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Governing Land Investments: Do Governments Have Legal Support Gaps?

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Columbia Center
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GOVERNING LAND INVESTMENTS

DO GOVERNMENTS HAVE LEGAL SUPPORT GAPS?

BRIEFING MARCH 2018



Timber port, Gabon.

GOVERNING LAND INVESTMENTS

DO GOVERNMENTS HAVE LEGAL SUPPORT GAPS?

In the wave of efforts to encourage and support more “responsible” land investments, one aspect has been largely overlooked: are governments equipped with the legal and technical support needed to effectively negotiate and conclude investment contracts that lead to responsible outcomes?¹

NOTES

1. This briefing note draws from a longer report with the same title by the Columbia Center on Sustainable Investment. The report is available at <http://ccsi.columbia.edu/work/projects/legal-support-for-governments/>. This research was funded by UK aid from the Department for International Development, although the views expressed do not necessarily reflect those of the UK government.

In a number of low- and middle-income countries, governments enter into contracts with investors to grant concessions, provide leases, or give incentives for agriculture or forestry investments. These investment contracts, along with domestic and international laws, shape the rights and obligations of investors and governments, as well as the distribution of benefits. They thus can significantly influence the outcomes and impacts of investments. Despite this, some governments negotiate investment contracts without having adequate internal or external legal or technical support.² This can lead to contracts that concede too much ground to investors, or that poorly define key obligations, increasing the likelihood that the resulting projects will fail to produce the anticipated public benefits, seriously degrade the environment, or breach the rights of local communities.

WHO IS THIS NOTE FOR?

This report is highly relevant for:

- » Government representatives from low- and middle-income countries that host or seek to host land investments for agriculture and forestry projects.
- » Donors and other organizations and practitioners seeking to improve the impacts of land investments.
- » Lawyers and other support providers who provide support to governments in the context of land investments.
- » Investors who may negotiate investment contracts with host governments, and who aim to minimize business risks and avoid adverse impacts on third parties.

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

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

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

“RESPONSIBLE” LAND INVESTMENTS?

This note seeks to determine how governments’ legal support gaps can be addressed in order to help low- and middle-income countries achieve responsible land investments. But what does “responsible” actually mean?

This note considers “**responsible land investments**” to be investments in agriculture or forestry that:

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

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

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

LEGAL SUPPORT FOR GOVERNMENTS

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

Types of legal support

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

Benefits and limitations of different types of legal support

Each type of legal support has its own strengths and limitations. Overseas lawyers may be more likely than lawyers based within the country or within the government to have experience negotiating complex investment contracts. They may also have a deeper commercial understanding of particular industries or commodities and of how similar agreements were negotiated in other jurisdictions. On the other hand, overseas lawyers are not always able to grasp the local political and legal context, which can lead to work that is, in the words of one government representative, “not consistent with reality, and unusable.”³ Lawyers based within the country or government are generally better equipped to ensure that the government's investment strategies, and individual deals, are adapted to the country's laws and context. Such lawyers also may better understand the dynamics and political interplay between government agencies. However, domestic lawyers may not always have the relevant expertise and experience for certain tasks, such as complex contract negotiations.

Adding value beyond traditional legal services

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

Issues affecting government access and implementation of legal support

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

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

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

External legal support provider for governments⁴

3. Interview with government representative, July 20, 2017.

4. Interview with external legal support provider, April 13, 2017.

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

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

While essentially a technical service, legal support can be affected by **political factors**. In some situations, political decision-makers may choose to ignore legal advice for legitimate reasons. Yet at times, political factors can lead to situations in which, despite solid legal advice, negotiations still result in subpar outcomes for the country. In addition, governments may be reluctant to follow legal advice,

especially from external lawyers, when they do not sufficiently trust them. Government officials skeptical of external legal support may not seek external legal support at all.

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

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

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

STAGES OF LAND INVESTMENTS



Pre-negotiation processes

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

Interviewees reported few instances of governments accessing legal support during this stage. More generally, those interviewed regularly described governments as devoting insufficient attention and resources to this stage, which frequently leaves governments under-prepared for contract negotiations.⁵ In addition, processes like impact assessments and community consultations are not always carried out, or are only undertaken after a contract has been signed. Reasons for governments' limited preparations through these processes include resource and capacity shortages, investors receiving special treatment when "connected" to senior government officials, and governments being "desperate" for investments.⁶ The ensuing lack of information or preparation makes it harder for the government to negotiate a responsible contract, even for officials who are otherwise effective negotiators.

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

Non-legal support provider for governments⁷

Contract negotiations

If, after conducting the processes mentioned above, the host government determines that the potential investment is acceptable, it may then need to define the terms according to which the project will be permitted to operate. In countries where investment contracts are negotiated between the government and the investor, relevant legal expertise on the government's negotiating team is crucial. Legal expertise can be particularly important if an investment treaty might apply, as treaties can elevate investor-state contracts above domestic law, increasing potential risks to the government.⁸

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

For the majority of countries principally covered by interviews, interviewees were generally of the view that the host governments were not achieving optimal outcomes during negotiations with investors.⁹ While not the only reason for sub-optimal outcomes, the majority of these interviewees identified a lack of adequate legal support as an important factor.

Governments often use lawyers during contract negotiations. In some situations, senior government representatives lead negotiations and use their lawyers as a sounding board for specific legal questions. In other instances, lawyers—whether in-house or external—may lead the negotiations on the government's behalf, although decision-making ultimately resides with the government. When a government's in-house legal staff represents the government at negotiations, those lawyers may be generalists without the relevant expertise needed to negotiate an effective investment contract. For instance, government lawyers may not understand commercial or technical considerations unique to agricultural or forestry projects and to specific commodities, even though such knowledge can be key to negotiating a responsible contract with confidence. In addition, governments sometimes negotiate contracts with only minimal participation by lawyers.¹⁰ This is often problematic, given that lawyers have essential skills that are relevant both in drafting clear legal language and in assessing the potential risks and issues that may arise from legally binding agreements.

5. Interview with external legal support provider, April 13, 2017; interview with external legal secondee, April 11, 2017.
6. Interview with non-legal support provider, March 30, 2017; interview with private sector representative and former government employee, May 1, 2017; interview with external legal fellow, June 8, 2017; interview with external legal fellow, July 26, 2017.
7. Interview with non-legal support provider to government, August 23, 2016.
8. For further information about investment treaties, their interactions with investor-state contracts, and the potential implications for government, see Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, *Land Deals and the Law: Grievances, Human Rights, and Investor Protections*, Columbia Center on Sustainable Investment (March 2016), http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deals-and-the-law_Briefing.pdf.
9. Interview with government representative, May 3, 2017; interview with government representative, July 15, 2016; interview with non-legal support provider, March 30, 2017;

- interview with non-legal support provider, August 31, 2016; interview with government representative, August 17, 2016; interview with civil society representative, March 30, 2017; interview with private sector representative and former government employee, May 1, 2017; interview with government representative, May 11, 2017; interview with government representative, July 26, 2017; interview with government representative, June 20, 2017; interview with private sector representative and former government employee, July 25, 2017.
10. Interview with government representative, May 3, 2017; interview with non-legal support provider, August 31, 2016; interview with private sector representative and former government employee, July 25, 2017; survey response, May 16, 2017.
11. Interview with external legal fellow, July 26, 2017; interview with external legal fellow, June 8, 2017; interview with external lawyer, November 29, 2017.
12. Interview with government representative, May 11, 2017; interview with government representative, June 21, 2017; interview with government representative, June 20, 2017;

In one of the thirteen countries principally covered by interviews, interviewees were more optimistic about how the country had performed in negotiations.¹¹ That country has benefited from a combination of international and local lawyers, including embedded fellows placed in government ministries for sustained periods of time; it also has an engaged civil society that has closely followed negotiations and implementation of agreements. Lawyers leading negotiations have benefitted from the trust of the President, and have earned credibility with the government's counterparties. Yet there have still been challenges stemming from negotiations and investments. The government's emphasis on reinvigorating its economy meant that social and environmental protections were not always adequately addressed in negotiations. Further, despite negotiators' intent to make the contract easy for government agencies to monitor, the government's resource shortage has constrained monitoring.

In multiple countries covered by interviews, interviewees described negotiation processes where the investor would prepare a first draft of the contract and then send it to the government to review.¹² In some of these countries, the government reportedly either would accept the agreement as drafted or would request very minor changes before signing it.¹³ Allowing an investor counterparty to draft an agreement being negotiated—or even to pick the precedent contract that will be used as the starting point—can lead to suboptimal outcomes for the government. Although the precedent or first version of the contract creates important parameters for the scope of negotiations, governments do not always appreciate this, preferring the convenience of having the investor prepare a first draft.

Interviewees described multiple countries having (or developing) some form of model or template investment contract for agricultural or forestry investments, although the degree to which such models are used in practice varies.¹⁴ Robust, context-specific models that make most terms non-negotiable can bolster the government's bargaining position by limiting the focus of negotiations and the discretion of government negotiators.¹⁵ Models also provide guidance to less experienced negotiators, can reduce the time and effort needed for negotiations, and encourage consistency with other contracts. Of course, the benefits of model contracts may not always eventuate: for instance, a government negotiator may stray from the model, or the model itself may be of low quality.

As opposed to model contracts, international guidelines were rarely mentioned by interviewees as playing a significant role in government approaches to contract negotiations. Some interviewees stressed that governments might be more interested in “common practices,” and in staying competitive with other countries, rather than “best practices.”¹⁶ Yet one external lawyer for governments also noted that international best practices can be incorporated into a contract without being explicitly mentioned; they may be reflected in the choices of the terms of the contract.¹⁷

Implementation and monitoring

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

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

Few of the countries covered in interviews appeared to monitor investment contracts comprehensively, let alone with the support of lawyers.¹⁸ One country's monitoring and follow-up was described by an external non-legal support provider as “notoriously bad.”¹⁹ In another country, although specific multi-agency coordination bodies charged with monitoring the implementation of specific agreements had been established, monitoring was reportedly still limited, focusing primarily on tax collection but not on other issues.²⁰

interview with private sector representative and former government employee, July 25, 2017; interview with government representative, July 26, 2017; interview with government representative, May 3, 2017; interview with government representative, May, 2017; interview with private sector representative and former government employee, May 1, 2017.

13. Interview with government representative, July 26, 2017; interview with government representative, May 3, 2017; interview with government representative, May, 2017; interview with private sector representative and former government employee, May 1, 2017.
14. Interview with external lawyer representing investors, August 8, 2017; interview with government representative, May 11, 2017; interview with government representative, June 20, 2017; interview with government representative, July 20, 2017; interview with government representative, April 12, 2017; interview with government representative, May 3, 2017.
15. David Kienzler et al, *Natural Resource Contracts as a Tool for Managing the Mining*

Sector, Columbia Center on Sustainable Investment (June 2015), pp. 30-31, <http://ccsi.columbia.edu/files/2015/07/Natural-Resource-Contracts-as-a-Tool-for-Managing-the-Mining-Sector.pdf>.

16. Interview with government representative, August 17, 2016.
17. Comment from external lawyer, January 23, 2018.
18. Interview with external legal secondee, April 11, 2017; interview with non-legal support provider, August 31, 2016; interview with private sector representative and former government employee, May 1, 2017; interview with government representative, July 26, 2017; interview with private sector representative and former non-legal support provider to government, May 15, 2017; interview with non-legal support provider, March 30, 2017.
19. Interview with non-legal support provider, March 30, 2017.
20. Interview with external legal fellow, July 26, 2017.

GOOD PRACTICES

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

Host governments can:

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

Donors can:

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

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

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

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

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



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