the non-discrimination obligations to the extent that the government has not enacted similar regulations requiring other investors to also provide such rights of transit.

- *Human rights law*: the government's human rights obligations require it to respect, protect, and fulfill the rights to food, water, and housing. If the community is indigenous, community members also have a right to free, prior, and informed consent. Allowing the investment to proceed as described in the scenario could imperil those human rights. For example, if the concession interfered with existing access to productive resources used for food production, that could constitute a violation of the government's obligation to respect and protect the right to food. Similarly, allowing the cutting off of access to water sources without alternative supplies would likely be a violation of the government's obligation to protect and respect the right to water, while evictions could constitute a violation of the right to adequate housing, and would contravene the general prohibition against forced evictions.
- *The investor-state contract*: as noted above, the contract might not be valid under domestic law. In addition, the scenario indicates that the contract was not the only authorization the investor requires to commence operations, as there are additional approvals required by law. The contract does include a stabilization clause, which means that, if the contract is deemed valid under domestic law, then any changes to the law might not apply to the underlying project, or the government might have to compensate the investor for the costs of complying with those changes. Even if the contract is deemed invalid under domestic law, an investment arbitration tribunal asked to interpret the contract may adopt a different view, holding the government to the contractual promises and enforcing them under the umbrella clause and/or fair and equitable treatment obligation. In an arbitration, an investor might also argue, for example, that the issuance of the contract grants it rights that the government is now "estopped" from arguing are invalid.

Potential options:

- a. *Shaping or reshaping concession boundaries* – assuming the investor will obtain all requisite approvals and that the investment will move forward, the government might seek to redefine the boundaries of the concession area to avoid or minimize any adverse impacts on community members. Doing so without the investor's consent in a way that affects the investor's valid contractual rights could expose the government to liability under international investment law or under the contract.
- b. *Renegotiating with investors* – particularly given that the investor may not have followed all processes required under domestic law, and the fact that the concession exceeds the maximum size limit, the government might seek to renegotiate the contract with the investor. In doing so, it could aim to negotiate terms that avoid the outcomes on which previous grievances were founded, potentially by changing the concession area boundaries. Because investment arbitration tribunals have disfavored threats of sovereign action (such as a change in the law to accomplish what it aimed to achieve in the renegotiation) as a means of bringing the investor back to the negotiating table, the government should be wary of doing so to the extent that investor might have valid contractual rights.
- c. *Terminating a contract* – the government might seek to terminate the investor-state contract on the basis that it was not entered into in compliance with domestic law. Indeed, this might be required by domestic law. However, even if the requisite procedures were not followed before the contract was signed, the investor may still react by bringing an arbitration claim, arguing, for instance, that the termination violated its "legitimate expectation" that the investment would be allowed to proceed.
- d. *Facilitating domestic litigation* – if community members that stand to be affected by the investment commence domestic litigation regarding the granting of the concession, the government could also, at the very least, not oppose that litigation, and could decline to defend against it. While this may not be politically attractive in all situations, it might be a feasible option, particularly where the entity that granted the concession is different from the entity that would defend the suit. In addition, a government entity may also seek to challenge the validity of the contract through the domestic court system. As noted above, however, even if a domestic court did determine that the contract were

invalid, the investor might commence an arbitration proceeding, arguing that such a decision violated various obligations within the applicable investment treaty.

- e. *Developing a national policy strategy for legal and policy reform* – In addition to pursuing one or more of the above options, the government might also seek to carry out a process to ensure inter-governmental coordination so that future concessions are not granted without following all relevant procedures. Undertaking this process could also demonstrate to the community members that the government is dedicated to ensuring that future concessions do not infringe on human rights.

Scenario Two

Ten years ago, in compliance with domestic law, the government entered into an investor-state contract with a foreign investor for a 20,000-acre rubber plantation. There is no operative investment treaty between the host government and the investor's home government. Nearby communities are now claiming that runoff from the plantation has polluted local water sources, rendering their water unfit for drinking or farming, and that they have no other options for accessing alternative supplies of adequate water. Representatives of the communities have explained these problems to local leaders, and have asserted that so far the investor has been unwilling to listen to their concerns. The investor appears to be in compliance with all domestic laws and contractual obligations, and the contract does not mention water issues. The government now seeks to respond to the communities' concerns.

Note: This scenario focuses on grievances related to concession operations that are consistent with the investor-state contract and current domestic law, but that are nevertheless problematic.

Legal assessment:

- *Domestic law:* the runoff does not appear to be in breach of domestic laws, although the country's laws concerning land, water, and environmental protections should be closely reviewed.
- *International investment law:* while there may not appear to be an applicable investment treaty in place, the investor may have potentially "forum shopped" to take advantage of investor protections in an applicable investment treaty, and so this should also be assessed.
- *Human rights law:* the government's human rights obligations require it to respect, protect, and fulfill rights to water and a healthy environment. A failure to stop the negative impacts on the communities' water supply likely amounts to a failure to protect these rights.
- *The investor-state contract:* the contract appears to be valid, and entitles the investor to carry out the investment. While it does not expressly give the investor the right to cause such pollution, it also appears to not explicitly prohibit such pollution.

Potential options:

- a. *Requesting investor action* – the government can ask the investor to voluntarily modify its operations to stop runoff from polluting water sources and to mitigate other adverse impacts on the water supply of the communities.
- b. *Facilitating or establishing local dispute settlement efforts* – the government can help to facilitate efforts to resolve the pollution-related disputes between the communities and the investor. For example, the government could encourage the investor to implement a grievance mechanism, or it could assist in supporting mediation between the communities and the investor.
- c. *Rehabilitating and compensating affected communities* – the government might seek to compensate affected communities, or request or require the investor to do so, so as to ensure that their rights to water and a healthy environment are remedied and guaranteed

moving forward. Compensation could potentially combine financial compensation with increased access to water sources and other relevant public services. If there were an applicable investment treaty (for example, if the investor had successfully forum shopped), the investor might rely on that treaty to challenge a *requirement* to pay compensation.

- d. *Renegotiating with the investor* – the government could seek to renegotiate the investor-state contract, including amendments that would ensure more robust requirements aimed at avoiding further water pollution. Even if there were an applicable investment treaty and the government told the investor that, in the absence of renegotiating, it intended to enact stronger environmental laws to address the problem, this would likely not be viewed as a problematic threat of sovereign action, given that the contract does not expressly give the investor the right to pollute.
- e. *Revoking or terminating authorizations that are necessary for investor operations to continue* – the government could consider revoking authorizations or permits needed for the investment so as to halt the pollution of local water sources. If termination does not occur in compliance with the investor-state contract, then the government may face liability for breach of contract and, potentially, under international investment law.
- f. *Adopting changes in the law* – the government could adopt new legislation or amend existing laws to create stronger environmental protections, including stronger protections of water sources, with which the investor would have to comply. The government could also seek to enact other laws that could help address problematic situations like the one in this scenario, such as laws enabling those who suffer loss or injury from such harms to pursue civil (tort) claims against the entities responsible for those wrongs, which in this case would include the investor.
- g. *Developing a national policy strategy for legal and policy reform* – in addition to other options, the government could also embark upon policy strategy processes to determine how to better protect community access to water, or how to better to prevent environmental harms, in the context of land-based investment projects. Undertaking this process could also demonstrate to the community members that the government is dedicated to avoiding the pollution of water sources and other negative impacts.

Scenario Three

The government has granted a concession to an investor for the purposes of growing jatropha curcas, which will be used to generate biofuels. The granting of the concession was done in compliance with domestic laws, and the investor is covered by the investor protections contained in an applicable investment treaty. After the concession was granted, a report by a credible investigative journalist revealed that, last year in a neighboring country, the investor cleared and planted on land outside agreed concession areas, and engaged private security contractors who violently assaulted community members found trespassing on the investor's land. The report has generated significant concern among communities close to the concession area. The government had been unaware of such allegations, and now seeks to respond to the communities' concerns about the investor's poor track record during previous projects.

Note: This scenario focuses on concerns that the investor might in the future operate in a way that has negative impacts on the community or that is contrary to domestic law, even though there are no current problems.

Legal assessment:

- *Domestic law*: no domestic laws have yet been breached, and the granting of the concession was valid. Instead, the grievance is based on the potential for future wrongdoing.
- *International investment law*: the investor is covered by the investor protections contained in the investment treaty.

- *Human rights law*: the government's human rights obligations require it to protect the community members' human rights by preventing third parties, such as the investor, from violating them. This includes, amongst others, the right to housing and the prohibition of forced eviction; the rights to food, water, health, and a healthy environment; rights to liberty and security of person (including the prohibition of arbitrary arrest or detention); and the right not to be deprived arbitrarily of one's life. If the investor's future actions negatively affect these or other human rights, the government may be responsible for failing to protect such rights.
- *The investor-state contract*: the contract appears to be valid, and entitles the investor to carry out the investment.

Potential options:

- a. *Developing a national policy strategy for legal and policy reform* – the government might embark upon a policy strategy process to determine whether legal reforms are needed to ensure that there are sufficient safeguards preventing illegal actions or human rights abuses on the part of investors, including sufficiently severe consequences for investors that break domestic law.
- b. *Adopting changes in the law* – the government might make changes to the domestic law if necessary to ensure that there are adequate consequences for companies that break the law, as well as opportunities for third parties to seek recourse against harms.