



**SECOND  
EDITION**

# Foreign investment, law and sustainable development

A handbook on agriculture and extractive industries

Lorenzo Cotula

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A handbook on agriculture and extractive industries

Lorenzo Cotula

Second edition published by the International Institute for Environment and Development (UK) in 2016. First edition published in 2013.

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Product code: 12587IIED

ISBN: 978-1-78431-299-2

ISSN: 1605-1017

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For information on the Natural Resource Issues series please see inside the back cover of this book. For a full list of publications please contact:

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A catalogue record for this book is available from the British Library

Citation: Cotula L. (2016) Foreign investment, law and sustainable development:

A handbook on agriculture and extractive industries, Natural Resource Issues No. 31.

IIED, London, 2nd Edition.

Design by: Eileen Higgins, email: [ehdesign@virginmedia.com](mailto:ehdesign@virginmedia.com)

Cover photo: A basket full of coal taken illegally from an open-cast mine near the village of Bokapahari, India, where a community of coal scavengers live and work

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Printed by Full Spectrum Print Media, UK on 100% recycled paper using vegetable oil based ink.

#### Disclaimer

This handbook discusses trends in the law governing natural resource investments in low and middle-income countries, and the policy and practical options for ensuring that investments promote sustainable development. IIED is a policy research institute, and the handbook should not be deemed to constitute legal advice in any way.

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# Acronyms and abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ATS	Alien Tort Statute (United States)
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral investment treaty
CAFTA	Dominican Republic – Central America – United States Free Trade Agreement
CAO	Compliance Advisor/Ombudsman, International Finance Corporation
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIT	Corporate income tax
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate social responsibility
DTT	Double taxation treaty
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
EITI	Extractive Industries Transparency Initiative
ELAW	Environmental Law Alliance Worldwide
ESIA	Environmental and social impact assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCPA	Foreign Corrupt Practices Act (United States)
FET	Fair and equitable treatment
FOI	Freedom of information
FPIC	Free, prior and informed consent
GATS	General Agreement on Trade in Services
HRIA	Human rights impact assessment
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
ILO	International Labour Organization
IPIECA	'IPIECA, the global oil and gas industry association for environmental and social issues' (the full title which the acronym originally stood for is no longer in use)
MDGs	Millennium Development Goals

MFN	Most favoured nation
MST/CIL	Minimum standard of treatment under customary international law
NAFTA	North American Free Trade Agreement
NCP	National Contact Point
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
PSA	Production sharing agreement
RSB	Roundtable on Sustainable Biomaterials
RSPO	Roundtable on Sustainable Palm Oil
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
TPP	Transpacific Partnership
TRIMs	Agreement on Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
US	United States
VAT	Value added tax
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WTO	World Trade Organization



# Acknowledgements

This handbook was prepared for ‘Legal Tools for Citizen Empowerment’, an IIED-led initiative to strengthen local rights and voices in natural resource investments. It was funded by UK aid from the Department for International Development, though the views expressed do not necessarily represent those of the UK government.

The handbook draws on research and capacity support work that I have been involved with over the years, covering a range of issues at the interface between natural resources, foreign investment, law and sustainable development. I would like to thank the many legal professionals, development agency staff, government officials, advocates and researchers with whom I have shared (parts of) this path, and from whom I have learned so much that is reflected in this handbook.

This second edition features extensive revisions and updates on the version originally published in 2013. Like the first edition, the analysis benefited greatly from the wealth of material produced by the United Nations Conference on Trade and Development (UNCTAD) and available on the Investment Policy Hub (<http://investmentpolicyhub.unctad.org/>). The analysis also benefited from the intelligence, information and legal materials available from Investment Arbitration Reporter ([www.iareporter.com](http://www.iareporter.com)), Investment Treaty Arbitration ([www.italaw.com](http://www.italaw.com)) and Investment Treaty News ([www.iisd.org/itn/](http://www.iisd.org/itn/)).

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Several people provided helpful comments on earlier drafts of this second edition, in whole or in part: Joseph C. Bell (taxation and corporate structure), George Boden (corruption), Allison Christians (primarily taxation and corporate structure), Suparna Jain (Box 33), Lise Johnson (primarily international investment law), Tom Lomax (Chapters 4 and 5) and Megan MacInnes (corruption). Their comments and suggestions were of great help in finalising the handbook.

I would also like to reiterate my gratitude to Elisa Morgera, Federico Ortino, Emily Polack, Andrea Shemberg, Kyla Tienhaara, Halina Ward and Emma Wilson, who reviewed the first edition, in whole or in part. I am particularly grateful to James Mayers for his review, comments and suggestions on both first and second editions. Of course, while my heartfelt gratitude goes to all these reviewers, the responsibility for the views expressed and for any remaining errors is mine.

# Executive summary

## Why law matters

Sustainable development, broadly defined, is a process that improves people's lives while respecting the environment, based on bottom-up agendas and priorities. A sustainable development perspective has important implications for the governance of private investment. While for the investor the main concern is usually about generating commercial returns, for host countries and communities the main aim is (or should be) to mobilise assets and capabilities to promote sustainable development. Therefore, the quality of the investment, not just its quantity, matters a great deal.

The effective use of legal tools, by government and advocates alike, has become an important ingredient of public efforts to promote quality in investment processes, and ensure that foreign investment contributes to sustainable development. For example, whether affected people have secure land rights and effective opportunities to influence decisions will partly depend on law design and implementation.

The application of environmental legislation will influence the extent to which environmental issues are considered at the investment approval stage and throughout project implementation. Tax rules – including arrangements to fight tax avoidance – will influence the amount and distribution of the public revenues contributed by an investment project. Legal processes can also provide avenues for accountability, and the ability of different groups to have their concerns taken into account will partly depend on the effectiveness of any legal remedies available to them.

Of course, law is only a part of the story. Policy instruments outside the legal sphere can also influence investment patterns and outcomes (for example, macroeconomic policy). Legal norms are often not properly implemented due to vested interests, power imbalances or resource constraints. And even well-implemented legislation may produce unintended consequences. But if governments and advocates fail to harness the potential of law for sustainable development, they will miss out on important levers for change.

## About this handbook

This handbook is about how to use law to make foreign investment work for sustainable development. It aims to provide a rigorous yet accessible analysis of the law governing foreign investment in low and middle-income countries – what this law is, how it works, and how to use it most effectively.

The main target audience is governments and advocates in low and middle-income countries. The ambition is to provide a resource that can assist government efforts to ensure that foreign investment contributes to sustainable development, and advocates' efforts to influence decisions, help grassroots groups to claim rights, and hold government and investors to account.

Some of the issues discussed here are relevant to all sectors of the economy, but the focus is on agriculture and extractive industries. These sectors account for a large share of investment flows to many low and middle-income countries. In addition, investments in agriculture and extractives have distinctive features. For example, they can exacerbate pressures on natural resources in contexts where people's livelihoods and culture crucially depend on those resources.

Because several legal instruments are relevant to any given investment project, the handbook takes an integrated approach that cuts across areas of law typically treated in separate literatures and by different communities of practice – including investment treaties, extractive industry legislation, land tenure, human rights norms, environmental legislation, and tax law. For both governments and advocates, strategic use of a variety of legal tools is critical in harnessing the full potential of law.

## Harnessing law for sustainable development

The handbook discusses the use of legal tools in four broad and interlinked areas:

- **Ensuring that public policies and decisions on investment respond to a bottom-up, strategic vision of sustainable development based on local and national aspirations.** This includes government protection and advocates' exercise of political rights for collective action, such as freedom of assembly and association, and robust protection of advocates from any repression, intimidation or compression of rights.

It also includes government promotion of public participation in the elaboration of policy-setting legislation, and advocates' leveraging of these processes to catalyse public mobilisation on strategic policy choices; transparency, public participation, local consultation and free, prior and informed consent when all options are still open; and effective legal remedies at national and international levels.

- **Getting a fair economic deal.** This includes arrangements to promote inclusive investments and positive linkages with the local economy; tax rules, including mechanisms to fight tax avoidance; and the norms and institutions that enable the government to get a handle on corporate structures.

Governments are chiefly responsible for regulating and monitoring the economic deal. Well-drafted legislation and effective administration systems are key, for example in tax matters or industrial policy. But advocates can play an important role too, for instance by advancing more inclusive models of investment; advocating for tighter tax laws and 'naming and shaming' tax avoiders; and monitoring compliance with any requirements for companies to train and employ local workers or source from local suppliers.

- **Addressing social and environmental issues.** This involves well-drafted and enforced legislation to regulate impact assessments, secure local land rights, uphold labour rights, protect the environment, provide for effective monitoring powers, and establish legal liabilities and remedies – among other things.

Making this legislation work requires well-resourced and properly mandated government institutions. It also requires effective action by advocates. For example, advocates can use legal tools to protect the land rights of indigenous peoples, small-scale farmers, forest dwellers, pastoralists and fisherfolk – including by documenting these rights to maximise their legal protection, supporting local landholders and their organisations to claim rights and influence decisions, and holding governments and investors to account.

- **Thinking through investment promotion policies.** Action in the previous three areas can improve investment preparedness – that is, the extent to which people and institutions in a given country can identify the right types of investment, fully harness the benefits of that investment and minimise its risks. A sustainable development perspective also has implications for investment promotion.

For example, a sustainable development perspective requires carefully thinking through policy choices on the international treaties promoting foreign investment, including to ensure that investment protection standards do not constrain the ability of states to act in the public interest. Governments can harness recent developments in investment treaty making and guidance from United Nations agencies and think tanks. Advocates can push the boundaries of emerging opportunities to scrutinise treaty negotiations and the conduct of investor-state arbitration.

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## Addressing capacity challenges

Harnessing the law requires not only savvy law making, but also effective institutions in both governmental and non-governmental sectors. This ranges from government agencies responsible for collecting taxes, ensuring compliance with environmental regulation or managing investor-state arbitration through to law units established by non-governmental organisations or social movements to monitor and comment on legal developments and handle public interest litigation.

Where capacity gaps exist, host governments may consider options for strengthening their own capacity. These include, first and foremost, effective arrangements for mobilising expertise available within the country, for instance in private practice and academia. Where external support is appropriate, multiple channels may be possible: technical co-operation projects, partnerships with leading universities, professional advice on a pro bono (voluntary) basis, pooling of experience and expertise among countries, and staff secondments.

The issue of capacity is not limited to government. Non-governmental organisations, social movements and parliamentarians need to be in a position to influence government action and hold decision makers to account. National organisations of rural producers and workers need to be properly equipped to help their members to have a strong voice.

Capacity support in the non-governmental sector may consist of leveraging existing knowledge, for instance through documenting success stories and sharing lessons from experience. It may also involve strategic local-to-global alliances between organisations that can contribute complementary capacities – for example, legal and technical expertise, skills and channels for outreach and campaigning, and capacity to mobilise vocal constituencies.

### Politics, long-term vision and citizen action

The law regulating natural resource investments involves highly technical legal issues. Specialised expertise is therefore critical. This handbook discusses some of these technical issues. But harnessing the law to ensure that investments contribute to sustainable development is not just about dealing with technical aspects concerning specific legal instruments.

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Sustainable development calls for a vision for the formulation and implementation of the law in light of real-life trajectories towards sustainable development. Politics are essential to this process, and use of many tools discussed in the handbook would reflect political choices – for example, on taxation, land ownership or investment promotion. In advocacy strategies, legal avenues alone are usually not enough: collective action and political mobilisation can help to give real leverage to legal rights.

Therefore, harnessing the law to make investment work for sustainable development is not a task for government regulators or legal advisors alone. It also requires vibrant non-governmental organisations and social movements to advocate, scrutinise, challenge and influence. Most importantly, it requires citizens themselves to be able to appropriate and wield legal tools in their efforts to shape their own future.

# Introduction

## 1.1 About this handbook

### Topic and target audience

This handbook is about how to use the law to make foreign investment work for sustainable development. It aims to provide a rigorous yet accessible analysis of the law regulating foreign investment in low and middle-income countries – what the law is, how it works, and how to use it most effectively. It aims to identify issues and map options, rather than provide ready-made solutions, and is no replacement for expert advice.

The primary target audience is governments and advocates in low and middle-income countries. ‘Advocates’, broadly defined, include a wide range of individuals and groups, including non-governmental organisations (NGOs); membership-based organisations, such as trade unions and federations of rural producers including small-scale farmers, forest dwellers, pastoralists and fisherfolk; and diverse alliances of indigenous peoples, rural communities and grassroots groups.

The ambition is to provide a resource that can assist government efforts to ensure that foreign investment contributes to sustainable development, and advocates’ efforts to influence public decisions, help grassroots groups to claim rights, and hold government and investors to account.

Governments and advocates typically play different roles in investment processes. They also often have different positions on a number of the sustainable development issues discussed in this handbook, such as transparency and desirable levels of protection for local land rights. In many parts of the world, advocates face intimidation and repression for their work, particularly where governments are authoritarian and the politics are polarised.

Even within these categories there may be actors with different and possibly conflicting interests. For example, within governments, national oil companies and environmental protection agencies have different concerns. In distilling the practical implications from the analysis, this handbook seeks to be mindful of these diverse target groups.

The handbook covers complex issues. In the interest of accessibility much detail had to be glossed over, but the text is inevitably fairly technical. Making the most of it should not require specialised legal expertise, but it does assume a degree of familiarity with investment policy issues.

### Scope, focus and added value

Parts of the handbook are relevant to all sectors of the economy. For example, the text dealing with investment treaties and arbitration is relevant to foreign investment in sectors as diverse as natural resources, manufacturing and telecommunications.

On the whole, however, this handbook focuses on investments in agriculture and extractive industries.

The focus on agriculture and extractive industries reflects the importance of these sectors in investment flows to many low and middle-income countries. Investments in agriculture and extractives also raise particular issues. For example, they can exacerbate pressures on natural resources in contexts where people's livelihoods and culture crucially depend on those resources, and where competition for resources may already be intensifying as a result of demographic pressures and socio-economic change (Box 1).

While foreign and domestic investments raise many similar issues, this handbook focuses on foreign investment. This choice is justified on legal grounds: as will be discussed, international investment law specifically protects foreign investment. In low-income countries where domestic sources of capital are limited, there may also be a correlation between the scale of investment and its impacts on the one hand, and the involvement of foreign capital on the other.

Although investor-state contracts can be very important in setting the terms of investment in natural resource sectors, this handbook focuses on the wider legal frameworks. The relationship between investor-state contracts and sustainable development has been discussed in earlier IIED-related work (for example Ayine *et al.*, 2005; Cotula, 2010, 2011; Ahmadov *et al.*, 2012; Cotula and Berger, 2014).

## 2

There is already an extensive literature on important aspects of the law regulating foreign investment. With regard to international investment law, for example, the United Nations Conference on Trade and Development (UNCTAD) has published a wide range of materials (eg UNCTAD, 2010, 2012a, 2012b, 2012c, 2013a and 2015a; see also Box 2), and think tanks have published guides and reports (for example, Mann *et al.*, 2005; Bernasconi-Osterwalder and Johnson, 2011; Bernasconi-Osterwalder *et al.*, 2012).

The handbook complements this literature through a holistic discussion of the national, international and transnational legal arrangements governing investment in low and middle-income countries. Because multiple sites of regulation are relevant to any given investment project, the handbook takes an integrated approach that cuts across areas of law typically treated in separate literatures and by different communities of practice – including investment treaties, extractive industry legislation, land tenure, human rights norms, environmental legislation and tax law.

### What this handbook is not

This handbook is not a thorough, comprehensive legal analysis of applicable norms, nor a source of legal advice. The areas of law covered are far too vast and complex, and the contexts too diverse. The topics discussed are inevitably selective, and the treatment of issues succinct. The primary emphasis is on policy issues and trade-offs.

Neither is this handbook an advocacy-oriented critique of investment law. Advocates have produced many such critiques in recent years (for example Eberhardt and Olivet, 2012). While anchored to a sustainable development perspective, the handbook aims to discuss the law in a detached way, providing a resource for readers to make their own choices.

Finally, this handbook is not a training manual, although it could provide background information for materials more explicitly oriented towards the delivery of training courses. The handbook aims to provide a resource primarily for government officials and advocates operating at the national level. Using the material at the local level is likely to require significant adaptation.

### **Box 1. Extractives and agriculture – some differences and commonalities**

Investments in petroleum, mining and agriculture share some common characteristics. They typically involve the allocation of long-term rights to land and/or natural resources in exchange for revenues and development contributions. These investments often involve contracts with the host government, because states usually own subsoil resources and, in many low and middle-income countries, large amounts of land too.

Investments in agriculture and extractive industries can have major impacts on the land and resource rights of indigenous peoples, small-scale farmers, forest dwellers, pastoralists and fisherfolk. In many societies, land and natural resources provide the basis of local livelihoods; they have important social, cultural and spiritual values; and they shape the foundations of social identity. This has implications for the law: it is particularly important that rules and institutions can manage pressures on resources and safeguard the rights of rural people.

Natural resource investments tend to require high capital costs up front, for example to build a mine, oil pipeline or agro-processing facility. They will typically take a long time to recover costs and make a profit. Once the investment has been made, the investor cannot exit the project without incurring major losses. Therefore, negotiating power tends to shift from the investor to the government (Vernon, 1971). Commodity price fluctuations are often accompanied by renegotiations initiated by either side, and by disputes (Wälde, 2008). These features also have implications for the law, because investors tend to require legal safeguards to protect their investment from adverse government interference, while governments want to ensure that they benefit from the project over time.

At the same time, there are differences between these sectors. Petroleum, mining and agriculture raise different legal issues – ownership of subsoil resources in extractive industries, for example, versus irrigation rights in agriculture. They also raise different sustainable development questions. For example, petroleum operations typically involve large-scale investments. Key issues may include whether or not petroleum operations should proceed in given contexts, the place of the sector in the overall development strategy, the regulation of investments including in social and environmental matters, and the management of public revenues.

Agricultural production, on the other hand, can be undertaken by farms of various sizes and using different cultivation methods. Globally, small-scale farmers are the main source of private investment in agricultural production (FAO, 2012). Foreign investment in agriculture does not necessarily involve large plantations. It can be of different scales and forms, including small-scale agro-processing facilities that source produce from local farmers. So a key challenge in agriculture is to define the types of investment that best respond to local and national aspirations.



## 1.2 Quality investment and sustainable development

### Investment quality, not just quantity

Foreign investment in agriculture, mining or petroleum can have both positive and negative social, environmental and economic outcomes in recipient countries. By contributing capital, know-how and market links, foreign investment can help to promote economic development, generate public revenues, develop infrastructure and create employment in countries with limited alternative options for development.

But foreign investment may fail to create enough positive linkages with the local economy, for instance in the form of employment and opportunities for local businesses. It may crowd out or out-compete local producers, and wipe out important livelihood strategies.

Foreign investment can bring cleaner technologies and better management practices, but many large natural resource projects have degraded the environment. Increased investment can create new livelihood opportunities that help reduce poverty, but if it is not done properly, it can also dispossess poor people of their land and natural resources.

Given the potential for both positive and negative outcomes, the quality of investment, not just its quantity, matters a great deal (UNDP and UNEP, 2011). The concept of sustainable development provides guidance to assess quality in investment processes.

## 4

### Sustainable development: an evolving concept

Sustainable development is a flexible and evolving concept, and there is no universally accepted definition. In foreign investment projects, investors, governments, advocates and affected people often put forward competing visions of what constitutes sustainable development, and how to balance multiple considerations (Fortin and Maconachie, 2013). International instruments adopted over the past three decades do provide increasingly specific guidance, however.

The Brundtland Report (World Commission on Environment and Development, 1987) and the 1992 United Nations Conference on Environment and Development (UNCED), held in Rio, played a key role in shaping the concept of sustainable development. The Rio conference resulted in the adoption of important legal instruments, including the Rio Declaration on Environment and Development.

Sustainable development thinking has evolved considerably since 1992. Follow-on summits have further developed the concept, particularly through the Plan of Implementation of the World Summit on Sustainable Development, adopted at the Rio+10 summit in 2002, and the document 'The Future We Want', adopted at the Rio+20 summit in 2012.

The recent adoption of a set of 'Sustainable Development Goals', embodied in the United Nations (UN) document 'Transforming Our World: The 2030 Agenda for Sustainable Development' (Box 3), is likely to fuel new shifts in the way sustainable development is conceptualised and operationalised. National policy making over the

## Box 2. The Investment Policy Framework for Sustainable Development

In 2012, UNCTAD launched the Investment Policy Framework for Sustainable Development. A revised edition was released in 2015. The framework provides authoritative guidance on how to ensure that investment policy promotes sustainable development. It establishes 'Core Principles' for investment policy making. These principles include:

- 'The overarching objective of investment policy making is to promote investment for inclusive growth and sustainable development'.
- 'Investment policies should be grounded in a country's overall development strategy [...]'.- 'Investment policies should be developed involving all stakeholders [...]'.- 'Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics'.
- 'Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all'.
- 'Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects'.
- 'In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment'.
- 'Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature'.
- 'Policies for investment promotion and facilitation should be aligned with sustainable development goals [...]'.- 'Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance'.
- 'The international community should co-operate to address shared investment-for-development policy challenges, particularly in least developed countries [...]'.-

The framework contains detailed policy guidelines and options on how to integrate these principles into national and international investment policy.

Source: UNCTAD, 2012a and 2015a.

past twenty years has also helped to clarify the trade-offs and implications of the concept of sustainable development.

This handbook defines sustainable development in broad, non-legalistic terms, as a process that improves people's lives while respecting the environment, based on bottom-up agendas and priorities. This definition builds on Principle 1 of the Rio Declaration on Environment and Development, which states that human beings are 'at the centre of concerns for sustainable development' and that they 'are entitled to a healthy and productive life in harmony with nature'.

In this perspective, promoting investment is not an end in itself, but a means to an end. While for the investor the main concern is usually about generating commercial returns, for host countries and communities the main aim is (or should be) to mobilise assets and capabilities to promote sustainable development. This perspective has implications for two key aspects of investment processes: placing people centre stage in investment decision making; and addressing social, environmental and economic issues.

### Box 3. The Sustainable Development Goals

In September 2015, the UN General Assembly adopted a plan of action containing 17 Sustainable Development Goals (SDGs), accompanied by 169 more specific targets and a comprehensive set of indicators to measure progress.

The SDGs aim to guide the global agenda for the period 2015-2030. They take over from the Millennium Development Goals (MDGs), which covered the period 2000-2015. While the latter focused on development aid, the SDGs are significantly more comprehensive. They apply in high as well as low and middle-income countries, and range from ending poverty and hunger to reducing inequality within and among countries, through to combating climate change and promoting access to justice.

The plan of action recognises the role of private investment in strategies to realise the SDGs. This reinforces the need for the government to establish effective rules, institutions and processes and for advocates to step up strategies for influence, in order to ensure that business activity in the natural resource sector is aligned with the SDGs and contributes to achieving them.

### Placing people centre stage

Principle 1 of the 1992 Rio Declaration places people at the centre of sustainable development. Giving real meaning to this concept requires more than just managing the social and environmental risks of prevailing investment patterns. It arguably entails a fundamental shift away from treating people as passive beneficiaries or victims of investment projects, who at best are able to react through local consultation exercises.

It requires ensuring that public policies and decisions on what types of investment to promote, where and how respond to a bottom-up, strategic vision of sustainable development, based on local and national aspirations. This shift in perspective means that countries have 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies' (Principle 2 of the Rio Declaration).

Placing people centre stage also has implications for the ways in which a government exercises that right and manages resources on behalf of its citizens. It involves empowering people to have greater control over the decisions and processes that affect their lives, for example through greater access to information, decision making and legal redress (Principle 10 of the Rio Declaration), and through recognising the role of indigenous peoples and local communities in environmental management and development (Principle 22 of the Rio Declaration).

Placing people at the centre of sustainable development is at the heart of the SDGs, including goals on ending poverty and hunger, ensuring healthy lives, achieving gender equality and ensuring access to affordable energy. The SDGs also emphasise the importance of participatory and accountable governance.

Indeed, SDG 16 involves promoting 'inclusive societies', access to justice and 'effective, accountable and inclusive institutions at all levels'. Also, SDG Target 16.6 refers to developing 'effective, accountable and transparent institutions', while Target 16.7 calls for ensuring 'responsive, inclusive, participatory and representative decision making'.

### Addressing social, environmental and economic issues

Promoting sustainable development requires holistic consideration of the social, environmental and economic issues at stake in any investment process. A few provisions of the Rio Declaration and references to the SDGs can help illustrate this point.

Economic considerations are an important part of sustainable development. Principle 3 of the Rio Declaration refers to the right to development, while SDG 8 involves promoting 'sustained, inclusive and sustainable economic growth'. Realising this right and goal may require promoting private investment,<sup>1</sup> including in natural resource sectors in countries where these can provide an important basis for economic activities.

But realising the right to development and the goal of inclusive growth also involves maximising the economic benefits to the host country and communities from those investments – for example, public revenues, capital contributions, employment, business opportunities, technical skills and know-how, technology transfer and infrastructure development.

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With regard to environmental considerations, Principle 4 of the Rio Declaration states that 'environmental protection shall constitute an integral part of the development process'. Building on concepts developed by the Brundtland Report, the Rio Declaration also states that the right to development must be fulfilled 'so as to equitably meet developmental and environmental needs of present and future generations' (Principle 3). This principle of inter-generational equity has important implications in terms of safeguarding the environment for future generations. Environmental sustainability also underpins most SDGs.

In an investment context, addressing environmental issues may involve minimising negative impacts on the environment, for instance water abstraction or resource degradation; clearly allocating responsibility for environmental damage and remediation; and actively promoting environmental benefits, for instance through investment in low-carbon technologies.

When it comes to social considerations, the Rio Declaration makes poverty eradication 'an indispensable requirement for sustainable development' (Principle 5). It also calls on states to support the interests of indigenous peoples and

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1. See for example the Plan of Implementation of the 2002 World Summit on Sustainable Development, paragraph 84; the Outcome Document of the Rio+20 summit of 2012, 'The Future We Want', paragraphs 46 and 56-74; and 'Transforming Our World: The 2030 Agenda for Sustainable Development', paragraph 67.

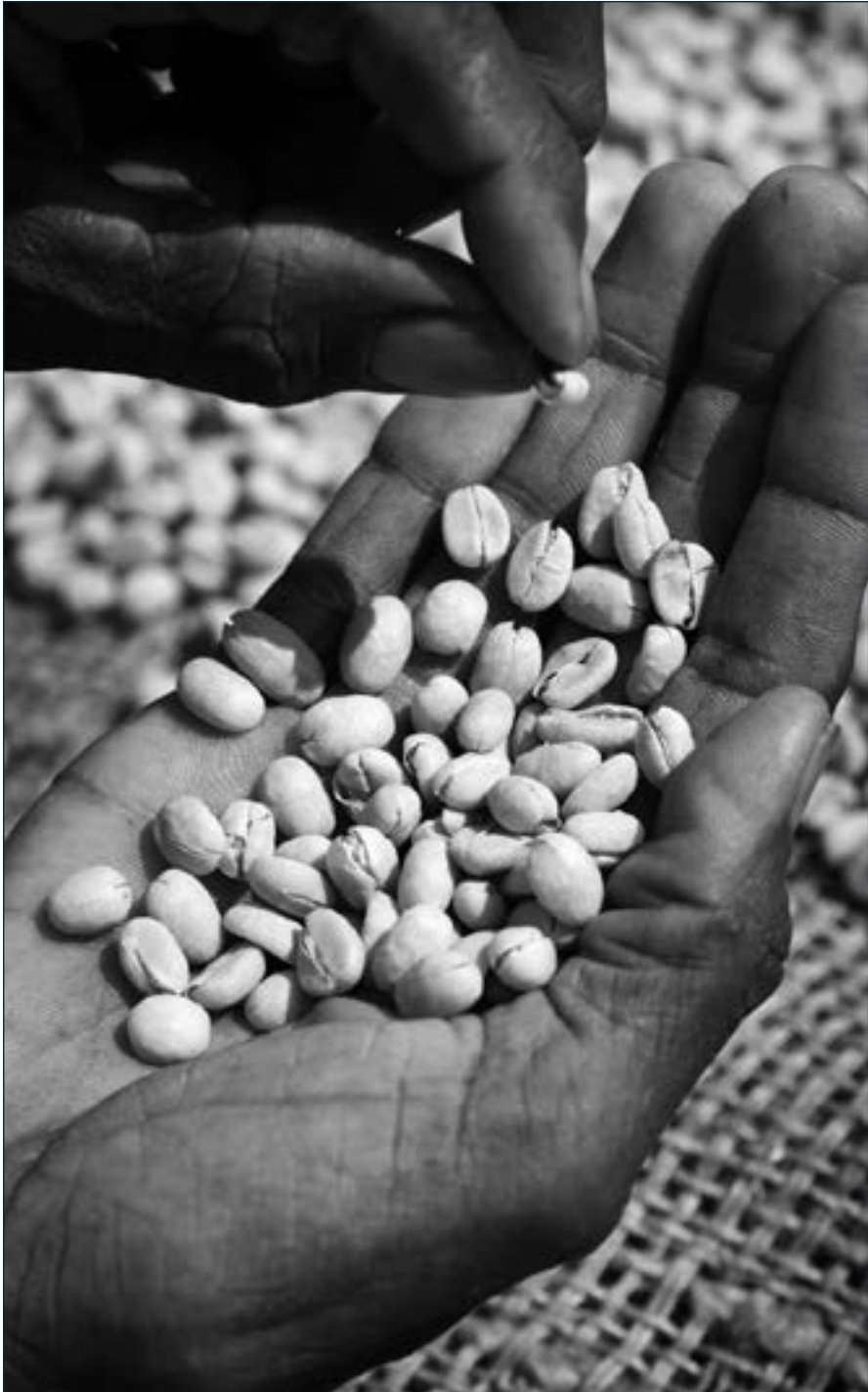


Photo: Sven Torfinn / Panos Pictures

**Sustainable development requires the careful handling of the social, environmental and economic considerations at stake in investment processes**

local communities (Principle 22). And while the Rio Declaration placed much emphasis on the relationship between economic development and environmental sustainability, subsequent summits have more fully recognised the importance of social aspects in sustainable development.

For example, the Plan of Implementation of the 2002 World Summit on Sustainable Development contains language on poverty, hunger, health, energy, water and sanitation, and corporate social accountability. It also states that respect for human rights is essential for achieving sustainable development. Social issues are central throughout the SDGs, for example ending poverty and hunger; ensuring healthy lives, quality education and access to energy and to water and sanitation; promoting decent work; and reducing inequalities.

Taking social considerations seriously means that even an investment that is economically beneficial to the country as a whole (for example in terms of gross domestic product or public revenues) cannot be argued to promote sustainable development if for example affected people are arbitrarily dispossessed of their land, or if they are oppressed by security forces.

In any investment process, social, environmental and economic considerations are interlinked and can involve complex choices. The principles of participatory and accountable governance discussed in the previous section provide guidance on how these choices should be made.

## 1.3 Why the law matters

### The law can influence important aspects of investment quality

Legal instruments play an important role in determining the terms and conditions applicable to foreign investment (Box 4). And as foreign investments in agriculture and extractive industries increase pressures on land and natural resources, the law is an important vehicle for managing competing claims.

Take the case of a foreign investment project to develop a sugarcane plantation and processing facility in a low-income country. The national law of the host state (that is, the state where the investment takes place) and possibly local 'customary' systems will regulate who owns the land needed for the project, who can participate in decisions affecting that land, the rights that the agribusiness firm will be able to acquire over the land, and the protection available to villagers who may be using the land for farming, herding or foraging.

Sugarcane being a thirsty crop, national law will also regulate the allocation of water rights for irrigation, and balance competing water demands. In addition, national law in principle determines the amount and distribution of tax revenues that the project will contribute. Typically, national law also regulates labour relations, and determines the applicable environmental safeguards and liabilities.

#### Box 4. Law: key concepts

The law governing foreign investment in the natural resource sector typically involves rules developed at both national and international levels. In many societies, local systems of customary law also influence the governance of land and natural resources.

National law primarily applies within a given country. In most countries, a written constitution defines ground rules for public governance, and affirms fundamental rights that all public actors must respect. Parliament usually passes 'primary' legislation (that is, laws), while government agencies typically have the power to adopt 'secondary' legislation (that is, regulations to implement the primary laws).

Depending on the country, the context, and in some respects the content of the legislation, primary laws may be referred to as statutes, acts of parliament or codes. Secondary legislation may include decrees and regulations. Typically, primary legislation must respect the constitution, while secondary legislation must respect the constitution and primary legislation. Depending on the country, court decisions can also create laws, or establish authoritative interpretations of legislation.

Local-level customary systems are typically based on unwritten practices that draw their legitimacy on 'tradition', even though they have often evolved considerably over time. Rights based on these systems may enjoy a degree of protection under national law and considerable social legitimacy, even in the absence of legal recognition. In natural resource investments, customary systems may affect rights and authority in allocating land rights, for example.

International law mainly regulates relations between states and, in some cases, between private actors and states. It is primarily based on customary rules and international treaties. Customary rules are created through state practice accompanied by states' belief that their practice reflects an international legal obligation.

Treaties are reciprocally binding agreements concluded between two or more states. They must be clearly distinguished from contracts, which are agreements primarily concluded between private entities, or between a private entity and a state.

Source: FAO, 2013 and 2016, with additions.

International law will also define key terms applicable to the sugarcane project. Global or regional trade treaties will determine the terms for the company to export its produce, and define space for the government to grant tariff protection to that produce if the venture targets the national market. An investment treaty may set standards to protect the agribusiness venture from adverse host state interference, and allow it to bring an international arbitration against the government for alleged breaches.

International law also facilitates co-operation between states on issues like tax matters or the management of shared natural resources – for instance, if the sugarcane venture abstracts water from a cross-border watercourse. Importantly, international law protects the human rights of people who may be displaced or otherwise affected by the venture, and the labour rights of those employed by it.

Transnational legal relations – that is, relations that straddle multiple national jurisdictions – are another recurrent feature of foreign investment. The national law of several countries beyond the host state may be relevant to important aspects of the project. For example, the investment may be channelled through companies incorporated in different countries for tax minimisation and investment protection purposes.

And if affected people feel wronged by the venture and distrust local courts, depending on the jurisdiction they might be able to sue the parent company of the agribusiness firm in its home country (that is, the country where the parent company is based).

A complex web of contracts among the investor, the host state, lenders, insurers, suppliers and contractors will define the rights and obligations of these multiple parties. For example, the contract between the investor (that is, the agribusiness firm in the sugarcane venture example) and the host government may allocate resource rights, set the terms for the investment, define how returns will be shared between investor and state, and specify social and environmental safeguards.

The contract between the investor and the host government is loosely termed here as the ‘investment contract’, though in practice multiple contracts between the two parties may be involved.<sup>2</sup> In some countries, national law contains detailed rules applicable to all covered investments, and authorities issue standardised licences or permits instead of negotiating contracts. Contracts may themselves be standardised, with variation only permitted on specific variables.

Finally, international guidelines and standards may raise the bar beyond what is required under applicable law. Guidance has been developed by UN agencies, other international organisations such as the Organisation for Economic Co-operation and Development (OECD), lenders and multi-stakeholder certification schemes. Certification schemes relevant to sugarcane include the Roundtable on Sustainable Biomaterials (RSB), and the Better Sugarcane Initiative (‘Bonsucro’).

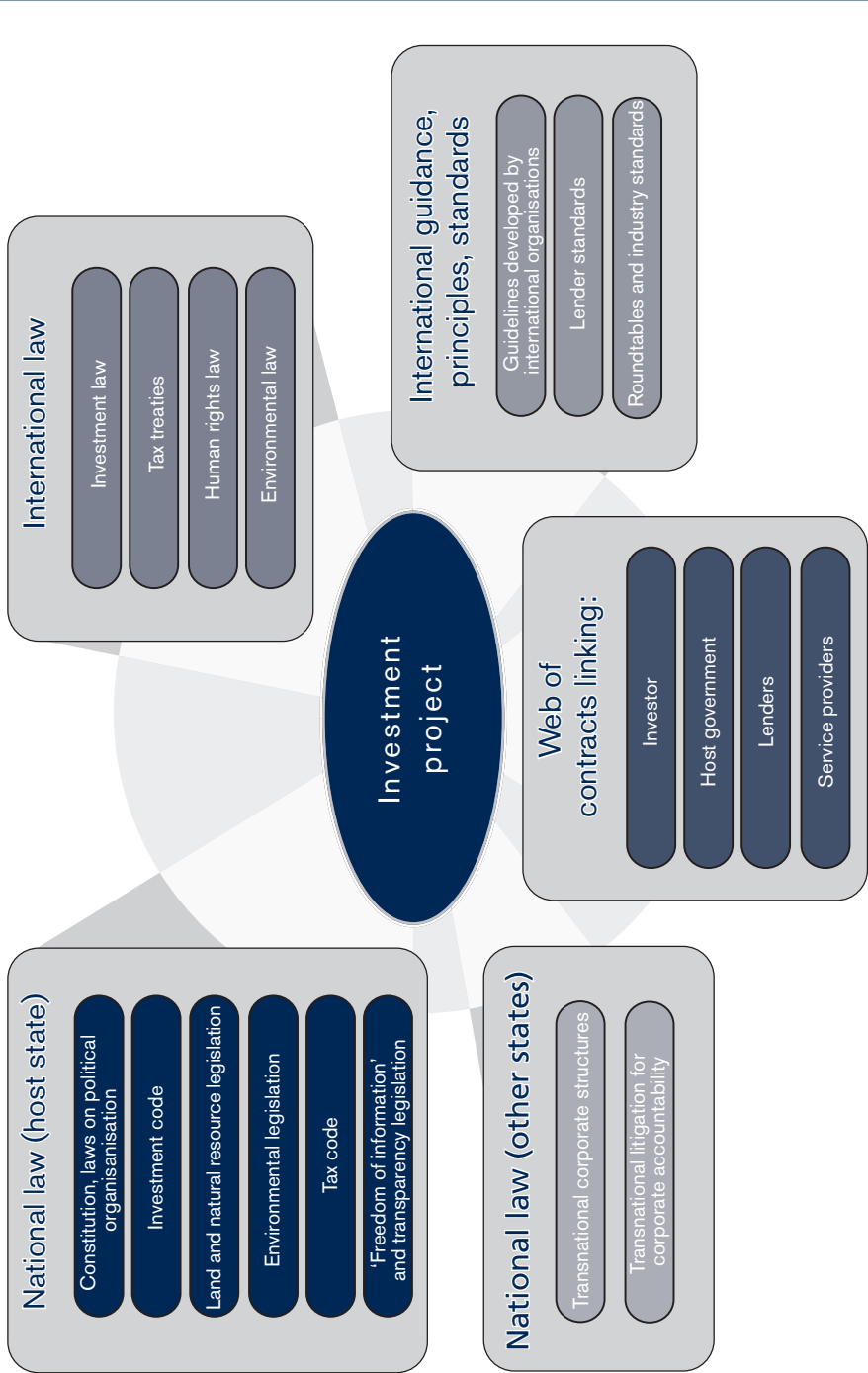
Guidelines and standards are not legally binding but they can still have legal consequences. For instance, legislation or project contracts may require the venture to comply with specific standards, and international guidelines can establish parameters of ‘due care’ that could be referred to in court litigation. Even where international guidance or standards have no legal value, the institutional arrangements associated with them can still create effective incentives for companies to comply, including grievance mechanisms and reputational damage in case of non-compliance (Figure 1).

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2. In the sugarcane venture example, the company and the government may at different stages sign a memorandum of understanding, an establishment convention, a land lease, and a water rights convention.



**Figure 1.** Multiple sources of regulation and guidance



Source: Author

These various sources of regulation and guidance influence key aspects of investment quality, which is critical in the pursuit of sustainable development. Taken together, the multiple legal instruments define the rights and obligations of the different parties involved; they affect the way the costs, benefits and risks of investments are shared among these parties; and they provide opportunities for contestation and negotiation. They also shape the rights and recourse mechanisms that affected people hold in their capacity as citizens, landholders, workers, or unlawfully wronged persons.

### The limits of law

Of course, law is only a part of the story. Policy instruments outside the legal sphere can also influence investment patterns and outcomes (for example, macroeconomic policy). Laws are often not properly enforced due to vested interests, power imbalances or resource constraints. Legislation may nominally protect human rights, land rights or labour rights, but often remains a dead letter. Tax laws may be circumvented, and tax payments are not always easy to collect.

Some contracts for natural resource investments have been awarded in violation of prescribed procedures or substantive rules. Implementation may take legal norms in unexpected directions, often reflecting power relations between those who stand to gain or to lose from competing interpretations of the law. Even well-implemented legislation may produce unintended consequences. Whether affected groups are well-organised for collective action may have greater impact than the legal rights they formally hold.

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Shortcomings in implementation mean that investment processes typically reflect a spectrum of situations between law and practice, between the normative and the experienced, in which multiple norms with varying degrees of implementation have both intended and unintended consequences for real-life processes.

But given the role of law in framing the terms of investment, effective use of legal tools by governments and advocates alike is an important ingredient of public efforts to ensure that foreign investment contributes to sustainable development. Many governments have become more aware of the far-reaching repercussions of investment law, particularly after investors brought international arbitrations challenging public action in wide-ranging policy areas. Unlike many legal arrangements relevant to foreign investment, effective enforcement mechanisms mean that investment treaties and arbitration can have real bite.

At the grassroots, villagers, NGOs and social movements in many low and middle-income countries have resorted to legal action to contest large investment projects. In many cases, using the law now constitutes an important part of wider advocacy strategies that combine legal recourse with collective action and political mobilisation.

## 1.4 Outline of the handbook

The remainder of this handbook is structured as follows. Chapter 2 discusses the law promoting investment flows, with a focus on investment treaties and arbitration. It explains key concepts and trends, and examines their sustainable development implications.

Chapter 3 explores selected issues concerning the economic deal – from corporate structure to taxation, through to promoting positive linkages with the local economy, such as employment and business opportunities.

Chapter 4 discusses social and environmental considerations. While these considerations cover a wide range of diverse issues, the focus of the chapter is on impact assessment, land rights, labour rights and environmental protection. The chapter discusses social and environmental aspects together because some legal processes, such as impact assessments, aim to cover both sets of considerations.

Chapter 5 examines selected issues concerning investment decision making: bottom-up deliberation, transparency, anti-corruption measures and legal remedies. These topics reflect diverse pathways to greater local control and accountability in investment processes. They are key to placing people at the centre of sustainable development.

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There is significant overlap between the issues discussed in the different chapters. For example, job creation is an important ingredient of the economic deal (Chapter 3) and a key 'social' issue (Chapter 4). Community engagement is important in shaping public participation and accountability in investment decision making (Chapter 5) and also, more specifically, in impact assessment and land acquisition processes (Chapter 4).

In each chapter, the main text discusses the relevant law, while boxes distil tips for policy and practice. Where relevant, figures accompany the text. These are simplified representations of often very complex realities. At the end of each chapter, a few resources for further reading are suggested. Given the handbook's non-academic target audience, these lists prioritise policy-oriented resources that are available online.

To keep the discussion practical, Chapters 2 to 5 provide examples to illustrate the issues discussed. The intention has not been to present 'success stories': individual legal instruments and strategies typically present both strengths and weaknesses, governments have often struggled to implement well-meaning reforms, and realities on the ground may vary greatly, even within the same country. Country contexts do matter.

But the examples aim to illustrate the implications of the issues discussed, and the ways in which policy thinking and practical options have evolved in recent years. While Chapters 2 to 5 focus on practical issues and options, Chapter 6 draws out some deeper, more systemic reflections about the relationship between natural resources, foreign investment, law and sustainable development.

# Investment preparedness and promotion

## 2.1 Preparedness, not just promotion

### Investment preparedness

Investment preparedness refers to the extent to which people and institutions in a given country can identify the right types of investment, fully harness the benefits of that investment and minimise its risks. Many investment policies focus on promoting investment. But preparedness is critical to ensuring that investments contribute to sustainable development in the relevant country.

Investment preparedness has much to do with issues outside the legal sphere. For example, it presupposes a strategic vision of national development, and of the types of investment that are best suited to advance that vision (see UNCTAD's Investment Policy Framework for Sustainable Development, Box 2 in Chapter 1).

Preparedness may also involve effective institutions and the capacity to manage investment processes, competitive domestic suppliers and producers that can seize the new business opportunities created by incoming investment, and vibrant citizens' groups with the capacity to hold government and business to account.

Preparedness has a legal dimension too. The law can provide tools to ensure that investment policy is in line with local and national development aspirations, to maximise the local and national benefits of investments, and to minimise and equitably allocate the risks and the costs associated with investments.

This legal dimension of investment preparedness could include publicly debated framework legislation that sets strategic orientations for sectoral development (see Box 38 in Chapter 5 on Mali's Agricultural Orientation Act of 2006). It could also include properly enforced legislation protecting local land rights, requiring effective community engagement in the early stages of project design, establishing robust social and environmental impact assessment requirements and processes, protecting labour rights and creating mechanisms to minimise tax avoidance.

In many countries, recent legislation has created new opportunities that could increase investment preparedness. For example, environmental legislation was embryonic in many low and middle-income countries until the mid-1990s. But several states have more recently adopted comprehensive framework legislation to regulate environmental matters. This trend is being driven by factors such as increased public scrutiny, donor pressures and a more widespread recognition that greater investment does not automatically translate into positive sustainable development outcomes.

Yet much remains to be done to reform laws and properly implement them. In many low and middle-income countries, land and resource rights remain insecure,

labour rights fragile, and environmental safeguards weak. Some governments are concerned that efforts to address these issues might increase business costs and deter potential investors. But quality investors are often used to operating with the costs created by rigorous social and environmental management systems.

In fact, limited legal preparedness could deter quality investors, including due to lack of a level-playing field with their competitors in the country. Limited legal preparedness also creates the breeding ground for conflict and contestation, even in countries where foreign investment could provide a real contribution towards sustainable development. Recent sustained contestation about 'land grabbing' illustrates these issues (Box 5). The bulk of this handbook (Chapters 3 to 5) discusses ways to improve investment preparedness.

### **Box 5. 'Land grabbing' or agricultural investment?**

In the mid-2000s, changing agricultural commodity prices, expectations of rising land values, public policies to promote long-term food and energy security, and government efforts to attract foreign investment in agriculture all fuelled a surge in large-scale land deals for agribusiness plantations in many low and middle-income countries.

In many cases, the deals involve long-term concessions or leases on state-owned land, particularly in Africa and in the Mekong region where governments own or otherwise control much land. However, where much land is owned by clans and families, as in Ghana, customary chiefs have been leading the deal making, and private land purchases and complex financial transactions appear to be more common in Latin America. Even in these cases, however, governments often play a central role, through providing incentives, establishing investment promotion schemes, and enacting law reforms that facilitate land access for commercial operators.

Rigorous assessments of the long-term socio-economic outcomes of this surge in agribusiness investments remain limited. However, available evidence points to disappointing outcomes, at least in the short term. The failure rate of these agribusiness ventures appears to have been high, though impossible to quantify with precision, and slow implementation has marred ongoing investments. Available data suggests that only 4.1 million hectares, out of a total of 37.3 million hectares transacted since 2000, are under cultivation (Land Matrix, 2014), indicating that overall levels of implementation remain very low.

What is clear, however, is that large-scale land deals can increase competition for land and resources. There have been numerous reports of land dispossession, for example in Cambodia, Ethiopia, Ghana, Laos, Liberia, Mozambique, Uganda and Tanzania. There has also been significant contestation at local, national and international levels, with local-to-global alliances of affected people, social movements and NGOs opposing the deals or seeking to change their terms (Polack *et al.*, 2013; Hall *et al.*, 2015).

Contestation often reflects polarised views on desirable agricultural development pathways, including the role of small, medium and large-scale farming. But it also reflects concerns about weak governance and lack of preparedness in many recipient countries – particularly in relation to insecure land rights and limited opportunities for public participation and accountability in investment processes.

### Prepare for investment

- If investment is to contribute to sustainable development, preparing for investment needs to be a key part of investment policy making, and investment promotion needs to be based on a clear strategic vision of national development.
- In legal terms, improving investment preparedness involves action by governments and advocates to leverage a wide range of legal tools to promote the emergence of a long-term, bottom-up vision (Chapter 5), get the best economic deal (Chapter 3), secure local land and resource rights (Chapter 4), protect labour rights (Chapter 4) and safeguard the environment (Chapter 4), among other things.

### Investment promotion

Broadly speaking, investment promotion involves measures aimed at stimulating investment. It is widely recognised that private investment can play an important role in pursuing sustainable development. This role was explicitly recognised at the 1992 Rio Conference on Environment and Development and reinforced with the recent adoption of the SDGs (see Box 3 in Chapter 1). The role of foreign investment is particularly relevant in poorer countries, where domestic capital resources are often constrained.

Over the past two decades, governments in many low and middle-income countries have taken steps to attract foreign investment, including in the natural resource sector. For example, many countries have established investment promotion agencies that provide prospective investors with information and guidance, and help investors to navigate administrative procedures.

Investment promotion measures have also included reforms to national law, and the signing of international treaties. Governments have pursued a number of different approaches. Depending on context, law making to promote investment has involved investment liberalisation, including the easing of restrictions on cross-border investments; and investment protection, because many think that legal safeguards can help to attract investments in contexts where political risk is perceived to be high. International investment law plays a particularly important role in the protection of foreign investments (Box 6).

In many ways, it would make sense for this handbook to discuss investment preparedness first, and investment promotion after. Logic would require a country to first think through the models of investment it wants to promote and tighten up the necessary safeguards, and then to take steps to promote those investments.

In practice, policy making does not always work in this way. The economic reality underlying existing investment patterns does matter. And existing norms can have far-reaching implications for a country's ability to take measures that could strengthen preparedness. For example, international trade rules and some investment treaties restrict the use of legal requirements on investors to source goods and services locally.

By discussing investment promotion first, this chapter introduces key concepts about investment treaties and arbitration that will be referred to while examining aspects of investment preparedness (Chapters 3 to 5). Governments play a central role in drafting and implementing investment treaties and legislation, and in the conduct of investor-state arbitration. Therefore, many of the 'tips' in this chapter relate to government action. However, advocates have been increasingly active in scrutinising investment law making (see Section 2.5) and arbitration (see Chapter 5).

### **Box 6.** International investment law, investment treaties and investor-state arbitration

International investment law is the body of international law that governs the admission and treatment of foreign investments. It does not apply to domestic investment. It has undergone rapid change and exponential growth over the past two decades.

International investment law is based on customary international law and international treaties (see Box 4 in Chapter 1). Treaties account for the bulk of the norms of investment law. There is no global treaty that sets standards of treatment for foreign investment, and there is no global institution comparable to the World Trade Organization (WTO). Rather, international investment law is centred on a network of over 3,000 bilateral or regional treaties, of which an estimated 2,300 are in force.

Investment treaties are mostly bilateral investment treaties (BITs) but also, increasingly, regional investment treaties and regional or bilateral preferential trade agreements that contain an investment chapter. Traditionally, investment treaties were mainly concluded between a high-income country and a low or middle-income country, or between low and middle-income countries. Treaty negotiations are now also being conducted between high-income countries.

The number of investment treaties has increased sharply since the early 1990s, when neo-liberal thinking became prevalent. But the extent to which governments have signed up to these treaties varies considerably across countries, and recent years have witnessed important changes in investment treaty making.

Investment treaties aim to promote investment flows between the state parties by establishing obligations about how investments by nationals of one state will be admitted and protected in the territory of the other state. Most investment treaties also allow investors to bring disputes with the host state to international arbitration (investor-state arbitration). These disputes are settled by arbitral tribunals that issue binding rulings called arbitral awards. In addition, most treaties allow states to file arbitrations against the other states parties (state-state arbitration), though this mechanism has had relatively little use so far.

Investment-related norms are also included in treaties relating to the WTO, particularly the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). These agreements are binding on the over 160 states that have joined the WTO, and are enforced through a state-state dispute settlement system at the international level.

## 2.2 Investment admission

### Trends in admission policy

Under customary international law, states have the sovereign right to regulate the admission of foreign investment within their territory. As a result, countries have 'a free choice as to the degree of open admission' of foreign investment: they can restrict entry or place conditions on it, or they can liberalise it through unilateral measures or international treaties (Muchlinski, 2008:20). Admission policy largely depends on national policy preferences. Restrictions tend to have diverse motivations, including national security and a desire to protect local producers.

For a long time, many states imposed controls on entry. Commonly used controls included bans on foreign investment in specific sectors, screening processes that admitted foreign investment only on government authorisation, restrictions on foreign ownership of strategic businesses or assets and performance requirements such as the need to source goods or services from local producers (Muchlinski, 2007).

In the 1990s and early 2000s, however, many states took measures to liberalise and facilitate inward investment, including in the natural resource sector. These measures involved reforms in national law, and much international treaty making. Many states have revised their mining, petroleum and investment codes to partly or fully liberalise the admission of foreign investment (Box 7). Some have also reformed their land legislation to allow market transactions and enable foreign investors to acquire more secure land rights.

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#### Box 7. Trends in investment codes

An investment code is piece of national legislation that determines key aspects of the legal regime governing investment. Many states have adopted an investment code – not only low and middle-income countries, but also high-income ones. Other countries do not have a comprehensive code but some comparable norms are contained in other legislation.

Some older codes focused on foreign investment alone. Nowadays, many investment codes cover both foreign and domestic investments, and there is a trend towards reducing differences in the treatment applicable to the two. Some investment codes do not apply to the extractive industries, in which case the petroleum or mining code regulates issues that would otherwise be tackled by the investment code.

The content of investment codes is very diverse. Many codes regulate the admission of foreign investment. For example, some codes restrict admission, such as through establishing screening requirements or excluding strategic sectors. Other codes favour a more open approach to admission, but few countries are completely open.

Some codes provide tax and other incentives for (certain types of) investments, and many establish institutions to promote investment. In the latter cases, the investment code regulates the creation of the investment promotion agency, clarifies its mandate and objectives, and determines its governance structure and reporting lines.

Some investment codes also provide legal protections for investment, for example through regulating expropriations and enabling foreign investors to bring disputes to investor-state arbitration. These issues are discussed in Sections 2.3 and 2.4.

Source: World Bank, 2010, with additions.



Many states have introduced facilitation measures such as the establishment of an investment promotion agency to provide investors with information, consider investment applications, issue relevant administrative certificates and help investors to liaise with other government departments.

Many governments have also made extensive use of tax incentives to attract investments, triggering debates about whether these incentives work, and about the cost of foregone public revenues for host countries (UNCTAD, 2000; Zee *et al.*, 2002; OSI *et al.*, 2009). Some governments have sought to establish 'land banks': inventories of land deemed 'unused' and ready for allocation to prospective investors. This latter trend has fuelled concerns about risks of 'land grabbing'.

In recent years, some governments have taken new steps to screen and regulate foreign investment (UNCTAD, 2012d). A commodity boom in 2007-08 emboldened many governments to seek to renegotiate extractive industry projects or reform legislation not only to obtain higher taxation, but also, in some cases, to secure greater government control on the business venture itself.

Today, admission policies vary significantly in different countries. Some national laws establish open conditions for the admission of foreign investment, while others impose controls. For example, some laws require that proposed investments be screened and approved by a government authority, or that foreign investors operate through a local subsidiary incorporated in the host country.

Even in relatively open economies, certain types of investments may be subject to scrutiny. In Canada, for example, the Investment Canada Act subjects to a 'net benefit' screening transactions over a certain size. In addition, some laws restrict foreign ownership of businesses in specified sectors, for example mining, though several states have since removed these restrictions. Others restrict foreign ownership of sensitive assets such as land (Box 8).

Ultimately, choices on admission policy are inherently political. Different countries may legitimately take different approaches, in light of their specific historical trajectory, socio-economic conditions, sustainable development aspirations and realistic pathways towards realising those aspirations. Technical analysis can facilitate informed choices, based on proper consideration not only of economic issues, but also social and environmental ones (eg on land rights issues, see Box 8).

### **'Pre-establishment' investment treaties**

International investment treaties (see Box 6) mainly concern the treatment of foreign investment after its entry into the territory of the host state. Most treaties do not oblige the host state to admit foreign investment. Many merely require compliance with the admission rules contained in national law – although some call on the state parties to create 'favourable conditions' for investment from nationals of the other state party (Newcombe and Paradell, 2009).

## Box 8. Regulating foreign investors' land rights

Land raises political and often emotive issues. Land acquisition by foreign nationals can cause resentment and tensions. In the European Union (EU), the lifting of restrictions on foreign land ownership was a particularly sensitive issue when Central and Eastern European countries negotiated their accession to the EU (McAuslan, 2010). Sensitivities can be particularly acute where historical legacies are at play, particularly a history of colonisation or foreign domination, for example in Africa.

Some states have enacted legislation restricting the land rights that foreign investors can acquire. For example, some national laws:

- Bar non-nationals from acquiring outright land ownership (eg under Cambodia's land law)
- Require government authorisations for the acquisition of land rights by non-nationals (eg under Namibia's land reform legislation and in the Canadian province of Saskatchewan)
- Provide maximum or shorter lease durations for non-nationals (eg under Ghana's constitution)
- Provide maximum land area ceilings for non-nationals, in aggregate terms as a percentage of national and/or subnational rural land and/or in relation to individual landholdings (eg in Argentina)
- Or restrict the allocation of land rights to non-nationals to specified forms of land use (eg under Tanzania's land legislation).

Source: Cotula, 2015a.

Some investment treaties do create enforceable obligations regarding the admission of foreign investment. Subject to exceptions and reservations, these 'pre-establishment' treaties usually require states not to discriminate against foreign investors and investments in the issuance of permits, licences, authorisations or other formalities that may be required for the making of an investment. In effect, foreign investors can make, acquire or expand their investments under the same rules applicable to local nationals – a far-reaching form of investment liberalisation.

Investment treaties do usually circumscribe the scope of pre-establishment obligations. Under the 'positive listing' approach, for example, the pre-establishment obligations would only apply to sectors or measures that are specifically mentioned in the treaty, or in schedules attached to it. Many investment treaties frame pre-establishment obligations in general terms, but exclude specified sectors or activities ('negative listing'). In these cases, pre-establishment obligations apply to all sectors and measures that are not explicitly excluded.

In addition, pre-establishment treaties typically identify exceptions for measures relating to covered sectors and activities that do not conform to treaty requirements and that states wish to preserve. Some treaties exempt all existing non-conforming measures, so that pre-establishment obligations effectively only apply to new measures.

Pre-establishment treaties that liberalise sectors or activities account for a minority of the global stock of investment treaties. But they are increasingly common, particularly in integrated trade and investment treaties. The pre-establishment approach is particularly common in the treaties concluded by the United States (US), Canada and Japan. Some treaties feature pre-establishment provisions but exclude these provisions from investor-state arbitration.

WTO norms also have implications for the admission of foreign investment in certain sectors or aspects. Most states today are either members of the WTO, or are in the process of joining. The WTO GATS requires these states, among other things, not to discriminate against foreign service providers in the establishment of branch offices within their territory – though this only applies to the service sectors for which each state has agreed to be bound in this way. The WTO TRIMs agreement restricts use of performance requirements, such as measures conditioning establishment on the use of local goods (Section 3.4).

### Pre-establishment treaties – policy considerations

Some governments may be prepared to agree to limit how they exercise their sovereign powers in future, in order to attract investment. But it is important to remember that there is no legal obligation for states to sign pre-establishment treaties. Pre-establishment commitments can send a strong signal to prospective investors, but also reduce the host state's ability to regulate the admission of foreign investment into its territory.

The issue discussed here is not whether a state should liberalise investment flows or not. As discussed, states can legitimately take different approaches. Rather, it is whether a state that wishes to liberalise investment should do this through an investment treaty. States can and often do liberalise investment by reforming national law.

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Should there be a policy change in future, a state can more easily change its own national law than renegotiate or terminate an investment treaty. In other words, enshrining liberalisation commitments in an investment treaty tends to make a country's investment policy more rigid, against often rapidly changing economic needs and policies.

Treaties that follow a 'negative listing' approach are particularly delicate to negotiate. The treaty, or schedules annexed to it, must explicitly identify all measures and sectors that a state would like to exempt from pre-establishment obligations. Failure to do this may force the state to change its own legislation in order to comply with the investment treaty. Getting the list of exclusions right can be difficult, because the treaty can affect wide-ranging issues and economic sectors.

Finally, liberalisation obligations are not the only way to reassure investors about the way they will be treated at the admission stage. States can also make less far-reaching commitments on admission. For example, a treaty provision stating that investments must be admitted in accordance with the national laws of the host state would preserve the ability of the host state to impose entry controls and change laws over time. But it would also protect investors against arbitrary government decisions that conflict with national law (UNCTAD, 2012a).

## TIP 2

### Carefully consider admission policies, especially if they are entrenched in international treaties

- States have the sovereign right to regulate admission of foreign investment in their territory.
- Legislation affecting admission in agriculture and extractive industries requires well thought-out policy choices based on country context, sustainable development aspirations and realistic pathways towards realising those aspirations.
- Before entering into any 'pre-establishment' investment treaties, governments should fully appreciate the ramifications that these treaties can have. Governments wishing to preserve their ability to regulate admission may prefer not to include pre-establishment obligations in their investment treaties.
- 'Negative listing' can be particularly difficult to negotiate, so governments wishing to preserve their ability to regulate admission may prefer 'positive listing', particularly where capacity challenges make it difficult for authorities to draw up a robust negative list.
- Stating that investments must be admitted in accordance with national law would give more freedom to host country regulators, while also providing reassurances to investors against arbitrary refusals.
- Advocates can promote public debate on and scrutiny of admission policies, including through highlighting the likely consequences for local producers.

## 2.3 Investment protection

### Standards of investment protection

In order to promote foreign investment, many countries have adopted national legislation and concluded international treaties that protect investment from conduct that may adversely affect the business venture. Indeed, in addition to governing admission, many investment codes establish legal safeguards to protect existing businesses from adverse state interference. Some sectoral laws provide comparable safeguards.

But it is international treaties that play a particularly important role in this area – not least because, compared to the safeguards provided in national investment codes, treaties are more difficult for a state to change unilaterally. While many investment codes establish protections for both domestic and foreign investments, investment treaties only protect foreign investments.

Legal safeguards to protect investment aim to reassure investors that adverse state conduct will not prevent them from reaping the rewards of their economic activities. As such, these safeguards are widely thought to be an important ingredient of investment promotion. In practice, the empirical evidence on whether legal protection instruments like investment treaties do promote investment is mixed (Box 9).

Many investment codes regulate the power of the government to expropriate investments – for example in Cambodia, Guatemala and Tanzania. Some codes also allow investors to bring disputes to international arbitration. But given the prominent role of investment treaties in defining investment protection standards, the remainder of this section focuses on these treaties.

## Box 9. Do investment treaties promote foreign investment?

Governments negotiate investment treaties because they want to promote investment. But empirical evidence on whether this works is mixed. Some econometric studies have found a statistical correlation between a country's involvement with investment treaties and its foreign investment inflows, but others have found no such correlation (see eg the studies collected in Sauvant and Sachs, 2009). Significant methodological challenges affect this type of research, and only some studies have considered differences in the content of investment treaties (eg Berger *et al.*, 2013) and between economic sectors (eg Colen *et al.*, 2014).

There is qualitative evidence that informed investors take account of investment treaties when structuring investments. Indeed, several international arbitrations of investment disputes show how investors' corporate planning can involve choosing to channel their investment through a state that had signed a robust investment treaty with the host state. But one survey of general counsels from top US companies found that many counsels had little familiarity with investment treaties, or did not think that the legal protection provided by investment treaties made a big difference (Yackee, 2010).

The vast literature on what drives foreign investment shows that investment decisions are primarily shaped by business opportunities, for example valuable natural resources, or a population providing an attractive market that a firm can cater for. Investment decisions are also likely to be shaped by the general business environment in the country, including access to and reliability of infrastructure, and access to a desired labour pool.

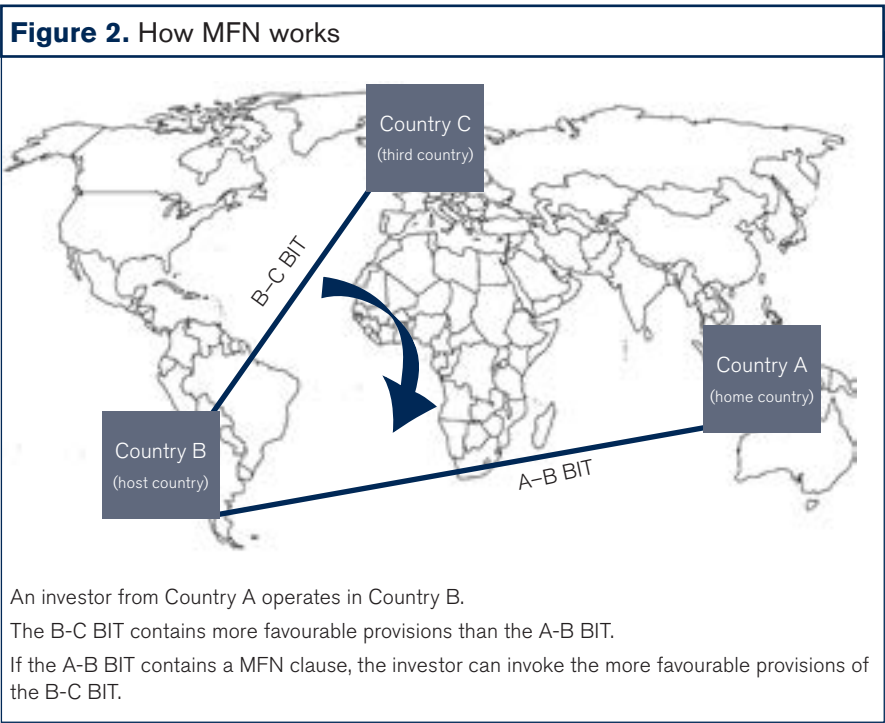
So investment treaties are at best one among the 'many determinants that drive firms' investment decisions', not least because investment treaties alone 'cannot turn a bad domestic investment climate into a good one' (UNCTAD, 2012d:133).

Legal safeguards provided in international investment treaties usually include:

- 'National treatment' and 'most-favoured-nation' (MFN) clauses that typically require states to treat foreign investors or investments no less favourably than investments in similar circumstances by their own nationals (national treatment) or by nationals of other states (most-favoured nation treatment).
- 'Fair and equitable treatment' (FET) clauses that require states to treat foreign investment according to a minimum standard of fairness, irrespective of the rules they apply to domestic investment under national law.
- 'Full protection and security' clauses, which are usually interpreted as requiring states to take steps to protect the physical integrity of foreign investment, but have in some cases been interpreted more broadly to also require legal protection.
- Clauses that require expropriations to be non-discriminatory and for a public purpose, to follow due process, and to involve compensation usually linked to market value. These clauses typically cover not only outright expropriations, but also regulation that, while not transferring ownership title, substantially deprives investors of their investment ('indirect expropriation').
- Provisions on currency convertibility and profit repatriation, which allow investors to repatriate returns from their activities.

As interpreted by some tribunals, MFN clauses can allow investors to claim more favourable treatment provided by treaties between the host state and states other than the country where investors are based (Figure 2). So in order to understand the full implications of one investment treaty, it is important to consider all the other treaties that the state may have concluded. In effect, MFN clauses level the playing field upwards, because investors and investments operating in one state may be entitled to the most favourable treatment provided by any of the treaties ratified by that state.

Because treaty standards of investment protection are often formulated in unspecific terms ('fair and equitable treatment', for example), a treaty's implications may only be fully understood by considering how arbitral tribunals have interpreted and applied similar clauses when settling disputes. The duration of an investment treaty is another important dimension, because treaty clauses often restrict the ability of the state parties to terminate the treaty unilaterally (Box 10). So it is often more difficult for a state to change an investment treaty than it is to amend national law.



Source: Author

## Box 10. Termination clauses

Once a state has concluded an investment treaty, withdrawing from it may be difficult. Investment treaties can be and often are terminated by agreement between the two (or more) state parties. But this requires all the parties to agree, and it may often be politically sensitive or practically difficult to do.

On the other hand, investment treaty clauses often restrict states' ability to unilaterally terminate treaties, or (for treaties involving more than two parties) to withdraw from them. There is great diversity in these unilateral termination clauses, but also some recurring features.

In many cases, termination clauses provide that the treaty can only be terminated unilaterally after 10 or even 20 years. The longest known duration is 30 years, though such long terms are rare (Pohl, 2013). Many termination clauses also provide that, once the treaty has been terminated, it continues to apply to investments made while the treaty was in force for an additional 10 or 20 years. In other words, signing an investment treaty can have long-lasting implications.

Most preferential trade agreements that include an investment chapter do not contain a termination clause. However, a state would have to terminate the whole treaty to withdraw from the investment chapter. This may be economically or politically very difficult to do.

## Investment protection vs policy space

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Broadly speaking, 'policy space' refers to the ability of one country 'to calibrate national policies to local conditions and needs' (Akyüz, 2008:i). It can also refer to the policy options available to a country for honouring international obligations other than investment treaties, for example on human rights or environmental protection.

International treaties can limit national policy space: governments may be legally required to take some measures, and may no longer be allowed to take other measures. While much depends on how a government uses the policy space it does enjoy (Mayer, 2009), there have been concerns that investment treaties might create excessive restrictions on national policy space (Box 11).

In recent years, investors have relied on the standards of protection included in investment treaties to challenge a wide range of state conducts – including measures adopted in the name of social, environmental or economic goals. Examples concerning natural resource investments include impact assessment procedures and government refusals to issue necessary environmental permits; measures to promote locating part of 'research and development' activities in the host country; and contract termination to sanction contractual breaches.

Other examples include affirmative action to redress historical injustice; environmental regulations to protect sensitive cultural and environmental heritage; and land redistribution programmes. Court proceedings initiated by NGOs and direct action led by grassroots groups (eg farm occupations) have also resulted in international arbitrations based on investment treaties.

### Box 11. Investment treaties and ‘regulatory chill’

There has been much controversy about the extent to which investment protection standards can restrict the ability of states to act in the public interest. Some have raised concerns that overly broad investment protection standards can make it more difficult for states to take action (eg OHCHR, 2003; Tienhaara, 2009).

States can adopt measures but they may have to pay steep compensation bills if they wish to regulate in violation of a treaty obligation. Even if companies lose a case, the government may still face costly legal bills. The concern is that the prospect of having to pay substantial amounts in compensation and/or in legal costs might discourage states from acting.

Systematic empirical evidence of this ‘regulatory chill’ is difficult to find, partly because:

- Information is not in the public domain
- Counterfactuals (whether authorities would have acted differently in the absence, or presence, of an applicable investment treaty) are not available
- And biases undermine the evidence base, for example because we can more easily find out about the cases where authorities did act, resulting in publicly reported investor-state disputes (see Bonnitcha, 2014).

More socio-legal research is needed to assess the extent of regulatory chill. But reports that even high-income countries consider the risk of liabilities in their policy-making processes (eg Peterson, 2013) highlight the need to not be complacent about the restrictions that investment treaties can create, particularly in low and middle-income countries where public finances face harder constraints.

And irrespective of any regulatory chill, the financial implications of investment treaties raise questions about how the costs of socially desirable measures should be distributed between investors and states.

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Concerns about preserving policy space led some states to ‘recalibrate’ (Alvarez, 2010) their investment treaties. This often involves using more narrowly defined investment protection standards. Early movers included the United States and Canada – two states at the receiving end of sizeable arbitration caseloads in the context of the North American Free Trade Agreement (NAFTA). Some South and Southeast Asian states have also taken more nuanced approaches to investment treaty making, as have some African and Latin American states.

This shift is reflected in new departures in treaty formulation, including for example more narrowly formulated fair and equitable treatment provisions; annexes clarifying the criteria to determine whether an indirect expropriation has occurred; and general exceptions clauses allowing the states parties to regulate in specified matters, including the environment. Some recent treaties look very different from those typically concluded even a few years ago.

#### An example: fair and equitable treatment

Take the case of FET – a standard that has been relied on in ‘almost all claims brought to date by investors against states’ (UNCTAD, 2012d:147). Given the open wording of this standard, arbitral tribunals have played an important role in clarifying the practical implications of FET.





Photo: Chris Stowers / Panos Pictures

### **Investment treaties require a careful balancing act between multiple policy goals**

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For example, many arbitral tribunals have held that FET requires respect for the 'legitimate expectations' that the investor had when making the investment. Some tribunals have emphasised the importance of consistency and transparency of government conduct, and stability and predictability of the regulatory framework. These interpretations have enabled many investors to obtain significant amounts in compensation for public action in a wide range of policy areas.

To address concerns that arbitral interpretations might take investment protection beyond what states were prepared to accept, some governments have reconsidered the formulation of their treaties. For example, recent Canadian and the US treaties clarify that FET is restricted to the international minimum standard of treatment required under customary international law (MST/CIL).

In these cases, an investor would need to prove that a norm of customary international law prescribes or prohibits a certain conduct, and that the state violated that norm. Also, the MST/CIL has traditionally been interpreted relatively narrowly, as referring to conduct that amounts 'to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.<sup>3</sup> So equating FET to the MST/CIL should restrict investment protection and preserve greater space for national policy.

However, there is uncertainty about the precise contours of the MST/CIL. Some recent arbitral awards have suggested that the customary standard is itself evolving, have required relatively low thresholds of evidence for claimants to prove this

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3. *LFH Neer and Pauline Neer (USA) v. United Mexican States*, paragraph 6.

evolution, and have adopted broader interpretations of the MST/CIL. So the extent to which the more restrictive treaty formulations can help remains to be seen.

Some other treaties establish an investment protection standard around much more specific obligations, with or without reference to FET. This may include an obligation not to deny justice in legal proceedings, or not to subject the investor to targeted discrimination on manifestly wrongful grounds. This more specific language is meant to safeguard foreign investment while limiting exposure to liabilities that are difficult to foresee – though much depends on how tribunals will interpret these formulations.

Some treaties frame these more specific formulations as mere examples to illustrate FET. In this approach, conducts not explicitly prohibited in the treaty clause could still be found to violate FET. Other treaties are more restrictive and consider the list exhaustive, or else they require special procedures to add items to the list.

In addition, the FET clause of the Investment Agreement developed by the Common Market for Eastern and Southern Africa (COMESA) requires arbitral tribunals to consider a country's level of development when applying FET. It is as yet unclear how arbitral tribunals will apply this type of provision.

Some other states have taken entirely novel approaches to the formulation of investment treaties, increasing diversity in the international treaty landscape. For example, Brazil recently concluded treaties that look very different from conventional investment treaties, and which omit the FET clause altogether (Box 12).

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Comparable evolutions towards more nuanced investment protection standards and towards greater diversity in investment treaty making have occurred for several other key treaty standards, including expropriation clauses and general exception clauses. Some recent treaties also explicitly reaffirm the state parties' 'right to regulate'. These developments illustrate the wide range of options available to states when negotiating investment treaties (eg on FET, see Figure 3).

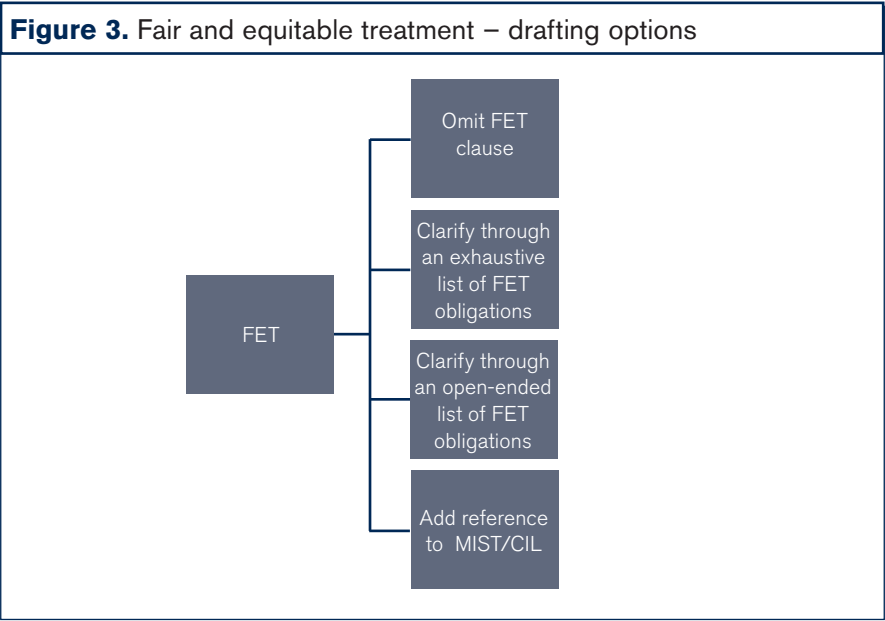
#### **Box 12. Brazil's investment facilitation and co-operation agreements**

Brazil signed 14 bilateral investment treaties in the 1990s but did not ratify any of them. Opposition by Congress was a key reason for non-ratification. There were concerns in Congress that these treaties would provide preferential treatment to foreign investors in breach of constitutional provisions (WTO, 2013).

In 2015, Brazil concluded new 'investment facilitation and co-operation' treaties, including with Angola and Mozambique, that differ significantly from most existing investment treaties. These treaties place much emphasis on investment facilitation through exchange of information, joint committees and national 'focal points'. These provisions are typically absent in conventional investment treaties.

With regard to investment protection, the new Brazilian treaties contain an expropriation clause but do not feature the FET standard. They allow state-to-state arbitration but not investor-state arbitration.

UNCTAD (2015b) provides a more comprehensive overview of issues and options in framing investment protection standards. In addition to reconsidering the formulation of their investment treaties, some states have also taken steps to influence how their existing treaties are interpreted (Box 13).



Source: Adapted from UNCTAD, 2015b

**Box 13.** How states can influence the interpretation of investment treaties

When an investor-state dispute is pending, the interpretation of an investment treaty for the purposes of settling that dispute is ultimately in the hands of the arbitral tribunal. But states can pursue several avenues to influence the interpretation of the treaties they have concluded (UNCTAD, 2013b; Johnson and Razbaeva, 2014).

First, some states have issued joint, authoritative interpretations of treaty provisions. For example, the inter-governmental NAFTA Free Trade Commission issued an interpretive note that restricted FET under NAFTA to the narrower standards of protection already prescribed by customary international law. The NAFTA treaty clarifies that interpretations by this commission are legally binding.

Second, at least one state initiated arbitral proceedings against another state party to an investment treaty over disputed treaty interpretations. Also, states have sometimes made submissions in arbitral proceedings initiated by an investor against another state under a treaty ratified by the non-disputing state. These submissions enable a state that is not a party to the dispute to articulate its position on the interpretation of treaty provisions.

Some experts have suggested developing a multilateral convention that authoritatively clarifies the interpretation of standards (such as FET) included in all the treaties signed by the states parties to the convention (Schill, 2015).

## Ensuring responsible investment

Investment treaties have traditionally focused on investment protection. Most treaties say little or nothing about the standards that investments must comply with. Yet an emphasis on investment quality (see Chapter 1) calls for ensuring that legal frameworks adequately address these issues.

Investment treaties are not necessarily the best vehicle for tackling all the social and environmental issues raised by natural resource investments. National law has a key role to play, in ways discussed in Chapters 4 and 5. But many commentators have argued that aligning investment treaties with the pursuit of sustainable development would require integrating standards of responsible business conduct into those treaties, and making investment protection conditional on compliance with those standards (for example Mann *et al.*, 2005).

A few investment treaties require investors and their investments to comply with all applicable laws and regulations in force in the state where the investment is made. Depending on circumstances and approaches, these investor obligations clauses could help the state to have an investor-state dispute thrown out due to inadmissibility or lack of jurisdiction; influence the tribunal's decision on the merits of the case; or reduce the amount of compensation due to the investor.

In some arbitrations, the tribunal found that the state's conduct breached treaty standards, but violations did not warrant compensation because the investor had in turn breached a treaty clause establishing investor obligations (for instance, in the award *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*).

Investor obligations clauses could also allow states to make counterclaims – that is, to respond to an investor's arbitration claim not only through a defence, but also through seeking damages for harm caused by the investor's illegal behaviour.

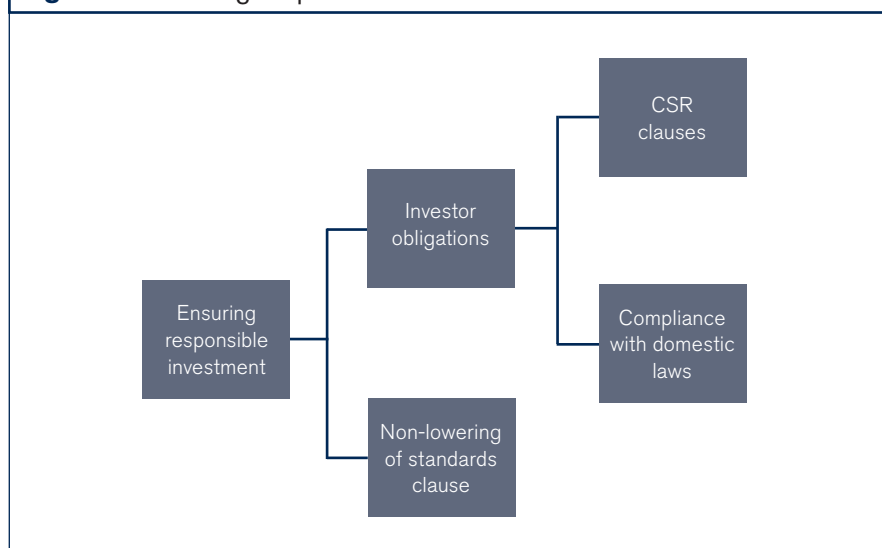
Depending on the country, an obligation to comply with national law may not be enough to ensure that acceptable standards are upheld. Some recent treaties require states to 'encourage' their investors to comply with internationally recognised standards of corporate social responsibility (CSR). International CSR standards may go significantly beyond national law requirements.

These 'best efforts' clauses can send a signal to investors (Lévesque and Newcombe, 2013), but they are not enough to create a legally binding obligation for investors to comply with specified standards. On the other hand, the Model Investment Treaty of the Southern African Development Community (SADC) mandates investors to comply with specified social and environmental standards.

Some investment treaties commit the states parties not to water down labour or environmental standards ('non-lowering of standards clauses'). There have also been suggestions to integrate into investment treaties commitments to implement internationally accepted standards of responsible land governance (eg Cotula, 2015a);

investor obligations to respect human rights; and provisions on transparency, including requirements that investors comply with the Extractive Industries Transparency Initiative (EITI) Standard. These issues are discussed further in Chapters 4 and 5.

**Figure 4. Ensuring responsible investment**



Source: Adapted from UNCTAD, 2015b

### TIP 3

#### Protect policy space and ensure responsible investment

- Investment protection standards can have far-reaching implications for a wide range of policy areas. They require careful thinking through. And even with careful consideration, significant delegation of authority to arbitral tribunals could result in unforeseen interpretations – an issue that should be factored into policy choices on investment treaty making.
- Recent developments in investment treaty making increasingly provide examples of how states can clarify the scope and content of protection standards – for example, through rethinking the formulation of fair and equitable treatment, expropriation and general exceptions clauses. Some recent treaties omit some of these standards altogether.
- There is relatively little arbitral jurisprudence on several of these 'recalibrated' standards, and some uncertainty remains on how tribunals will interpret these standards.
- There is also limited but growing experience with installing responsible investment parameters into investment treaties, including obligations for states to ensure that social and environmental standards are upheld, and for investors to comply with applicable law and standards.
- There are multiple ways for states to seek to influence the interpretation of their existing investment treaties, including joint authoritative statements and submissions in investor-state arbitrations. Some experts have suggested developing a multilateral convention that clarifies the meaning of existing treaty standards.

## 2.4 Investor-state dispute settlement

The previous sections discussed standards of treatment concerning the admission and protection of foreign investment. This section discusses the legal remedies available to foreign investors if state conduct breaches those standards. The default rule usually is that the investor must bring the case to national courts in the host state. However, many states have allowed investors to bring disputes to international arbitration instead of (or in addition to) national courts, as part of strategies to promote foreign investment.

In recent years, investor-state arbitration has formed the object of much controversy, calling for carefully considered policy choices. This section outlines key issues in investor-state arbitration. It also briefly touches on recent debates that could potentially transform investor-state dispute settlement, including proposals to establish a new international investment court. Transparency aspects are discussed in Section 5.3.

### Investor-state arbitration in outline

International investor-state arbitration refers to the settlement of a dispute between the investor and the host state by an international arbitral tribunal. By taking a dispute to arbitration, the investor will seek to enforce a commitment that the government has entered into through a treaty, law or contract. The investor will typically allege that the government took (or failed to take) action in violation of that commitment.

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As discussed (see Box 6), the decision of the arbitral tribunals is referred to as an arbitral award. If the arbitral tribunal decides in favour of the investor, the award usually orders the state to pay the investor compensation. Arbitral tribunals are not bound by precedent, that is by previous judgments or arbitral awards. Also, there is no centralised system for appeals against awards, so different tribunals have often followed different approaches, although tribunals usually do refer to earlier awards to support their reasoning.

Use of investor-state arbitration has increased sharply since the late 1990s. By the end of 2014, there were over 600 known cases of international arbitration under investment treaties (UNCTAD, 2015b); up to the year 2000, this number was below 50 (UNCTAD, 2012d). Natural resource investment features heavily in the overall case load. For example, 30 per cent of arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID) relate to extractive industries and agriculture, fishing and forestry (ICSID, 2015).

Investment treaties commonly include provisions that enable investors to bring investment disputes to arbitration. Most treaties do not require investors to pursue the dispute through the domestic courts before filing a notice of arbitration, although some do. Other treaties feature different requirements – for instance, by asking investors to attempt amicable settlement or domestic litigation for a given period of time. In yet other cases, investors can choose between international

arbitration and national litigation – but once they have chosen, the other option is precluded ('fork-in-the-road' clauses).

Many national laws and investment contracts also allow the investor to bring disputes to arbitration. In these cases, the arbitral tribunal would apply the contract and/or relevant law, rather than treaty standards. However, several national investment codes and sectoral natural resource laws do not contain an unequivocal offer of consent to arbitration, and some states have dropped reference to arbitration in their national legislation.

Investor-state arbitration based on contracts is primarily confined to disputes between the parties to the contract – that is, an identified investor and a state or a state entity. On the other hand, investment treaties and laws contain unilateral advance offers of consent to arbitration on the part of the states. Many investors covered by the treaty or law could pick up this unilateral offer of consent. As such, arbitration clauses in treaties and laws can expose governments to arbitration claims from an unknown and potentially large number of investors.

This ability of private actors to access international redress directly is unusual in international law. It constitutes an important difference compared to international trade law, for example, where only states can bring disputes about alleged treaty violations. International human rights law allows individuals to access international remedies, but usually only after individuals have unsuccessfully pursued remedies available under national law.

### Arbitration rules and enforcement mechanisms

Investor-state arbitration can be conducted under different sets of rules. The World Bank-hosted ICSID is one prominent example. It was established through a multilateral treaty in 1965 specifically to administer investor-state arbitrations (the ICSID Convention). ICSID sees dozens of arbitrations per year.

Strictly speaking, ICSID only deals with disputes between investors and states where both home and host states are parties to the ICSID Convention. However, the ICSID 'Additional Facility' Rules extend the application of most ICSID rules to cases where either the host state or the home state is not a party to the ICSID Convention.

Private bodies like the International Chamber of Commerce, the London Court of International Arbitration, the Stockholm Chamber of Commerce or the Hong Kong International Arbitration Centre administer other arbitration rules. Unlike ICSID, these institutions are mainly concerned with business disputes between private parties, but are also used for investor-state disputes. Each institution has its own procedural rules.

Arbitrations are also carried out outside any standing institutions (so-called 'ad hoc arbitration'), often following the rules adopted by the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).

Under most arbitration rules, a panel of three arbitrators is appointed by the parties to settle the dispute. Often, one arbitrator is appointed by each party, and the chair is either jointly appointed by the two parties or by the party-appointed arbitrators. People appointed as arbitrators are usually private lawyers or legal academics. Once the arbitration is completed, the tribunal disbands. Arbitrators can be appointed even where the government refuses to co-operate, and proceedings can continue even if the government does not take part.

Despite important variations, arbitral proceedings typically involve: a commencement stage; constitution of the tribunal; submissions of pleadings and evidence; an oral hearing and sometimes further written submissions; possible settlement discussions; an award decision and, if necessary, challenges to or enforcement of the award (Delaney and Barstow Magraw, 2008).

Widely ratified multilateral treaties facilitate the enforcement of pecuniary awards. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires states parties to recognise awards as binding and to enforce them within their jurisdiction. Most states have ratified the New York Convention. This widespread ratification makes arbitral awards easier to enforce than court judgements.

However, the New York Convention allows national courts to refuse enforcement on narrowly defined grounds – for example, if major defects affected the arbitral proceedings, or where enforcement would be contrary to the public policy of the country. In addition, in most cases the courts of the country chosen as the ‘seat’ for the arbitration can annul arbitral awards on narrowly formulated grounds. These grounds are often modelled on the New York Convention’s grounds to refuse enforcement. While enforcement proceedings are typically initiated by the investor, states can initiate annulment proceedings.

A different regime applies to awards rendered under the ICSID Convention. This treaty commits states parties to recognise awards issued by an ICSID tribunal as binding and to enforce them within their jurisdiction as if they were final judgements issued by their own courts. The ICSID Convention does not contain exceptions like the New York Convention that allow national courts to review awards. Rather, it provides some narrowly defined grounds for the annulment of an ICSID award through a special procedure before an international ‘ad hoc committee’.

If a host state fails to comply with an award covered by one of these multilateral treaties, the investor may seek enforcement in any signatory country where the host state holds interests, for instance by seizing goods or freezing bank accounts (see Box 14). Because in a globalised world virtually all states hold assets overseas, this type of legal action can be effective. In addition, governments are often under pressure to honour arbitral awards in order to keep attracting investment, although in recent years some states have refused to pay arbitral awards.



#### **Box 14.** Seizing the prince's plane: how arbitral rulings are enforced

In 2011, mechanisms to enforce arbitral awards made the headlines as an international construction firm seeking to enforce an arbitral ruling against the Thai government reportedly seized the plane used by the Thai crown prince after it landed in Germany (Jolly and Fuller, 2011). The Thai government reportedly claimed that the plane was owned by the prince in a personal capacity, rather than the government, but the plane was only released after the government offered a substantial bank guarantee (Isermann, 2011).

### **The pros and cons of investor-state arbitration**

Investors tend to value international arbitration. Arbitration offers an alternative to resolving disputes in the courts of the host state where, depending on the country, there may be risks of political interference in the judicial process or cumbersome and lengthy procedures.

On the other hand, arbitration can expose the host government to significant liabilities. The damages awarded can involve very large amounts of money, and may be substantially higher than those awarded by domestic courts. The costs of the arbitration proceedings can themselves be very high, and are often split between the parties even if the investor's claim is dismissed. Where arbitration is based on domestic legislation, it can also displace the role of national courts in interpreting national law.

#### **36**

Investor-state arbitration creates a unique space for international review of state conduct. It empowers arbitral tribunals, usually comprising three private individuals, to review the conduct of (often democratically elected) governments or legislatures, or of national courts. Where arbitration is based on an investment treaty, the standards of review are often formulated in unspecific terms, leaving significant discretion to tribunals.

For these reasons, some states have taken steps to limit their exposure to investor-state arbitration. Some states have not included investor-state arbitration provisions in their recent investment treaties (see Box 12), and as discussed some states have dropped investor-state arbitration from their investment codes. In recent years, investor-state arbitration has also given rise to lively public debates in which strong positions are taken about the merits and demerits of the system, particularly in the context of treaty negotiations between high-income economies hosting vibrant NGOs.

Given the major ramifications involved, choices about whether to agree to investor-state arbitration require careful consideration of both costs and benefits. As a broad generalisation, states with effective and independent judiciaries may have less to lose from not consenting to arbitration, because investors may be more prepared to trust national courts.

If arbitration is allowed, details matter. Take the case of arbitration based on investment treaties. Some treaties allow investor-state arbitration but also include devices aimed at limiting state exposure to potential liabilities. For example, they

stipulate that arbitration cannot proceed before domestic litigation or conciliation is pursued either for specified periods, or even to exhaustion of domestic remedies.

Also, some investment treaties require investors to bring any claims within a specified period of time, for instance three years, so as to prevent potential liabilities accumulating. Other treaties exclude certain treaty provisions or types of measures from the application of investor-state arbitration.

Reducing uncertainties in the formulation of investment protection standards is another strategy to limit exposure to arbitration, as is providing clear treaty definitions of protected 'investments' and 'investors'. The latter define the scope of application of an investment treaty, and thus the jurisdiction of treaty-based arbitral tribunals. Provisions on 'corporate planning', discussed in Section 3.2, are also relevant.

Some states have established national institutions to minimise exposure to arbitration, and to handle cases effectively where arbitration cannot be avoided (see Box 15). Care is needed to ensure that the establishment of these institutions does not result in governments prioritising the avoidance or settlement of disputes to the detriment of other legitimate and potentially conflicting policy goals.

#### **Box 15. Handling arbitration: lessons from Peru**

Peru has established a response system to deal with investor-state arbitration. The system involves an inter-ministerial commission and technical secretariat that represent the state in investment disputes, early alerts to identify disputes and so reach settlement before escalation, and it has funds allocated for legal costs and specialised advice. The United Nations report that the system has made government action better at both preventing arbitration and handling cases.

Source: UNCTAD, 2011, with additions

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### **The international debate about reforming investor-state dispute settlement**

Beyond policy choices about arbitration clauses in individual investment treaties, laws and contracts, there is growing international debate about ways to reform investor-state dispute settlement in systemic terms. In recent years, many have raised concerns about the functioning of investor-state arbitration.

Key concerns include the emergence of a restricted club of arbitrators, potential conflicts of interests (for example where an individual serves as arbitrator in one case, and as legal counsel in another suit that may deal with similar issues of law), inadequate mechanisms to challenge arbitral awards (there is no appeal system and applicable treaties usually allow for awards to be reviewed only on very narrowly defined grounds), and the high costs involved (van Harten, 2007; UNCTAD, 2012d).

Legal specialists have put forward suggestions for reforming the investor-state dispute settlement system, including the creation of a standing court or at least an appeal mechanism that can remedy errors of law and promote more uniform interpretation of treaty standards (van Harten, 2007). In 2015, the European

Commission proposed the establishment of an international investment court – a development that could transform investor-state dispute settlement.

There have also been proposals on possible ways to address potential conflicts of interest in arbitral proceedings. Improvements in the transparency of some arbitration systems are discussed in Section 5.3. Reform debates have so far been dominated by legal professionals from high-income countries. There is significant potential for government and advocates from low-income countries to engage more fully with this reform agenda to ensure it meets their concerns and aspirations.

#### TIP 4

#### Make informed choices about investor-state dispute settlement

- Decisions about whether to agree to investor-state arbitration require careful consideration, as consent to arbitration could expose the state to investor claims affecting wide-ranging policy areas.
- If arbitration is allowed, details matter. Some options to formulate investment treaties can help limit state exposure to arbitration – for example, requiring investors to first bring disputes to national courts, or to bring any arbitration claims within a specified period of time.
- Effective national institutions can help governments to minimise exposure to arbitration and handle the case effectively where arbitration cannot be avoided. But care is needed to ensure that avoidance or settlement of disputes does not unduly trump other legitimate policy goals.
- There is growing international debate on reforming investor-state dispute settlement, and much potential for governments and advocates from low-income countries to have a greater say in this debate.

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## 2.5 Investment treaties and policy choices

Investment promotion can involve use of diverse national and international legal instruments. Investment treaties are but one tool available to policymakers. But their investment protection standards and increasingly their pre-establishment commitments can have far-reaching implications for a wide range of policy areas.

Compared to national law, investment treaties are often more difficult to change. Therefore, choices about whether or not to sign an investment treaty, and about the wording of such a treaty, require particularly careful consideration and debate. This section elaborates on policy choices concerning investment treaties.

Important aspects of the investment treaty regime are still based on approaches dating back to the 1960s. But recent trends highlight the significant scope for innovation, and the value of thinking creatively and ‘outside the box’ to address new and emerging challenges. In recent years, states have made increasingly different policy choices on investment treaties, increasing diversity in the tested options available to policymakers.

Several states have terminated some of their investment treaties. Others are negotiating ‘mega treaties’ potentially creating some of the most ambitious investment treaties ever. Others have sought to ‘recalibrate’ their treaties, nuancing language to shift the balance between multiple policy goals. Yet others have explored entirely novel approaches.

The fact that many investment treaties currently in force were concluded a long time ago, and would now be ripe for termination based on their own termination clauses (see Box 10), compounds opportunities for carefully considering all policy options. From the point of view of an individual state, policy choices occur at two levels – individual treaty negotiations and systemic policy.

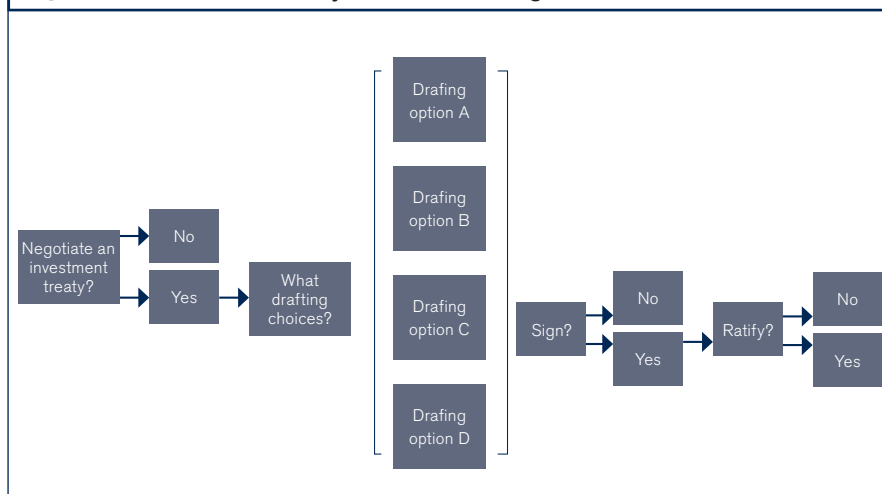
First, states are often called upon to make choices on individual investment treaties – for example, where government officials from another country suggest concluding a new treaty. In these situations, careful consideration would require a state to consider all the economic and political costs and benefits of concluding or not concluding the treaty (Poulsen *et al.*, 2013).

This may include potential benefits in terms of promoting inward or outward investments, strengthening an important bilateral relationship and depoliticising investment disputes; and potential costs in terms of risks of arbitration claims and reductions in policy space (Poulsen *et al.*, 2013). This assessment may also enable a state to clarify the policy objectives that would be pursued through the negotiation.

If a state decides to negotiate a treaty, it would need to consider the pros and cons of multiple drafting options, and the preferred options in light of its policy preferences. Imbalances in negotiating power often mean that states do not obtain what they seek, particularly when low and middle-income countries negotiate with high-income countries.

At the end of the negotiation, the state would need to consider whether the negotiation objectives were sufficiently achieved and the treaty warrants signature and ratification (ie the final approval that is usually required to bring the treaty into effect) (Figure 5).

**Figure 5.** Investment treaty decision making tree



Source: Author

Second, investment treaties have systemic implications. Due to the operation of MFN clauses, concluding a treaty featuring more narrowly formulated protection standards would achieve little if investors can rely on other more generous treaties. It may be possible to restrict the operation of MFN clauses. But this situation calls for making policy choices in systemic terms, rather than in relation to individual treaty negotiations alone.

Several states have carried out systemic reviews of their investment treaties, in some cases leading to significant policy shifts. These national reviews take stock of the country's network of investment treaties. The reviews also assess the costs and benefits of these treaties, including their effects on investment flows and exposure to arbitration, and identify needs and options for policy reform (UNCTAD, 2015b).

Outcomes have included choices to change policy, terminate existing treaties and develop a new model treaty to provide the basis for future negotiations (Box 16). A well thought-out model treaty can help government negotiators to have clearer objectives in real-life negotiations.

#### **Box 16. Investment treaty reviews: experience from Indonesia and South Africa**

Following an investor-state arbitration that challenged aspects of South Africa's policies dealing with the apartheid legacy, the government of South Africa reviewed its stock of investment treaties, terminated several of them and drafted a new investment code to strengthen national legislation. The government also resolved to develop a new model investment treaty as a basis for future treaty negotiations (Carim, 2015).

Indonesia also carried out a review of its investment treaties. Indonesia has been involved in several investor-state arbitrations, and concerns were raised that its existing stock of investment treaties was 'outdated' and did not strike an adequate balance between multiple policy goals. Based on the review, Indonesia terminated several investment treaties and is currently preparing a new model treaty (Jailani, 2015).

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### **Public participation in investment treaty making**

Debates about investment treaties are often framed in technical and legal terms, and are dominated by legal professionals. But the choices on whether to conclude investment treaties, and in what form, are eminently political. Opinion is divided, distributive issues are at stake, and different governments can legitimately follow different approaches. These political dimensions raise questions about who decides, and how public decisions are made.

Many treaty negotiations take place with little transparency or citizen participation. There is often little public debate about their pros and cons, particularly in low-income countries. Even parliaments often play a minor role in treaty making. Given the potentially far-reaching policy implications of investment treaties, this low level of public oversight creates real challenges for democratic governance and accountability.

There are some signs of change. Some parliaments are taking a more active role at policy-making stage, for example providing clearer guidance on general investment treaty policy or proposed treaty negotiations. More generally, some parliaments have been holding debates, asking questions, raising issues, tabling motions and prompting the government to consider the issues raised by advocates.

Public consultations on investment policy or proposed negotiations remain rare, but they are becoming more common. Examples include the multi-stakeholder consultation processes carried out for the elaboration of the US Model Investment Treaties of 2004 and 2012 (ACIEP, 2004 and 2009), and the (carefully circumscribed) online consultation launched by the European Commission on the investment chapter of the proposed Transatlantic Trade and Investment Partnership, TTIP (European Commission, 2015).

Treaty ratification after the inter-governmental negotiations are concluded could offer another opportunity for public scrutiny and debate. There have been growing calls for parliaments to scrutinise investment treaties before they are ratified. However, many constitutions do not require parliamentary approval as a condition for treaty ratification.

In many parts of the world, advocates are increasingly scrutinising treaty negotiations, intervening in arbitrations between investors and states, catalysing grassroots movements and promoting public debate (Cotula, 2015b; see Box 17). This growing citizen engagement may help to rethink important aspects of international investment law, and to strengthen its perceived legitimacy.

### **Box 17. Advocacy on investment treaty negotiations: experience from Malaysia**

In Malaysia, advocates have sought to influence policy around the country's participation in the Trans-Pacific Partnership (TPP) negotiations. The TPP is an ambitious trade and investment deal being negotiated among 12 countries around the Pacific Rim. The TPP's investment chapter attracted particular public attention.

Advocacy ranged from public campaigning to directly engaging with government, and highlighted the value of creating alliances with politically influential social groups. The diverse national coalition advocating on the TPP includes consumer groups, public health organisations and trade associations, creating a broad constituency. But coalitions of diverse interests can also be fragile. Promises can appease issue-specific concerns and take the wind out of activists' sails.

As multiple states are grappling with similar challenges, there is room for international lesson sharing and alliance building. The Malaysian case illustrates international alliance building at multiple levels – from sharing information and analysis among civil society groups in the 12 countries involved in TPP negotiations, through to joint letters calling for greater transparency signed by parliamentarians from different countries.

The Malaysian government's determination to sign up to the TPP in the face of sustained NGO campaigning is a reminder of how difficult it is to shift policy on politically and economically sensitive issues.

Source: Abdul Aziz, 2015.

### Promote inclusive and informed debate on investment treaties

- Investment treaties can have far-reaching implications. Choices on whether to conclude an investment treaty, and in what form, require careful consideration of all costs and benefits.
- Most-favoured-nation clauses require considering investment treaties in systemic terms: concluding a treaty featuring more narrowly formulated protection standards would achieve little if investors can rely on other more generous treaties via the most-favoured-nation clause.
- A systematic review of a country's existing investment treaty stock can provide insights for more informed policy choices on investment treaties, while a model treaty can provide clearer pointers for future negotiations.
- The political nature of these choices calls for inclusive debate, and there is growing experience with creating spaces for parliamentary and citizen oversight of investment treaty making.

### Useful online resources

- Bernasconi-Osterwalder, Cosbey, A, Johnson, L and Vis-Dunbar, D (2012) *Investment Treaties and Why They Matter to Sustainable Development: Questions & answers*. International Institute for Sustainable Development (IISD), Winnipeg. [www.iisd.org/pdf/2011/investment\\_treaties\\_why\\_they\\_matter\\_sd.pdf](http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf)
- Bilaterals.org: an open-publishing website on bilateral trade and investment treaties from an advocacy perspective. [www.bilaterals.org](http://www.bilaterals.org)
- Cotula, L (2015b) *Democratising International Investment Law: Recent trends and lessons from experience*. IIED, London. <http://pubs.iied.org/12577IIED.html>
- Investment Arbitration Reporter (IAReporter): an electronic news service tracking international arbitrations between foreign investors and their host governments. Requires subscription. [www.iareporter.com](http://www.iareporter.com)
- Investment Treaty Arbitration (ita): a resource for professionals and researchers on investment treaty law and arbitration, providing access to publicly available investment treaty awards and to other materials relating to investment treaties and arbitration. <http://italaw.com>
- Mann, H, von Moltke, K, Peterson, LE and Cosbey, A (2005) *Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook*, 2nd edition. International Institute for Sustainable Development (IISD), Winnipeg. [www.iisd.org/publications/pub.aspx?pno=686](http://www.iisd.org/publications/pub.aspx?pno=686)
- UNCTAD (2015a) *Investment Policy Framework for Sustainable Development*. United Nations Conference on Trade and Development, Geneva and New York. <http://tinyurl.com/zvoeu6a>
- UNCTAD (2015b) *World Investment Report – Reforming international investment governance*. United Nations Conference on Trade and Development, Geneva and New York. [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf), particularly Chapter IV.

## Getting a fair economic deal

### 3.1 Economic deals and sustainable development

It is widely held that poorer countries need economic development to sustain efforts to reduce poverty, create jobs and improve living standards. The 1992 Rio Declaration reaffirms the right to development, though it also states that this right must be fulfilled so as to equitably meet the needs of present and future generations (Principle 3). It is widely recognised that private investment can help to promote economic development. But much depends on the 'economic deal' regulating investment projects.

While many issues discussed in Chapter 2 are relevant to a wide range of industries (from banking to manufacturing, through to telecommunications), the nature of the economic deal varies significantly across different industries. This chapter focuses on natural resource investments, covering agriculture and extractive industries.

Despite much diversity between countries and between sectors, the basic deal underpinning natural resource investments typically involves the allocation of rights to exploit natural resources for commercial operations on the one hand, and public revenues, livelihood opportunities and other development contributions on the other. Because states tend to control natural resources within their jurisdiction, natural resource projects tend to involve contracts with, or licences from, government authorities (Box 18).

Despite this common underlying arrangement, natural resource investments display a great diversity of investment models. This is particularly pronounced in agriculture, where investments can take many forms. In some, companies invest in processing facilities and source the produce, in whole or in part, from local farmers.

In contrast, in recent years business operators have shown significant interest in large-scale land concessions for plantation farming, triggering concerns about 'land grabbing' (see Box 5 in Chapter 2). Choices between these different models of agricultural investment can have far-reaching repercussions for development pathways (Box 19). Legal tools can be used to promote more inclusive investment models (see Sections 3.4, 4.4 and 5.2).



## Box 18. Sovereignty, ownership and contracts

Under international law, states have permanent sovereignty over natural resources within their jurisdiction. This principle was affirmed in UN General Assembly Resolution 1803 of 1962 and is widely considered to be a rule of customary international law (see Box 4 in Chapter 1). An important corollary is that states have the right to regulate economic activities that exploit natural resources within their jurisdiction.

International law governs the exercise of sovereign rights in areas beyond a country's territory. For example, the United Nations Convention on the Law of the Sea (UNCLOS) defines criteria for the delimitation of the continental shelf, which affects the ability of a state to allocate rights for offshore petroleum projects.

In addition, international law regulates the exercise of state sovereignty over natural resources. Externally, states must ensure that activities within their jurisdiction do not cause harm to the environment of other states or of areas beyond the limits of national jurisdiction (Principle 2 of the Rio Declaration).

Internally, states must exercise their sovereignty over natural resources in the interest of the 'well-being of the people' (General Assembly Resolution 1803 of 1962, paragraph 1). International human rights institutions have held that the failure of governments to protect local interests affected by natural resource investments can violate human rights (for example *SERAC and CESR v. Nigeria*).

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In the exercise of their sovereign rights, states enact national legislation regulating ownership of natural resources within their jurisdiction. In most countries, subsoil resources are owned by the state, and the government has the legal authority to allocate rights to commercial operators. Mining and petroleum projects therefore typically involve state-issued licences or contracts with the host government or, in the petroleum sector, a state-owned entity such as a national oil company.

Patterns of land ownership are much more diverse. In many low and middle-income countries, national law vests land ownership with the state. As a result, many large agricultural investments involve leases or concessions granted by the government. In other jurisdictions, however, much of the land is owned by private landholders. In Ghana, for example, customary chiefdoms, families and individuals own the greater part of the land. In these cases, land leases may be signed with local landholders or customary authorities representing them.

Government ownership of natural resources can create tensions where the allocation of resource rights to commercial operators impinges on rights claimed by indigenous peoples, small-scale farmers, forest dwellers, pastoralists and fisherfolk. Equally, accountability problems can arise where the land is administered by customary chiefs. Effective legal arrangements for inclusive deliberation and public accountability are crucial, and are discussed in Chapter 5.

## Box 19. Inclusiveness in agribusiness investment

There is growing acceptance of the criteria for assessing inclusiveness of agribusiness investments – such as free, prior and informed consent; inclusion of local communities and producers as suppliers and possibly shareholders; fair labour relations; and gender equity (Chan, 2013).

Recent years have witnessed rising interest among businesses in acquiring long-term land leases in Africa, Asia and Latin America for plantations to produce food, biofuels and timber products. These investments have triggered lively media debates and NGO campaigns on 'land grabbing' (see Box 5 in Chapter 2).

But agribusiness investments can take many forms. In some cases, the agribusiness company focuses on agro-processing and sources agricultural produce from local farmers. These models would reduce the need for land acquisition, though some models combine a 'nucleus estate' plantation with outgrower contracts. In some cases, farmer associations own shares in the company they collaborate with (eg Mujenja and Wonani, 2012).

These collaborative models present features of inclusiveness but they can also create significant risks. Some projects have been linked to farmer indebtedness and unfair pricing arrangements, and questions have been raised about the extent to which local groups genuinely have a voice. Inclusion in global supply chains may only reach the most commercially oriented small-scale farmers, while the landless poor might benefit more from supplying local markets or from new wage labour opportunities (Vorley, 2002).

Any discussion of different models of agricultural investment goes well beyond purely legal matters and raises fundamental issues about visions of sustainable development and policy choices. But where incentives favour large over small-scale farming, law reforms could reverse that – for example, by strengthening local land rights (see Sections 4.3 and 5.2) or reframing tax incentives (Vorley *et al.*, 2012).

National law can also regulate contractual relations between companies and local farmers, defining key terms and setting minimum parameters. Some countries have adopted – or are in the process of adopting – legislation to regulate outgrower schemes.

In addition to making well thought-out choices about investment models, states wishing to maximise the economic benefits for themselves and for local communities must address at least three core aspects of investment preparedness when it comes to the economic deal:

- Legal arrangements enabling the host government to get a handle on transnational corporate structures (Section 3.2).
- Legislation regulating taxation and how public revenues are managed and shared by different levels of government (Section 3.3).
- Legal instruments to maximise positive linkages with the local economy (Section 3.4).

### 3.2 Corporate structure

Foreign investment projects in agriculture, mining and petroleum often involve complex transnational corporate structures. A parent company listed on a stock exchange in New York, London, Johannesburg or Singapore may be owned by a large number of shareholders worldwide, including pension funds, rich individuals or even governments.

The parent company may operate an investment project in Africa, Latin America or Asia through a local subsidiary incorporated in the host country. Shares in the subsidiary may be held by one or more intermediate holding companies, perhaps located in a low-tax jurisdiction to minimise tax liabilities, and/or in a country that has signed a robust investment treaty with the host state so as to ensure effective legal protection.

Important project activities – such as construction or management services – may be run by other companies that are part of the same business group ('affiliates') but are incorporated in third countries. It may make sense for a large business group to centralise certain capabilities (such as construction services for oil and gas projects), and for the local subsidiary to contract these specialised units to run operations requiring those capabilities. Other third-country affiliates may buy the output produced by the local subsidiary ('off-takers').

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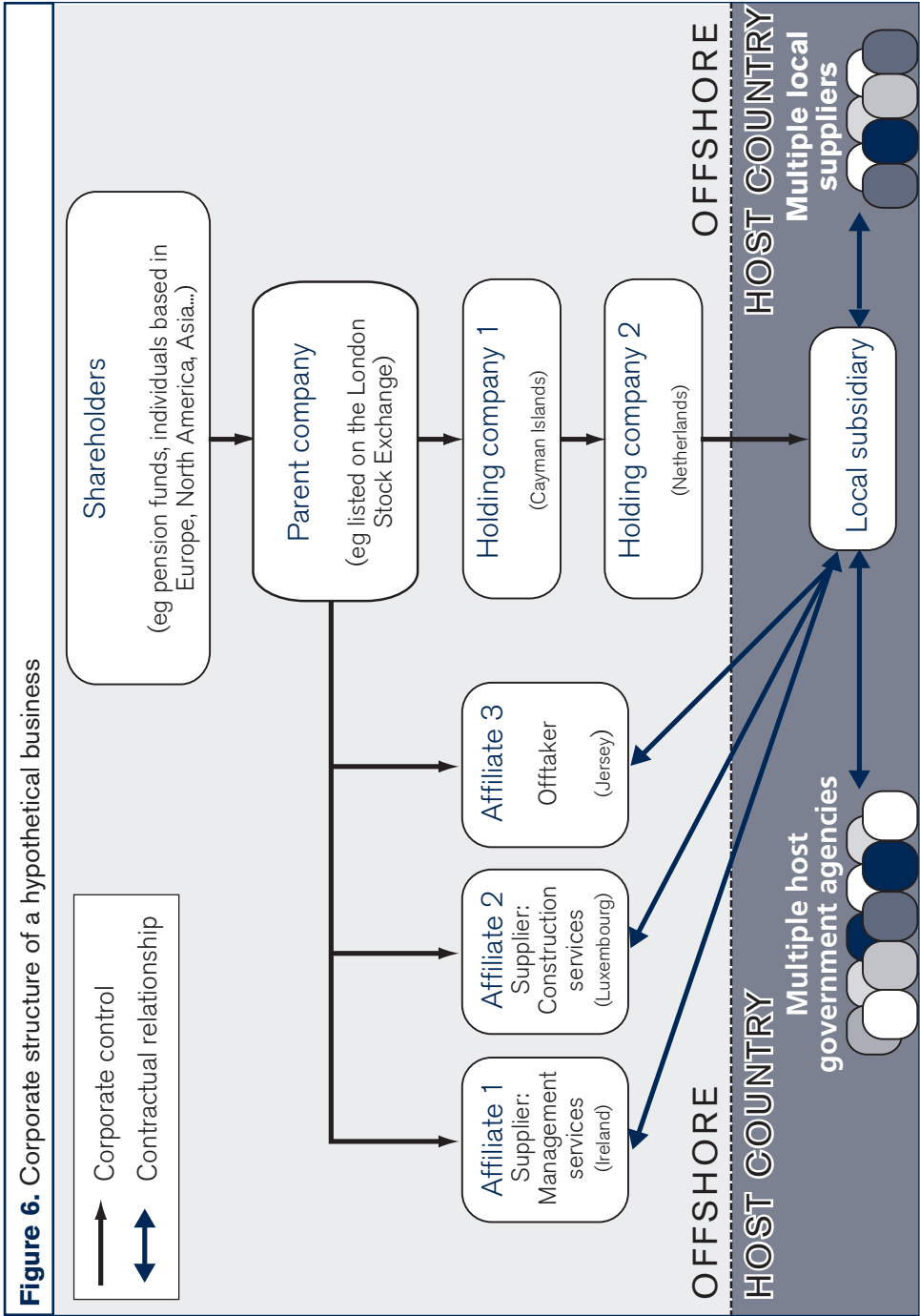
Financial flows within the group include capital injections from the holding company to the subsidiary to operate the project (in the form of equity or loans), the repatriation of profits from the subsidiary to the holding company, and payments between affiliates for transactions involving the supply of goods and services or the off-take of products.

Figure 6 shows a simplified diagram of a corporate structure – real-life ventures typically involve substantially more complex structures. They can also be extremely diverse. For example, the parent company in Figure 6 is listed on a stock exchange – but many companies are not listed and are privately owned.

Also, many oil and gas projects involve joint ventures between different international oil companies, and in some cases with the host government too. While Figure 6 emphasises vertical relations in the corporate structure, joint ventures involve horizontal as well as vertical relations.

These complex corporate structures can raise important issues for the host country. The host government has a direct interest in ensuring that an investor has the capabilities needed to implement a project, that taxes are paid and other project liabilities honoured, and that the national policy space is not unduly constrained.

Yet investors could exploit complex structures to sell the investment project to another company that may lack the required experience, avoid paying taxes by manipulating the terms of transactions between affiliates, or use third-country



holding companies to benefit from the protection of investment treaties that would otherwise not be applicable. Also, where investors operate through a thinly capitalised local subsidiary, affected people may find it more difficult to recover any damages that may be awarded to them for harm caused by the project.

Because of these issues, establishing systems to scrutinise the corporate structure is an important part of investment preparedness. The remainder of this section discusses a few specific legal issues, namely assignments of rights, 'treaty shopping' and 'legality requirement' issues. Taxation aspects are discussed in Section 3.3. Arrangements to hold the parent accountable for harm caused by its foreign subsidiaries are discussed in Section 5.5.

### **Ensuring that the company has the necessary capabilities: investor identity and assignments of rights**

In complex projects that require significant capital and know-how, it is important for the host government to know who the investor is. A company's experience and track record are often important considerations in government decisions about the allocation of resource rights, especially where multiple companies compete for the same project. Well-advised governments conduct thorough scrutiny of a company before awarding contracts.

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Yet, it is not uncommon for an investment project to change ownership over its duration, in whole or in part, as a result of the investor transferring ('assigning') its rights to another company. The investor may wish to exit the venture following changes in expected returns or corporate strategy, or as part of the investor's original plan.

For example, a small oil company may lead exploration activities but prefer to transfer its stake to a larger company with greater capabilities after making a commercially viable discovery, instead of operating the venture directly. Similarly, a company developing an agricultural plantation may transfer the project to a larger operator once the land has been acquired and the venture is up and running.

Such project transferability may be necessary if a project depends on loans, to offer guarantees to the lender that the debt will be repaid – or, in default, that the lender will be able to take over the project and sell it on. There is a risk, however, that an investor transfers the project to a firm that lacks the necessary capabilities. Also, unrestricted transferability can encourage speculative acquisitions of land and resource rights by companies that primarily aim to make a profit from transferring the project to third parties.

To address these issues, many governments make such assignments of rights subject to authorisation by the relevant government agency. These restrictions are only effective if they cover both direct transfers (eg where an agribusiness company transfers its land concession) and indirect ones (eg where the parent company sells its shares in the local subsidiary holding the land concession). Restrictions on assignments of rights may be found in national law or investment contracts.

Many investment contracts contain a clause that explicitly subjects both direct and indirect transfers to host government approval. Some also feature an annex detailing the corporate structure at the time of the contract signing, so as to provide information about the chain of shareholding at least up to the parent company (Gilchrist, 2012).

Well thought-out contracts also clarify the sanctions available to the government in case of violation, including termination of the contract. Some national laws (such as a country's petroleum or mining code) also require assignments of rights to be subject to government authorisation.

In some cases, government sanctioning of unauthorised transfers have led to investor-state arbitrations, with investors claiming foul play and seeking damages. Some arbitral tribunals have not upheld these claims (Box 20). But other tribunals found that government measures to terminate the contract for breach of assignment restrictions were disproportionate and violated FET (see the award *Occidental Petroleum Corporation v. The Republic of Ecuador*).

#### **Box 20.** Unauthorised transfer loses investor both contract and legal challenge

Assignments of rights have come up in investment arbitrations. In the 2013 award *Vannessa Ventures v. Venezuela*, the claimant acquired interests in a Venezuelan mine from a company that in 1991 had entered into a joint venture with a government entity in Venezuela.

In deciding to award the contract to the original operator, the host government gave significant weight to the technical and financial capability of the operator. In 2001, the original investor sold its stake in the project to the claimant because it deemed that low gold prices made the project uneconomic.

The Venezuelan government reacted by terminating the contract, taking over the mine and re-allocating it to another mining company. The company that had bought the project filed an arbitration against the government, alleging expropriation of its investment as well as breach of the FET and full protection and security clauses of an applicable investment treaty.

The arbitral tribunal dismissed the investor's claims. It recognised that the technical and financial capacity and the extensive experience in mining of the original operator had been important considerations when the host government awarded the contract. The tribunal found that the transfer of shares did not comply with contractual requirements.

Among other things, the joint venture contract with the government entity barred the parties from transferring 'in any manner' the rights created by the contract unless the other party consented. In transferring its shares in the project company, the original investor did not obtain authorisation from the Venezuelan government.

Although the case concerned the sale of shares in the company, rather than an assignment of the contractual rights, the restriction was deemed to be formulated broadly enough ('in any manner') for indirect transfers to be covered.

The contract also gave the joint venture partners a preferential right to purchase shares if the other partner wished to sell – a right that had not been respected in the transaction. As a result, the tribunal held that the government measures were lawful steps taken to remedy the investor's violations of contract terms, and refused to award compensation to the investor.

Source: *Vannessa Ventures v. Venezuela*.

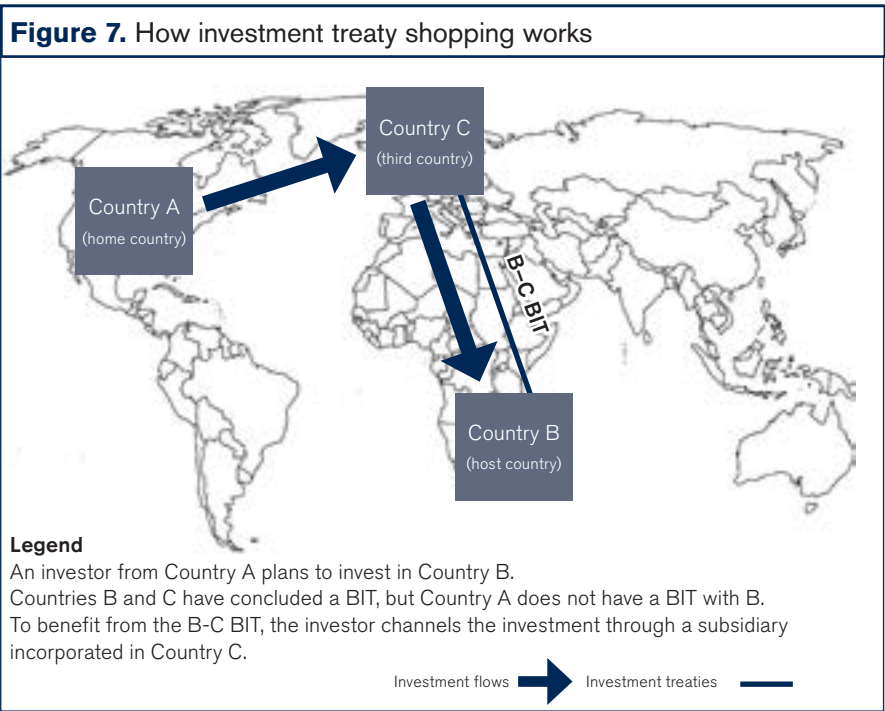
Addressing investment treaty shopping

Investors could organise their activities to benefit from the protection of investment treaties that would otherwise not apply. This may increase a country's exposure to arbitration claims. Some states have developed approaches to tackle this issue.

Many 'older' investment treaties protect investments that a company incorporated in one state makes in the other state. By referring to the country of incorporation to determine nationality, rather than, say, the country where the company conducts substantial business operations, these investment treaties effectively allow the practice of 'treaty shopping'.

Treaty shopping occurs when a company based in one country and investing in another country benefits from the protection accorded by an investment treaty concluded between the host country and a third country. This is done by channelling the investment through a subsidiary incorporated in the third country, even if the company has no real connection with that country (Figure 7). The company may want to do this because the host country has no treaty with its home country, or to secure advantages available under a more favourable treaty (Hébert, 2013).

Treaty shopping may also arise in connection with international tax treaties, for example where investors channel their investments through a third country to benefit from a more advantageous tax treaty that the host state may have concluded with the third country. However, taxation issues are discussed in Section 3.3.



Source: Author

In relation to investment treaties, arbitral tribunals have tended to interpret corporate nationality in formalistic terms: if the treaty refers to the country of incorporation as the sole criterion for determining the nationality of a company, as is often the case, most arbitral tribunals have considered the investor to be a national of the country of incorporation – even if that company is controlled by nationals of other countries, or by nationals of the host country.

In cases involving corporate restructuring after the dispute had arisen, some arbitral tribunals have declined to uphold the investor's claims for breach of an implicit investor obligation to act in 'good faith'. However, some tribunals have not followed this approach, and much depends on the facts of each case.

Some recent investment treaties feature formulations aimed at reducing room for treaty shopping. For example, some treaties define the investor's corporate nationality with regard to the country where the company has its main seat, and/or where the company has substantial business activities.

Other treaties include a 'denial of benefits' clause. Under this clause, each party has the right to deny the benefits of the treaty to a shell company that has no substantial business activities in the country under whose laws it is legally constituted. The formulations used for denial of benefits clauses vary, and arbitral tribunals have taken different approaches to their application.

In particular, some tribunals have held that reliance by a state on a denial of benefits clause during an arbitration can only affect subsequent claims by the investor – not the claims made through the pending arbitration. This interpretation limits the effectiveness of denial of benefits clauses and calls for giving careful consideration to the formulation of these clauses. Some recent clauses clarify that denial of benefits does not require advance notice.

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### Legality requirements and circumvention of national rules

Investors could also structure their investments in ways that circumvent national rules on corporate structure – for example, if national law prevents foreign investors from controlling companies in specified sectors, or if the granting of an equity share to the associate of an influential person in the host country disguises corruption in investment approval processes (see Section 5.4).

Some investment treaties include 'legality requirement' clauses that exclude investments made in violation of applicable law from legal protection under the investment treaty. So if an investor violates applicable law and then takes the government to international arbitration, the state could ask the arbitral tribunal to throw out the arbitration claim.

For example, the Germany-Philippines BIT of 1998 defines investment as 'any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State'. In one arbitration brought under this treaty (*Fraport AG Frankfurt*



*Airport Services Worldwide v. Philippines*), the host state obtained an award declining jurisdiction on grounds that national law restrictions on foreign ownership had been breached, although this award was later annulled.

Some arbitral tribunals have considered investors' violations of applicable law even in the absence of such legality clauses. However, many legality requirements in investment treaties only concern the making of an investment, so illegal conduct occurring during the operation of the venture may not exclude the investment from treaty protection.

Also, allegations of illegality may involve 'shades of grey' that are difficult to handle, for example where systemic gaps in laws or regulations undermine the proper operation of national law; where investments formally comply with legislation but advocates raise concerns about alleged violations of the 'spirit of the law' (Oxfam, 2013); or where issues are raised about the quality of measures taken by the investor to comply with national law (impact assessments and community consultation, for example).

### To sum up

Even before discussing the specifics of the economic deal, certain legal issues concerning the corporate structure can have important implications for the economic deal – and, more generally, for the pursuit of sustainable development. They relate to:

- Scrutinising transfers of rights, so as to ensure that the company has the necessary resources and capabilities.
- Minimising investment treaty shopping by investors, to limit the host government's exposure to potential liabilities towards companies that have structured the investment in opportunistic ways.
- Addressing illegal conduct in the structuring of an investment, through making investment protection conditional on compliance with applicable law.

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#### TIP 6

#### Address corporate structures and their implications

- Governments need to understand the transnational corporate structures of their investors. Effective arrangements to review the capacity of the operating company and its partners are critical not only before awarding any contracts, but also in the event of any transfer of ownership.
- Any transfers could affect applicable investment treaties, and consequently the balance of rights and obligations between the investor and the host state. Transfers can also affect the company's resources and capabilities, issues of taxation, and the ability of affected people to hold companies liable.
- Many national laws make any assignments of rights conditional on government authorisation, and empower government to scrutinise transactions. For this legislation to be effective, it must cover both direct and indirect transfers.
- Some investment treaties restrict protection to companies that have a genuine business connection with relevant states parties, and to investments made in compliance with applicable law.

## 3.3 Taxation

### Law, taxation and sustainable development

Public revenues are an important way in which the host country can benefit from a natural resource investment. Yet low and middle-income countries have often faced challenges in effectively taxing agribusiness and extractive industry ventures. As a result, investment projects may generate considerable profits but contribute relatively little public revenue. This can adversely affect the ability of a government to provide public services to its citizens, support poverty reduction initiatives and realise the SDGs (see Box 3 in Chapter 1).

Taxation has become a higher priority in public policy agendas, including as part of renewed efforts to mobilise public revenues to finance sustainable development (see SDG 17.1 and the 2015 Action Agenda on Financing for Development). Recent years have also witnessed heightened public concern about fairness in taxation and increased scrutiny of corporate tax practices.

Acting on a request from the G20, the OECD launched a high-profile Base Erosion and Profit Shifting (BEPS) initiative to tackle tax avoidance. This initiative developed guidance on implementing 15 wide-ranging 'actions' to deal with tax avoidance.<sup>4</sup> In addition, NGOs have stepped up their advocacy for 'tax justice', in order to help low and middle-income countries reap a fair share of the benefits generated by economic activities within their jurisdiction.

Legal norms importantly influence tax issues. In principle, taxation is regulated by generally applicable law, including the tax code, the investment code and sector-specific legislation like the mining or petroleum code. However, many countries, especially in the developing world, allow the investment contract to define aspects of the fiscal regime, deviating from generally applicable law (Sachs *et al.*, 2013). The OECD Guidelines for Multinational Enterprises state that tax provisions in contracts should not involve tax exemptions that are not contemplated in generally applicable law.

### Type of public revenues

Depending on the jurisdiction, a range of different taxes may be applicable to natural resource investments. One key distinction is between 'direct' and 'indirect' taxes. Indirect taxes are charged when certain transactions occur, for example a value added tax (VAT) applied when goods or services are bought and sold, or customs duties applied when goods are imported or exported. Indirect taxes are not linked to company profits, and in general they are ultimately borne by the consumer.

On the other hand, direct taxes are paid by the company to the government based on the income generated by the company. The main example is corporate income tax (CIT) or profit tax, which is charged on the company's profits. Many countries also charge withholding tax, which is a tax deducted from payments made by the

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4.The final BEPS reports were launched in October 2015 and are available at [www.oecd.org/ctp/beps-actions.htm](http://www.oecd.org/ctp/beps-actions.htm).

company to other persons located outside the country (for example dividends to shareholders or royalties for intellectual property rights). In effect, withholding taxes are a means to collect income tax that would be payable by the dividend or royalty recipients located outside the country.

Some revenue streams to the government are specific to, or particularly prominent in, a given industry. Land rental fees and water fees may be important sources of revenue in agribusiness projects. In extractive industries, royalties are common revenue streams. Royalties can be periodic payments based on the value of production (ad valorem royalties based on gross revenues), or more rarely on production volume ('specific' royalties). They can also be based on profit or on output price.

Royalties may be calculated on the basis of fixed rates or on a sliding scale that depends on factors like production levels or profitability. Bonuses to the government are commonly used in the oil and gas sector, including one-off payments (for example at contract signature or commercial oil discovery) and regular, fixed payments (for example after production reaches specified levels).

Many oil and gas projects in low and middle-income countries are based on production sharing agreements (PSAs). These contracts are typically concluded between the investor and the host state or a state-owned oil company, in which oil ownership is vested. While there are many different variants of PSA, the investor generally assumes financial risk and provides financial and technical services, for example funding exploration, development and production. In return, it receives a share of the oil or gas to recover costs and make a profit (Ahmadov *et al.*, 2012).

In production sharing agreements, the government's share of 'profit oil' (that is, oil net of costs), whether in cash or in kind, can be an important source of public revenue. It may be calculated on the basis of a fixed share of production or, more commonly, on sliding scales based on changing output levels or rates of return.

The fiscal regime for an investment may also involve other types of public revenues. Government agencies may charge application fees for licences, contract renewals and other procedures. If the project involves a joint venture with the host government, the government may receive dividends – the share of profits that is not reinvested into the joint-venture company but distributed to the joint-venture parties.

Finally, in investments that create large numbers of jobs, income tax paid by the workers can constitute an important share of the public revenues contributed – even if wages, and therefore individual tax contributions, are low. However, job creation after the construction phase is often modest, for example in the petroleum sector.

Sector-specific rules may modify the application of general tax law. In some jurisdictions, oil profits are taxed at higher rates than mainstream CIT rates. Another common practice is ring-fencing (Tordo, 2007). Under general tax law, CIT would be charged on a company's taxable profit. Corporate profit would be affected by the operation of all the investment projects that a company may run in a given country. In some jurisdictions, however, individual projects are ring-fenced, so CIT is charged on the profit generated by each project.

This means that profits made through one project cannot be offset by losses made in another project (Tordo, 2007). Ring-fencing is particularly important in capital-intensive industries like petroleum or mining. Without ring-fencing, the tax liabilities of an oil company may be significantly reduced if the company starts a new project in the country, because extractive industry projects typically involve significant losses until sunk costs have been recovered (Tordo, 2007). Ring-fencing also promotes neutrality among investors in the context of open tendering for new investment opportunities.

### **Towards optimal taxation for sustainable development**

There is no magic bullet when it comes to designing tax laws. Industries and jurisdictions are very different, and tax regimes reflect this diversity. A recurring challenge in designing fiscal regimes for natural resource investments is maximising revenue to the state, while also making the tax deal attractive to investors: if tax rates are too low, the host country will miss out on public revenues that could have been used to provide public services and reduce poverty; but if the rates are too high, companies may be deterred from investing in the country, and overall public revenues may suffer as a result (Otto *et al.*, 2006).

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While it is important to get the tax rates right, the design of tax legislation raises many other challenges. Different combinations of revenue streams may lead to different results in terms of distribution of public revenues over time, sharing of risk between the parties, incentives for economic (in)efficiencies, or ease of tax collection. These trade-offs need to be addressed in relation to specific contexts and based on government policy (Otto *et al.*, 2006).

For example, royalties based on gross revenues and corporate income tax are influenced by both production levels and sale prices, but their revenue implications are very different. Income tax is only due when the project becomes profitable, while royalties based on gross revenues are due irrespective of profitability.

A fiscal regime that emphasises income taxation over royalties may generate lower levels of public revenues in the early stages of the project until it becomes profitable enough to generate income tax. Profit-based taxes are also harder to administer than some other revenue streams such as bonuses or royalties, so regimes that emphasise income taxation need to have the capacity to administer it.

From a sustainable development perspective, taxation is not just a source of government revenue – it is also a public policy tool that may be used to regulate social and environment matters. In environmental policy, some recent legislation has emphasised an incentive-based approach, whereby behaviour is discouraged or promoted through tax incentives such as higher taxes or tax breaks rather than prohibitions and sanctions. For example, carbon taxation (an environmental tax on emissions of carbon dioxide) may be used as a tool to promote use of cleaner technologies.

#### TIP 7

##### Create a robust tax regime – and a well-resourced tax administration

- Well-drafted legislation and a well-resourced tax administration are crucial to the effective implementation of a tax regime. This would include appropriate rules and institutions to deal with any disputes.
- Understanding revenue streams over a project's life cycle through such means as financial modelling can give governments insight into an investment's viability and its likely contribution to sustainable development.
- It is more difficult to administer tax regimes where taxation is governed not just by tax law, but also by specifically negotiated contracts that create tailored regimes for particular companies or projects.
- The design of a fiscal regime implies clear and well thought-out policy choices to address trade-offs between competing objectives and considerations.
- Taxation is not just a source of government revenue – it is also a public policy tool that may be used to regulate social and environment matters.

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### Minimising tax avoidance

Natural resource investments often involve corporate structures that span multiple countries. This raises significant challenges for taxation. A holding company and its subsidiaries are distinct legal entities, and prevailing tax regimes treat them as independent entities. As a result, each company within the same corporate group is responsible for its own taxation (Muchlinski, 2007). These companies are typically located in different jurisdictions, so they have to comply with different tax requirements.

Worldwide, there is huge diversity in national approaches to taxation and the tax burden itself. In some countries, the law imposes little or no income tax, and transparency is very limited. These low-tax jurisdictions are sometimes referred to as tax havens. Other countries charge higher tax rates, though some still see their public revenues eroded by ill-designed tax holidays and poor tax administration. The rules that establish the jurisdiction of a country to impose taxation also vary greatly.

The diversity of national tax rules and administration systems has raised concerns that the same income might risk being taxed twice. However, this situation also creates opportunities for tax avoidance – the range of practices that result in income not being taxed at all, or being taxed under favourable terms (Box 21). Many countries, not just low and middle-income ones, are struggling to tax globally mobile profits.

### **Box 21. Tax avoidance and tax justice**

Over the past few years, NGOs have launched increasingly vocal campaigns to promote tax justice. This includes campaigns by ActionAid ([www.actionaid.org.uk/tax-justice](http://www.actionaid.org.uk/tax-justice)) and Christian Aid ([www.christianaid.org.uk/ActNow/trace-the-tax/](http://www.christianaid.org.uk/ActNow/trace-the-tax/)), as well as international networks and alliances such as the Tax Justice Network ([www.taxjustice.net/](http://www.taxjustice.net/)). NGOs have also produced toolkits for advocacy (for example Christian Aid and SOMO, 2011).

NGOs can play an important role in exposing and fighting tax avoidance. They can increase pressure for governments to reform their tax regimes, and 'name and shame' companies into paying their fair share. However, NGOs face structural obstacles to meaningful reform, including an entrenched architecture of global tax policy-making processes and legal norms (Christians, 2013).

Indeed, multinationals with a number of related companies incorporated in different jurisdictions, each with a diversity of applicable tax rules, may be able to structure their business in ways that take advantage of beneficial tax rules in different countries. For example, investors can minimise their tax liabilities by shifting profits to low-tax jurisdictions. Tax avoidance does not necessarily involve illegal conduct, as it often exploits gaps and loopholes in applicable law. But it can deprive host countries of large amounts of public revenues.

Companies use diverse tax avoidance strategies. Transfer pricing is a key concept. It refers to pricing in transactions that occur between companies belonging to the same business group ('affiliates' – see Figure 6). Transactions may include the sale of goods such as inputs or produce; the supply of services such as construction, management or marketing; the licensing of intellectual property rights such as patented technology; or loans between the local subsidiary and other companies belonging to the same business group.

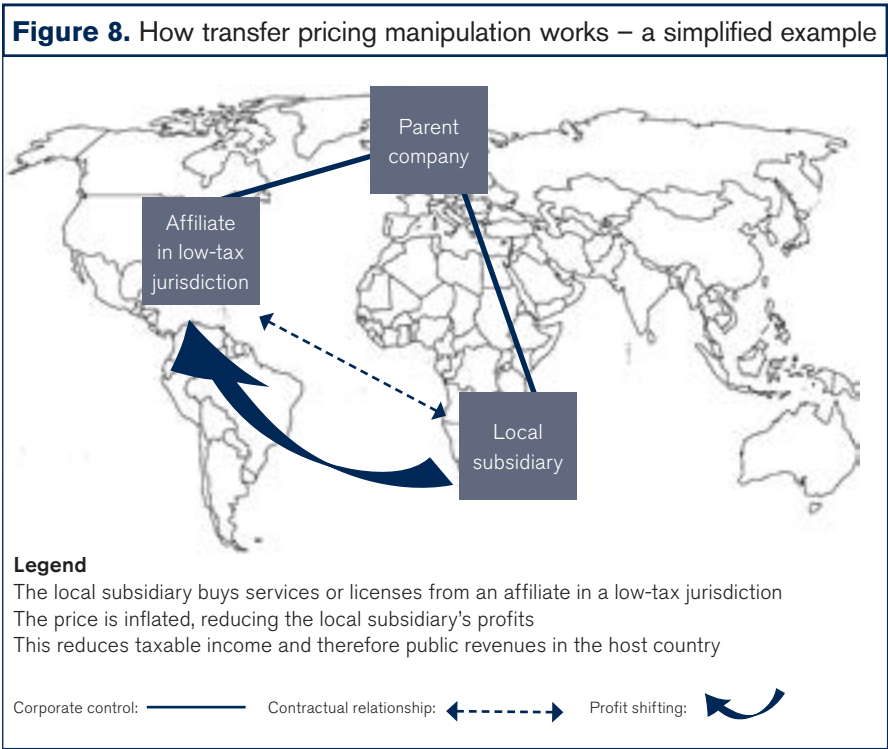
In large groups with many subsidiaries, these intra-corporate transactions are part of ordinary business life. But transfer pricing offers major opportunities for tax avoidance. Every cost that the firm allocates to operations in the host country has the effect of reducing the tax base in that country. And by manipulating prices for goods, fees for services, royalties on patents, or interests on loans, the investor can shift profits away from the locally incorporated company to affiliates located in jurisdictions where taxation is lower ('manipulation of transfer pricing'; Eden, 2001).

For example, if the subsidiary incorporated in the host country pays inflated prices to affiliates located in a low-tax jurisdiction, its profits, and thus the profit taxes paid to the host government, will be reduced. The investor will pay less tax to the host country, which will lose public revenues (Figure 8).

Transfer pricing issues can also arise when apportioning income among different economic activities carried out within the same jurisdiction, particularly where those activities are taxed differently. This may be the case, for example, where some activities, such as oil production, are subject to a higher CIT rate than others, or because some activities, such as farming, enjoy tax incentives not available to others.

Lending arrangements can also provide opportunities for tax avoidance (UNCTAD, 2015b). While the payment of dividends to shareholders is usually subject to taxation by the host state, interest payments are a cost to the investor's local subsidiary. As such, in many jurisdictions they can be deducted from taxable income for CIT purposes.

Investors could structure the investment so that the holding company, based overseas, injects little equity into the local subsidiary, and provides much of the financing as a loan instead. Debt financing may reflect genuine business decisions.



Source: Author

But by increasing tax-deductible costs, it reduces the tax base in the host country. Debt financing is also prone to manipulation. For example, the investor could manipulate the terms of the loan to shift profits from the local subsidiary to the holding company.

These practices would reduce CIT paid by the local subsidiary to the host government. If the holding company is based in a low-tax jurisdiction, the practices may also mean that the income is subject to little taxation worldwide. This latter point may not necessarily be a major concern for individual states. But it is a global concern for governments and advocates alike, raising fundamental issues about fairness and propriety.

Virtually all countries have developed legislation to deal with tax avoidance. States have also signed a network of double taxation treaties (DTTs), now estimated to total some 3,000 treaties worldwide (Picciotto, 2011; O'Brien and Brooks, 2013; Box 22). Many national laws and most DTTs apply the so-called 'arm's length principle'. The arm's length principle means that affiliates are free to apply the price they choose, but for tax purposes their taxable profits are determined to be those that would have arisen if the transaction had taken place between two unrelated parties (Muchlinski, 2007).

In other words, each government scrutinises the prices applied in transactions between affiliates, and if need be recalculates profits on the basis of arm's length transactions. Some governments also charge penalties if they have to make transfer pricing adjustments on profits declared by taxpayers (Muchlinski, 2007).

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In practice, applying the arm's length principle is often difficult. For transactions involving commodities, international commodity price indices may be available that offer a straightforward price comparator. Interest rates for comparable loans may also be available. But services provided are rarely identical, while intellectual property rights are by definition unique. It may be difficult to determine arm's length prices in these transactions (Muchlinski, 2007). Importantly, many low and middle-income countries lack the resources to administer the arm's length principle effectively.

Difficulties with applying the arm's length principle have led some experts to call for the application of a radically different method (eg Picciotto, 2011, 2012). Under the 'formulary apportionment' or 'unitary taxation' system, the tax base is determined with regard to the whole business group, rather than its individual subsidiaries. Profits and losses are then allocated to different affiliates based on a formula reflecting effective business presence (for instance, the location of sales, assets and staff), ignoring intra-corporate transactions altogether.

Under formulary apportionment, a business would in principle pay tax in the countries where it genuinely operates, rather than at low rates in low-tax countries. There is experience with formulary apportionment in some jurisdictions, particularly federal states where the system is used to apportion the income of companies



whose operations straddle several sub-national jurisdictions (in the US, for example). These experiences are often mentioned as examples that formulary apportionment can work.

However, some analyses have found that formulary apportionment can also create distortions, and as a result it does not necessarily address all tax avoidance linked to debt financing and intellectual property (Altshuler and Grubert, 2010). In addition, applying unitary taxation at the international level presents challenges.

Politically, the issue has proved controversial for a long time, and powerful vested interests are opposed to unitary taxation. There are technical challenges too, not least because formulary apportionment could result in the same income being taxed twice unless all jurisdictions agree to switch to the new system, possibly on the basis of a widely ratified international treaty.

## **Box 22. Double taxation treaties**

Double taxation treaties establish rules to allocate income for taxation purposes between different countries. They aim to avoid both double taxation and tax evasion – although in fact some tax treaty provisions can enable tax avoidance. Many DTTs also establish standards of treatment such as prohibiting discrimination against foreign investors and promote inter-state co-operation in tax matters through such means as exchanges of information. DTTs are mainly concerned with direct taxation, though they may have implications for indirect taxation too.

Both the OECD and the United Nations have developed model DTTs. The UN Model Double Taxation Convention between Developed and Developing Countries is seen as being more favourable to capital-importing countries, because it allows more scope for taxation by the country where the income is generated (the 'source country'); but it is the OECD Model Tax Convention on Income and Capital that has been more widely used, mainly because of the stronger negotiating position of capital-exporting countries in DTT negotiations (Salter, 2010).

Some leading tax experts have cautioned low and middle-income country governments against signing up to DTTs because of the provisions these treaties contain. For example, many DTTs limit the ability of the source country to impose withholding taxes – that is, taxes on payments made by the local subsidiary to other persons located outside the source country (Picciotto, 2011).

These payments could include dividends to shareholders, royalties for intellectual property rights, interests on loans and fees for management, marketing or other services. These restrictions can make it easier for companies to siphon off profits through manipulation of transfer pricing. Some DTTs also limit the ability of the source country to tax non-residents on gains or income derived from natural resources in the source country.

As in the case of investment treaties, the vast network of DTTs provides investors with opportunities for treaty shopping: many investors channel their investment through a shell company incorporated in a third country that has concluded advantageous DTTs. Some DTTs do feature a 'denial of benefits' clause, however (O'Brien and Brooks, 2013), and preventing abuse of tax treaties is an important part of the BEPS initiative (OECD, 2015a).

The BEPS initiative also involves plans to develop a multilateral treaty to modify existing bilateral DTTs and implement BEPS measures. A multilateral treaty would reduce the need for numerous, cumbersome bilateral treaty renegotiations (OECD, 2015b).

Under the prevailing international tax regime based on the 'independent entity' principle, well thought-out national policy can still address important aspects of tax avoidance. For example, if a country is determined to prevent businesses from shifting profits through debt financing or royalties on intellectual property, it could deny the deductibility of interest or royalties paid to all foreign recipients, impose a substantial withholding tax on all such payments, or both. The BEPS initiative developed guidance on tackling transfer pricing (OECD, 2015c, 2015d) and the tax implications of debt financing (OECD, 2015e).

The transnational and secretive nature of many tax-avoidance arrangements means that co-operation between national tax authorities, including exchange of information, is essential. The Convention on Mutual Administrative Assistance in Tax Matters, adopted in 1988 and revised in 2010, provides a framework for tax co-operation. The OECD BEPS initiative also involves efforts to enhance multilateral exchange of information (eg OECD, 2015f and 2015g).

In addition, BEPS has released guidance on national legislation requiring parent companies to file a country-by-country report in their jurisdiction of residence (OECD, 2015d). Such reporting would enable tax authorities to obtain a better understanding of the way a business structures its operations, and how much profit it declares in each country it operates.

The BEPS initiative has not been without critics, however. Some NGOs have criticised BEPS for locating discussions in a forum where low and middle-income countries are not properly represented, and for 'sidestepping' some issues that are important to these countries (ActionAid, 2014).

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In addition, advocates and experts have recognised that the BEPS actions 'open a new phase of the tax avoidance game' (Picciotto, 2015). But they have also raised concerns about the effectiveness of some BEPS actions, and expressed doubts as to whether poorer countries can benefit (Picciotto, 2015; Tax Justice Network, 2015).

For example, country-by-country reporting is expected to provide better information to home country tax authorities. But questions have been raised about the extent to which tax authorities from low and middle-income countries will be able to readily access that information (Tax Justice Network, 2015).

Lax tax regimes and tolerance for corporate tax planning in the investor's home country create the foundation for tax competition among host states. There is much that home country governments can do to close loopholes, and advocates can play an important role in influencing tax policy in these countries.

## TIP 8

### Minimise tax avoidance by strengthening tax rules and administration

- Putting in place effective systems to minimise tax avoidance is a key element of investment preparedness.
- Making systems to minimise tax avoidance more effective requires closing loopholes in tax laws and treaties, creating clear tax accounting standards, requiring companies to keep contemporaneous documentation of inter-company pricing arrangements, scrutinising intra-corporate transactions, and sanctioning non-compliance.
- Importantly, tackling tax avoidance requires collaboration between home, host and transit countries, including exchange of information between national tax authorities.
- While the arm's length principle is the most widely used approach to tackle transfer pricing, its application can be difficult. Unitary taxation raises technical and political challenges but it could change the game in tax avoidance.
- 'Denial of benefits' clauses in double taxation treaties can reduce treaty shopping by denying treaty benefits to a company that has no genuine business connection to its country of incorporation.
- Foreign investors will have access to the best tax and legal advice available. Host governments may consider options for strengthening the capacity of the tax administration, including through external support such as technical assistance projects, partnerships with universities or secondments of staff from other tax jurisdictions.

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### Taxation and international investment law

There are parallels between the global stocks of investment treaties and of DTTs. The coverage of the two sets of treaties often overlaps: countries that concluded an investment treaty often also signed a DTT, often in close succession (UNCTAD, 2015b). But while most investment treaties currently in force were concluded with low and middle-income countries, DTTs have been commonly signed between high-income countries too (UNCTAD, 2015b).

Tax measures can negatively affect investments – for example, changes to the fiscal regime, or sanctioning of alleged tax irregularities. Many investors have challenged tax measures through investor-state arbitrations based on investment treaties, laws or contracts. In these arbitrations, investors claimed that the tax measures breached applicable standards of conduct and sought compensation for losses. Other investors threatened to go to arbitration in order to persuade the government to reconsider disputed tax measures (Box 23).

### Box 23. Contract renegotiation in Zambia's mining sector

In 2008, the Zambian government introduced a new Zambia Mines and Minerals Development Act that significantly revised the fiscal regime applicable to ongoing and future mining projects. The law was passed after the government tried to renegotiate all mining concessions.

Among other things, the new tax regime introduced a new windfall profit tax based on the price of copper. But the reform was partly reversed following opposition from the mining industry, including in one case a threat of arbitration, and the government abolished the windfall tax.

Source: Sachs *et al.*, 2013.

UNCTAD (2015b) highlights the importance of managing the articulation between investment treaties and tax measures, including DTTs. Many investment treaties explicitly limit their application to taxation, in whole or in part. For example, many exclude or limit the application of MFN clauses to taxation, and provide that a DTT prevails in case of conflict.

Some investment treaties provide that only specified clauses apply to taxation – for example, expropriation clauses. This approach restricts investment protection to situations where tax measures have so radical an impact to be considered equivalent to an expropriation. It prevents investors from challenging tax measures on the basis of other protection standards, such as FET.

Also, some treaties establish procedures that make it more difficult for investors to access arbitration in relation to taxation. A common approach is to empower the tax authorities of the state parties authoritatively to agree, within a specified period of time, that the disputed tax measure does not violate the investment treaty.

#### TIP 9

##### Manage the articulation between taxation and investment treaties

- Tax measures can give rise to investor-state arbitration. There is growing experience with investment treaty formulations that seek to reduce this risk.
- Governments concerned about preserving policy space can limit the application of investment treaties and arbitration in relation to tax matters.

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### Revenue management and sharing for sustainable development

Optimising the government take through well thought-out tax regimes will do little to promote sustainable development if the revenues are not used wisely. Decisions about revenue use are a matter for national sovereignty and political choices. Different governments will have different priorities in spending decisions.

But international law provides important pointers. UN General Assembly Resolution 1803 of 1962, which is widely considered to reflect customary international law, requires states to exercise their sovereignty over natural resources in the interest of the ‘well-being of the people’ (paragraph 1).

International human rights treaties also have implications for budgetary allocations. For example, the widely ratified International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises economic, social and cultural rights such as the rights to education, to health and to food. Realising these rights can entail significant costs for the public purse.

The ICESCR commits each state party ‘to take steps, [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means [...]’ (Article 2). In other words, the Covenant requires states to ‘take steps’ and recognises that economic, social and cultural rights may be realised over time given resource constraints.

While in practice states enjoy wide discretion in public spending, references to 'the maximum of [...] available resources' and 'all appropriate means' create review standards for national courts and international human rights bodies, and also for advocates. Where resources are constrained, the reference to the maximum of available resources effectively requires states to prioritise the progressive realisation of human rights.

This interpretation was endorsed by the Committee on Economic, Social and Cultural Rights, which is the UN body responsible for overseeing implementation of the ICESCR (General Comment No. 3 of 1990, paragraph 10).

It is widely recognised that robust revenue management systems, and transparency and public scrutiny in revenue management, are essential in ensuring wise use of public revenues. They are therefore important ingredients of investment preparedness. Some countries have explicitly entrenched transparency requirements in law. This experience is discussed in Chapter 5.

Some countries have also set up public funds to manage the revenues generated by natural resource projects. These funds include 'stabilisation funds', which aim to shelter the national economy from fluctuations in mineral revenues; and 'future generations' funds, which aim to save revenues for future use (Box 24).

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National legislation can also require that a proportion of project revenue be devolved to local government bodies in the project implementation area. There is experience with this approach, for example in the mining sector (ICMM and Commonwealth Secretariat, 2009). In several jurisdictions (for example Ghana and Indonesia), mining legislation allocates a share of certain mining revenues collected by the central government to lower levels of local government (revenue sharing).

In other cases, particularly in federal systems, local government bodies have autonomous power to impose certain taxes. And in yet other instances, legislation allows the company to deduct its contributions to a community development fund from the CIT due to the central government (ICMM and Commonwealth Secretariat, 2009).

Devolving a share of the revenues to local government bodies is expected to enable people who suffer adverse social and environmental impacts to benefit from the investment, while also allowing the central government to redistribute part of the wealth nationally including to more deprived and less resource-rich areas.

In practice, however, revenue sharing has produced mixed results. In several cases, benefits have been captured by local elites, inequalities between neighbouring municipalities have been exacerbated, and locally administered monies have not always been used wisely (ICMM and Commonwealth Secretariat, 2009). Without effective checks and balances, revenues managed by the central government can also be misused, and benefits captured by elites.

## Box 24. Managing oil revenues through public funds: Chad and Ghana compared

A well-known – if ultimately unsuccessful example – of national legislation to regulate the management of oil revenues in Africa concerns Chad's Petroleum Revenue Management Act of 1999. This law was adopted as a condition for World Bank lending to the Chad-Cameroon oil development and pipeline project. The project involved oil development in southern Chad, and the construction and operation of a pipeline to transport oil to the coast of Cameroon.

In its original version, the law provided for the majority of the project's oil revenues to be spent on health, education, infrastructure, rural development, the environment and water. The law also provided for 10 per cent of oil revenues to be placed in a future generations fund, which was supposed to be spent on projects to support livelihoods once the oil reserves had run out. In addition, the law established mechanisms for transparency and public oversight, which are discussed in Chapter 5.

However, the government of Chad subsequently amended the law, adding security to the list of priority sectors for use of oil revenues and abandoning the future generations fund. NGOs raised concerns that this change would dilute the priority attached to realising social and economic rights. This experience highlights that real change must come from, and be sustained by, grassroots pressure, rather than external sources alone.

A more promising example is provided by Ghana's Petroleum Revenue Management Act of 2011. This law was passed following extensive NGO input. It was amended in 2015. The law establishes rules for allocating petroleum revenues to the government budget, a stabilisation fund and a future generations fund.

The law also allocates part of the petroleum revenues paid into the government budget to public investments and infrastructure development. However, the fungibility of budget resources, the ability of authorities to amend legislation, and the effect that a fund can have on encouraging increases in public borrowing all call for caution in assessing the potential for this legislation to make a difference. The legislation contains provisions to promote transparency in revenue management, also discussed in Chapter 5.

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### TIP 10

#### Manage and share investment revenue effectively

- Under international human rights treaties, governments have a legal obligation to prioritise the realisation of human rights in public spending decisions.
- National legislation can identify priority sectors for public spending, but genuine political commitment and robust public scrutiny are key to making this legislation work.
- Effective and transparent revenue-management institutions, and effective checks and balances, can help a country to take a long-term perspective to managing public revenues.
- Devolving a share of the revenues to local government bodies can enable affected people to benefit from the investment, but requires effective checks and balances and, where relevant, sustained investment in capacity support.

### 3.4 Maximising positive economic linkages

#### Performance requirements and inclusive investment

A recurring problem with many natural resource investments is that they fail to create enough positive linkages with the local economy. Capital-intensive extractive industries and mechanised farming often create only limited numbers of jobs. Opportunities for local businesses may also be few, especially where there is insufficient business capacity. As a result, investments may contribute to the national economy at the macro level, in terms of economic growth, export promotion or foreign reserves, yet have limited impact on poverty reduction.

Some countries have enacted legislation that specifically promotes positive economic linkages, for instance through the introduction of performance requirements. These are 'stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country' (UNCTAD, 2003:2).

Performance requirements come in different forms and shapes. They are mandatory when they are imposed as a condition for the admission or operation of investments. They are incentive-based if they do not oblige investors to comply, but link certain conducts to specified financial or other advantages such as tax breaks. In practice, borderlines are sometimes blurred: some incentives have so substantial an impact on returns that investors may be commercially compelled to meet the requirements (Nikièma, 2014).

Performance requirements may be imposed before the investment is made, ie at pre-establishment stage, or during the operation phase (Nikièma, 2014). While traditionally many performance requirements were mandatory and imposed as a condition for admission, they are now often non-mandatory and associated with financial incentives instead.

Performance requirements may be included in sector-specific legislation, such as that regulating the oil and gas sector; investment legislation; or contracts between the investor and the government. They can cover a wide range of issues linked to a company's operations – from 'local content' requirements for the company to source or accord preference to goods and services from local businesses, to joint venture requirements whereby investors must partner up with a local business, through to requirements linked to employment creation, exports, technology transfer or research and development.

Both developed and developing countries have made extensive use of performance requirements (Muchlinski, 2008). Following economic liberalisation in the 1990s, use of performance requirements declined (UNCTAD, 2003). In manufacturing, competition for foreign investment has contributed to the decline of performance requirements. But in the natural resource sector performance requirements are still relatively common, partly because the greater location dependency of natural resource investments can give governments more leverage.

Some countries have enacted local content laws that establish targets and incentives for companies to source from local businesses, and to hire and train local employees – for example, in the oil and gas industry (Box 25). Others have introduced comparable local content requirements through government regulations.

Evidence on the effectiveness of performance requirements is mixed (UNCTAD, 2003; Beviglia Zampetti and Fredriksson, 2003; Moran, 2011). Some evidence suggests that export performance requirements have effectively increased countries' export orientation, for example in Brazil, Chile, Japan, Malaysia, Thailand and the United States (UNCTAD, 2003).

However, joint venture requirements have proved difficult to use effectively (Cosbey, 2015). Performance requirements on local content or research and development tend to have little effect unless there is adequate local capacity to take up the business opportunities created. Some commentators also argue that performance requirements may lead to inefficiencies due to their inherently 'protectionist' nature (Moran, 2011).

Making businesses more competitive is essential in promoting positive economic linkages, whether performance requirements are used or not. Some commentators have also highlighted the importance of realistic targets and effective government support to strengthen the capacity of local businesses and employees (Cosbey, 2015).

In countries with limited local business capacity, there may be trade-offs between requirements to source goods and services locally on the one hand, and promoting higher safety, social, and environmental standards on the other. Managing these trade-offs is a matter for public policy. Finally, a government's ability to introduce performance requirements may be restricted by international treaties.

### **Box 25. Local content requirements in Nigeria's petroleum industry**

The Nigerian Oil and Gas Industry Content Development Act of 2010 creates incentives and targets for oil and gas operators to involve Nigerian contractors and workers. It requires that, as part of the bidding process, companies submit a 'Nigerian Content Plan' outlining how they plan to comply with local content requirements. The law also establishes a monitoring board to oversee implementation, and company reporting requirements to monitor compliance. If passed, amendments debated in 2015 would allow flexibility where local business capacity is limited.

Source: Nigerian Oil and Gas Industry Content Development Act.

### **Performance requirements and international treaties**

Under international law, states have the right to enact performance requirements. However, WTO rules restrict the use of some types of performance requirements. The WTO TRIMs agreement prohibits measures that are inconsistent with state commitments not to discriminate against non-nationals in trade in goods, and with state commitments to remove quantitative restrictions on imports or exports of goods.



So 'local content' requirements requiring use of local goods are prohibited. In contrast, requirements on employment, research and development, or use of local service providers would be outside the scope of TRIMs. The vast majority of countries in the world are now members of the WTO and are bound by these provisions, although least developed countries benefited from special transitional periods.

Most investment treaties do not contain provisions restricting performance requirements – but some do. This is particularly common in investment treaties that take a pre-establishment approach, in other words in those that create obligations on admitting foreign investment (see Section 2.2). Investment treaties that follow this approach often involve more wide-ranging constraints than those imposed by WTO norms. For example, some treaties restrict performance requirements concerning employment or research and development.

Also, remedies for violations differ between the WTO and investment treaties. The WTO focuses on disputes between states: a challenge to a prohibited performance requirement would need to be brought by the investor's home state. In practice, this state may not want to bring a dispute against the host state, based on multiple considerations including political ones.

In contrast, investment treaties give investors direct access to international remedies through investor-state arbitration (see Section 2.4), though some treaties exclude the provisions on performance requirements from the application of arbitration clauses. There is a small but growing number of cases where tribunals have found that performance requirements violated an investment treaty, and also where they found the disputed measure not to violate a treaty commitment.

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The point here is not whether or not states should introduce performance requirements. Rather, it is whether and to what extent it makes sense to regulate performance requirements through investment treaties, as these then restrict policy options. The issue is about acceptable levels of restrictions on national policy space.

States negotiating investment treaties have several options. One is not to include a performance requirements clause in the treaty (Nikièma, 2014). If the treaty does feature provisions on performance requirements, there are different ways to formulate these provisions.

For example, some performance requirement clauses merely incorporate TRIMs. Depending on the formulation, this approach would effectively enable investors to bring arbitrations for measures that breach TRIMs. But it would not affect performance requirements that are not already prohibited by TRIMs.

Some performance requirements clauses are limited to mandatory requirements, leaving flexibility for states to introduce incentive-based requirements (Nikièma, 2014). Other drafting approaches include limiting the application of restrictions on performance requirements to specified sectors only; exempting all existing non-

conforming measures; and excluding restrictions on performance requirements from investor-state arbitration.

Also, careful drafting of one treaty can be undermined by the operation of most-favoured-nation clauses if the country has concluded other treaties featuring broader performance requirements clauses. Addressing this issue requires systemic policy making (see Section 2.5), and possibly excluding performance requirements clauses from the operation of MFN clauses (Nikièma, 2014).

#### **TIP 11**

##### **If you use performance requirements, structure them effectively**

- Performance requirements raise complex trade-offs between different policy goals. They are only effective if local businesses have the capacity to seize the opportunity, so they often require complementary measures to strengthen that capacity.
- Investment treaty clauses on performance requirements can affect policy space. Decisions on whether to use these clauses, and on the multiple options available for their formulation, require careful thinking through.
- Requiring companies to regularly report on progress, extending the application of performance requirements to subcontractors and structuring procurement in ways that facilitate inclusion of local suppliers can all increase the effectiveness of performance requirements.

#### **TIP 12**

##### **Scrutinise the economic deal**

- Advocates can play an important role in promoting fairer economic deals. They can push for more inclusive models of investment. They can prompt governments to adopt tax and budgetary transparency measures, including access to data for independent researchers and robust checks and balances on both tax collection and spending.
- Advocates can also advocate for tighter tax laws, including in home countries; 'name and shame' tax avoiders; shed light on questionable corporate structures; and monitor compliance with any performance requirements. Transparency of any contracts is key for advocates to play these roles effectively.

## Useful online resources

Eden, L (2001) Taxes, transfer pricing and the multinational enterprise. In: Rugman, AM and Brewer, TL (eds). *The Oxford Handbook of International Business*. Oxford University Press, Oxford and New York.

[www.voxprof.com/eden/Publications/EDEN-OHIB-CHAPTER-12102552.pdf](http://www.voxprof.com/eden/Publications/EDEN-OHIB-CHAPTER-12102552.pdf)

Natural Resource Governance Institute has published extensive materials on revenue management and transparency in extractive industries:

[www.resourcegovernance.org](http://www.resourcegovernance.org)

Nikièma, SH (2014) *Performance Requirements in Investment Treaties*. International Institute for Sustainable Development (IISD), Winnipeg.

[www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf](http://www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf)

OECD/G20 Base Erosion and Profit Shifting Project. Reports on 15 actions to address tax avoidance under the prevailing 'independent entities' approach.

[www.oecd.org/ctp/beps-actions.htm](http://www.oecd.org/ctp/beps-actions.htm)

Otto, J, Andrews, C, Cawood, F, Doggett, M, Guj, P, Stermole, F, Stermole J and Tilton, J (2006) *Mining Royalties: A global study of their impact on investors, government, and civil society*. World Bank, Washington DC.

<http://tinyurl.com/z4x0n3>

Tax Justice Network: an independent international network conducting research, analysis and advocacy for a fairer international tax regime. [www.taxjustice.net](http://www.taxjustice.net)

UNCTAD (2015b) *World Investment Report – Reforming international investment governance*. United Nations Conference on Trade and Development, Geneva and New York. [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf), particularly Chapter V.

# Addressing social and environmental issues

## 4.1 Setting the scene

### Sustainable development and human rights

Even a deal that is economically beneficial to the country as a whole can be bad news if social and environmental considerations are not properly factored in. Large natural resource investments can bring significant negative environmental impacts, including water pollution, deforestation and soil degradation.

They can also raise major social concerns, such as protecting local land rights, ensuring continued food security for affected people, ensuring the project benefits are widely shared, regulating the conduct of security forces and establishing effective grievance mechanisms.

Addressing social, environmental as well as economic considerations is central to the concept of sustainable development. Principle 4 of the 1992 Rio Declaration on Environment and Development states that 'environmental protection shall constitute an integral part of the development process', while Principle 5 considers poverty eradication as 'an indispensable requirement for sustainable development'.

These principles have made their way into some international rulings. For example, the International Court of Justice (ICJ) has referred to the 'need to reconcile economic development with protection of the environment[, a need that] is aptly expressed in the concept of sustainable development'.<sup>5</sup> Pursuit of virtually all the SDGs would require properly addressing social and environmental issues in investment processes.

Many social and environmental issues are closely linked to the realisation of fundamental human rights (Box 26), and the Plan of Implementation of the 2002 World Summit on Sustainable Development states that 'respect for human rights [...] essential for achieving sustainable development' (paragraph 5).

The relevance of human rights is evident in social matters. For example, land acquisition processes can affect the internationally recognised human rights to property, to food, to housing and to culture, and indigenous peoples' rights to their ancestral lands. Labour relations can also raise important human rights issues.

But human rights are also directly relevant to environmental protection. Environmental degradation can impact on widely recognised human rights, including the right to health. Some international treaties also affirm the human right to a clean environment (for example Article 24 of the African Charter on Human and Peoples' Rights). The 1993 Vienna Declaration and Programme of Action clarifies that pursuit of economic development cannot be invoked to trump internationally recognised human rights.

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5. *Case Concerning the Gabčíkovo-Nagymaros Dam*, at 140.

Over the past two decades, human rights and sustainable development organisations have become very involved with advocacy on natural resource investments. Today, many large investments in the extractive industries and agriculture are accompanied by thorough public scrutiny. As a result, companies are under increasing pressures to uphold effective social and environmental standards.

Many companies have also taken a more proactive role in making social and environmental considerations a mainstream part of their business operations. The 'business and human rights' agenda (Box 27) enjoys strong support in many parts of the private sector.

In practice, addressing social, environmental and economic considerations is often complex, not least because there is no consensus on how to address important trade-offs, and because balancing acts are inherently context specific and evolve over time. The sustainability of any development can look very different at different levels: a decision that seems to promote sustainable development at the national level may be unsustainable at the local level.

## **Box 26. International human rights law**

International human rights law affirms the fundamental rights to which all human beings are entitled. It aims to protect human dignity. At the global level, human rights law is centred on international treaties and authoritative declarations linked to the United Nations system.

This includes the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Human rights are also protected by regional systems. In Europe, for example, there is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols; in the Americas, the 1969 American Convention on Human Rights (ACHR) and its protocols; and in Africa, the 1981 African Charter on Human and Peoples' Rights (ACHPR) and its protocols.

International human rights law has been further developed through authoritative treaty interpretations provided by the United Nations and regional human rights treaty bodies established to monitor the implementation of given treaties, and by international human rights courts. States have also negotiated guidelines, including the 2004 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

The United Nations has appointed Special Rapporteurs to develop specific rights or deal with specific issues or countries. For example, in 2009 the then UN Special Rapporteur on the Right to Food developed 'A Set of Minimum Principles and Measures to Address the Human Rights Challenge' in large-scale land deals for agribusiness investments.

## Box 27. The UN Guiding Principles and the proposed treaty on business and human rights

The UN Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights Council in 2011. They are intended to clarify the human rights duties of states and the responsibilities of companies in the context of business activities. The principles were developed through an international consultation process led by the then Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie.

The UN Guiding Principles rest on three pillars: protect, respect and remedy. States have a duty to protect human rights against third-party interference, including interference from business actors (protect). Businesses have a corporate responsibility to act with due diligence to avoid infringing on human rights and to address adverse impacts that may arise from their activities (respect). Finally there need to be effective remedies, including judicial fora and non-judicial grievance mechanisms (remedy).

The state duty to protect 'requires taking appropriate steps to prevent, investigate, punish and redress [human rights violations] through effective policies, legislation, regulations and adjudication' (Guiding Principle 1). In other words, states should enact and enforce laws, issue guidance and provide effective remedies. In addition to the state duty to protect, states (including all public bodies and agencies) also have a duty themselves to respect human rights.

The responsibility of business to respect human rights requires that enterprises:

- '(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts' (Principle 13).

The Guiding Principles are accompanied by annexes, including the Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations.

While not legally binding, the Guiding Principles have received wide acceptance and support. However, the non-binding nature of the Guiding Principles left some states and many advocates disappointed. Proposals for a binding treaty on business and human rights have been put forward, and discussions are currently underway. Materials on these discussions are available at <http://business-humanrights.org/en/binding-treaty>.

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## Can international standards fill gaps in the law?

There is much international guidance on ways to tackle social and environmental issues in investment processes. Principles, guidelines and standards have been developed by a variety of different types of bodies:

- International agencies, for example the OECD Guidelines for Multinational Enterprises.
- Global and regional multilateral lenders, for example the Performance Standards on Environmental and Social Sustainability of the International Finance Corporation (IFC), and equivalent documents adopted eg by the African Development Bank, the Asian Development Bank and the Inter-American Development Bank.

- Inter-governmental negotiation processes, for example the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT).
- Commercial lenders, for example the Equator Principles – a voluntary 'baseline and framework' developed by commercial lenders as a benchmark for their own internal social and environmental policies, procedures and standards.
- Multi-stakeholder roundtables and certification schemes, such as those established for industries and commodities as diverse as palm oil, soy, sugar and biofuels.

A group of governments, extractive industry companies and NGOs have adopted the Voluntary Principles on Security and Human Rights, which have become an international benchmark in matters relating to the operation of security forces (Box 28).

While all these international standards are not legally enforceable in themselves, many of them are backed up by grievance mechanisms – for example, the IFC Compliance Advisor / Ombudsman (CAO), and the National Contact Points (NCPs) established in countries that subscribe to the OECD Guidelines for Multinational Enterprises.

### **Box 28. The Voluntary Principles on Security and Human Rights**

The Voluntary Principles on Security and Human Rights were developed in 2000 by some governments, extractive industry companies and NGOs. They offer guidance to companies on how to protect the security of their operations while ensuring respect for human rights.

The principles provide guidance on risk assessment, whereby companies should assess security risks and the potential for human rights abuses. They also cover how companies should engage with public security providers (police, military) in a way that promotes the protection of human rights; and with private security providers (that is, contracted security) in a way that respects human rights.

Source: IPIECA, 2012a.

International social and environmental standards may go considerably beyond national legal requirements. Some investment contracts require projects to comply with international standards. Where national law does not provide effective regulation, this approach may help to fill gaps – but only if governments are equipped to monitor compliance with standards they may not be familiar with.

Reference to international standards can also have drawbacks. In democratic countries, national legislation reflects the balance of social, economic and environmental considerations chosen by the people, at least indirectly. National law thus has greater legitimacy than international standards. The application of different national and international standards to different projects under different contracts can also create inequalities among people in the same country, and challenges for the government agencies that monitor compliance.

International standards can provide a benchmark for national law making, however. In some countries, legislation has been used to effectively incorporate the content

of specified international standards into national law. International guidelines can also establish parameters of 'due care' that could be referred to in court litigation.

## Chapter outline

This chapter covers some recurring social and environmental concerns and the chief means used to address them: impact assessments, land rights, labour rights, and environmental standards and liability. It does not cover everything: for example, promotion of local development is another important issue. This issue is touched upon in Sections 3.3 and 3.4 (revenue sharing, job creation). Local consultation issues are discussed in Chapter 5.

Given the important role played by international standards in efforts to address social and environmental concerns, this chapter refers to some widely used standards, although there is not enough space to discuss all the relevant guidance. For instance, with regard to multilateral lenders, the chapter discusses the IFC Performance Standards, which have global relevance and are cross-referenced in the Equator Principles. It may be argued, however, that the standards developed by regional development banks may be more suitable in some cases insofar as they are tailored to specific regional contexts.

## 4.2 Environmental and social impact assessment

### Key concepts

Environmental and social impact assessments (ESIAs) aim to assess the likely or potential impacts of a proposed project before the project is approved. They also identify alternatives to the option proposed and consider preventative or mitigating actions to minimise any impact identified.

Impact assessments are typically carried out in the early stages of the project cycle. They are part of the process whereby proposed investments are approved. They should result in the formulation of social and environmental management plans to be applied throughout project duration. Management plans identify how particular risks, such as an oil spill, would be dealt with during the project.

### International obligations to conduct an impact assessment

Several environmental treaties require states to ensure that an environmental impact assessment is conducted before authorising activities that are likely to have significant environmental impact. For example, Article 14 of the Convention on Biological Diversity (CBD) commits states to introduce, 'as far as possible and as appropriate', 'procedures requiring environmental impact assessment of [...] proposed projects that are likely to have significant adverse effects on biological diversity'. The CBD has been ratified by virtually all countries in the world, with the notable exception of the United States (Morgera, 2013).

Some treaties specifically require or regulate impact assessments for projects that are likely to have an impact on the environment in other states or in areas beyond



national jurisdiction. This includes the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which has been ratified by a number of countries in the northern hemisphere, and numerous treaties regulating shared watercourses.

Even where these treaties do not apply, customary international law still requires all states to demand an environmental impact assessment for activities within their jurisdiction that are likely to cause environmental harm to other states. In the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the ICJ held that 'it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context', even if no treaty explicitly requires this.<sup>6</sup> Treaty provisions may still be useful to clarify specifics and procedures.

Impact assessments may also be required under international human rights law. In *Saramaka People v. Suriname*, the Inter-American Court of Human Rights held that respecting the collective right to property of a tribal people requires the government to ensure that an environmental and social impact assessment is conducted before awarding timber and mining concessions. The *Saramaka* judgment also clarified that prior environmental and social impact assessments must be conducted by independent and technically capable entities.

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International environmental law tends to focus on environmental impact, while human rights law requirements have implications for both social and environmental impact assessments. But requirements in some environmental treaties have been interpreted broadly to also include the social impact.

For example, the Conference of the Parties of the Convention on Biological Diversity has issued guidelines on how to conduct impact assessments where proposed projects affect indigenous peoples. These guidelines explicitly cover social and cultural as well as environmental impacts (Box 29).

Social impacts are also likely to be of direct relevance to 'human rights due diligence', one of the core elements of the business responsibility to respect human rights featured in the 2011 UN Guiding Principles on Business and Human Rights (see Boxes 27 and 30). There is growing experience and methodological guidance on how to conduct human rights impact assessments (Box 30).

### International guidance and standards

There are multiple sources of international guidance and standards on how to conduct social and environmental impact assessments. The Akwé: Kon Guidelines and the Guiding Principles on Business and Human rights have already been mentioned (Boxes 27, 29 and 30). In addition, IFC Performance Standard No. 1 deals with the 'Assessment and Management of Environmental and Social Risks and Impacts'.

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6. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, paragraph 204.

### **Box 29.** Impact assessments and indigenous peoples: the Akwé: Kon Guidelines

In 2004, the Conference of the Parties of the Convention on Biological Diversity adopted the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

The Akwé: Kon Guidelines provide guidance for states in the development of cultural, environmental and social impact assessment regimes where proposed projects affect indigenous peoples (Akwé: Kon Guidelines, paragraph 1). They cover several important aspects of impact assessments. For instance, they provide that information should be disclosed in local language and through means other than written materials.

The guidelines broaden the conventional scope of impact assessments to explicitly cover the cultural impact. This is defined as the 'process of evaluating the likely impacts of a proposed development on the way of life of a particular group or community of people, with full involvement of this group or community of people and possibly undertaken by this group or community of people' (paragraph 6(a)).

The guidelines are not legally binding, but they could be used as evidence of best practice in legal or other proceedings. In the United Kingdom, the National Contact Point hearing complaints for alleged non-compliance with the OECD Guidelines for Multinational Enterprises used the Akwé: Kon Guidelines as an international benchmark in a dispute involving indigenous people affected by mining operations in India (Morgera, 2013).

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### **Box 30.** Human rights due diligence and impact assessments

According to the 2011 UN Guiding Principles, human rights due diligence is the process through which companies 'identify, prevent, mitigate and account for how they address their adverse human rights impacts' (Principle 17). The process 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.

The human rights due diligence '[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations' (Principle 17). The commentary to the UN Guiding Principles clarifies that human rights due diligence can be included within broader enterprise risk-management systems, including impact assessment processes.

There is an increasing amount of guidance available on how to carry out human rights due diligence, for example in the petroleum industry (IPIECA, 2012b). Commentators have emphasised that the credibility of human rights due diligence depends on transparency and public scrutiny of company processes and claims (Harrison, 2013).

There is also growing guidance on how to conduct human rights impact assessments (HRIAs). Companies can carry out a HRIA as part of their human rights due diligence (for guidance, see BSR, 2013). Communities and advocates can also conduct HRIAs of investment projects to identify human rights risks and feed into advocacy and scrutiny (for guidance, see Rights & Democracy and Oxfam America, 2010).

Performance Standard No. 1 applies to all IFC-financed projects that have environmental and social risks and impacts. It provides guidance on the integrated assessment of a project's social and environmental impacts and risks, effective community engagement through disclosure of project information and local consultation, and the management of environmental and social performance throughout the life of the project.

Compliance with the IFC performance standard is also indirectly relevant to projects financed by lenders that have subscribed to the Equator Principles. This is because the Equator Principles effectively extend the application of IFC Performance Standard No. 1 to signatory banks.

Where they apply, the OECD Guidelines for Multinational Enterprises call on enterprises to develop environmental management systems to assess and control their environmental impacts, integrate environmental considerations into their business operations and progressively raise the level of environmental performance in all parts of their operations (Chapter VI of the OECD Guidelines).

Multi-stakeholder certification systems often set out requirements for impact assessment. For example, the Principles and Criteria of the Roundtable on Sustainable Palm Oil (RSPO) require conduct of a comprehensive and participatory independent social and environmental impact assessment.

### National legislation

Since the early 1990s, authorities in many low and middle-income countries have adopted national legislation on environmental protection. These laws usually require an environmental impact assessment for proposed projects that may have significant effects on the environment (for example, mining or petroleum operations), which frequently also includes identification and mitigation of social impacts.

Sector-specific laws including mining and petroleum codes often also require impact assessments for activities carried out under their provisions. Where government authorities approve an impact assessment, they issue the environmental permits or licences needed to implement the project.

The quality of impact assessment legislation varies greatly. The Environmental Law Alliance Worldwide (ELAW) website contains a global database and comparative analysis of many impact assessment laws ([www.elaw.org](http://www.elaw.org)). Key parameters include:

- The types of projects that require an impact assessment.
- The mandated content and scope of impact assessments, including the extent to which assessments must tackle social impacts.
- Whether legislation, regulations or guidelines provide clear guidance on the impact assessment process.
- Transparency and disclosure requirements, including whether draft and/or final impact assessment documentation must be disclosed.

- Scope for local consultation and public participation, including public hearings and opportunities to comment on draft and final impact assessments.
- The extent to which the law deals with any conflicts of interest that may arise in ESIA processes.
- Scope for citizens to seek administrative and/or judicial review of government decisions to approve impact assessments.
- Nature and enforceability of environmental permits issued on the basis of impact assessments, and arrangements to monitor compliance.

## Making impact assessments work

In practice, the implementation of impact assessment requirements is often marred by difficulties. The involvement of multilateral lenders or of well-established companies tends to be a force for good in impact assessment processes. On the other hand, there have been many reports of shortcomings in impact assessments, including violations of legal requirements, for example in relation to a recent wave of large-scale land deals for agribusiness investments (see Box 5 in Chapter 2).

Recurring problems include: inadequate company systems and expertise; lack of institutional capacity in the government agencies that scrutinise impact studies and subsequently monitor compliance with management plans; lack of institutional independence between the project proponent and the party (often a consultant) carrying out the assessment; and weak negotiating power of environmental agencies with other ministries when it comes to investment decision making.

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The right accountability and incentive structures are essential for effective assessments. Impact studies are often financed by the investor, creating potential conflicts of interest. Government authorities can ensure rigour by scrutinising drafts submitted by companies and also by demanding use of internationally recognised experts. Having multilateral lenders finance impact assessments can also help to increase the independence of the exercise.

Investments in agriculture and extractive industries are typically implemented over a long timeframe. Best-practice environmental permits or licences reflect the recommendations included in impact assessment studies or in separate management plans based on those studies. Best-practice permits also include detailed conditions (for instance, to safeguard groundwater resources or regulate waste management), either directly or through reference to the management plans.

For conditions attached to the environmental permit to be effective, government authorities need to have the power to monitor compliance and withdraw or suspend permits in case of non-compliance (see Section 4.5). The government agency mandated with approving impact assessments and monitoring compliance during project implementation also needs to be properly resourced, equipped with the full range of skills needed (including to deal with social impacts), and backed up by strong political support at the highest level of government. Transparency of processes and of applicable requirements is also key (see Section 5.3).

Only where affected people and concerned citizens can participate meaningfully in the ESIA process will it be possible to ensure that the impact assessment identifies and addresses all relevant issues. Some national laws explicitly require local consultation and public participation in ESIA exercises and public disclosure of ESIA documentation. Advocates can play an important role in supporting affected people to participate in impact assessment processes, scrutinising impact studies (Box 31), and in monitoring subsequent compliance with social and environmental management plans.

### **Box 31. Legal tools to scrutinise impact assessments**

Some impact assessment laws provide opportunities for public scrutiny and participation. The earlier advocates get involved, the more effective their participation will be – ideally, even at the screening stage.

Some laws require draft impact assessment documentation to be made available for public review, and allow the public to make written comments and participate in public hearings. Advocates can insist that documentation be made accessible, including any documents that are cited in the impact assessment study. Usually, comments must be provided within a specified timeframe – although for complex impact assessments advocates might be able to obtain an extension from competent government authorities.

Submitting comments and attending public hearings provide opportunities to raise concerns. Such actions can also strengthen the case of advocates that subsequently decide to seek administrative or judicial review of the final impact assessment, because advocates can prove that they had raised their concerns when given an opportunity to do so. In some countries, raising concerns through opportunities built into the impact assessment process is a legal requirement for advocates to be able to challenge the process through judicial proceedings.

If the government agency approves the impact assessment and issues environmental permits, dissatisfied advocates might be able to seek administrative review of the decision. Administrative review involves bringing the matter to higher-level government bodies, for example to claim that the process was flawed or some impacts were not duly considered. This process can be simpler than judicial review, but it can also be frustrating if corruption or other improper behaviour at a higher level were involved. There may also be very tight deadlines for submitting such administrative reviews.

Advocates could also seek judicial review of the decision to issue permits if the national law allows. This means taking the case to court. The courts would establish whether the impact assessment complied with legal requirements. Practical and legal barriers may constrain this route. For example, in some countries advocates are not deemed to have 'standing' (sufficient legal interest) to bring the case, though some national laws explicitly allow NGOs to bring cases in the public interest.

Source: ELAW, 2010, with additions.

Use of particularly rigorous impact assessment procedures, refusal to issue environmental permits following the conduct of an impact assessment and non-renewal of existing environmental permits have all resulted in investor-state arbitrations. The arbitrations were based on investment treaties and/or laws. Investors typically claimed that they had been treated unfairly and claimed compensation for losses.

In some cases, arbitral tribunals have awarded substantial damages to investors. States keen to minimise this risk would need to ensure that their conduct complies with investment protection standards. They would also need to give careful consideration to the investment protection standards they are prepared to commit themselves to (see Section 2.3).

#### TIP 13

### Ensure that impact assessments have teeth

Both governments and advocates have a role to play in making sure impact assessments are effective. Governments can:

- Require thorough environmental and social impact assessments of proposed investments when all options are still open, based on transparency, local consultation and public participation and subject to rigorous government scrutiny and public review.
- Establish institutions mandated with scrutinising impact assessments and monitoring compliance during project implementation. For these institutions to be effective, they must be properly resourced and backed up by strong political support.
- Push for rigorous impact assessments by demanding use of internationally recognised experts, involving multilateral lenders in the financing of the deal and scrutinising drafts submitted by the company.
- Ensure that any permits, and any conditions attached to those permits, reflect the recommendations of the impact assessments, and empower the authorities to monitor compliance and withdraw or suspend the permit in case of non-compliance.

Advocates can:

- Remind governments of their legal duty to require the conduct of impact assessments.
- Scrutinise social and environmental impact assessments by demanding disclosure of documentation, participating in public hearings, making written comments, seeking administrative or judicial review of government decisions, and monitoring subsequent compliance with the recommendations embodied in impact studies.
- Conduct their own impact assessment to feed into advocacy, for example using human rights impact assessment methods.
- Hold businesses to account, including for their responsibility to respect human rights, and including by benchmarking business practice against the extensive international guidance on how to handle social and environmental issues.

## 4.3 Land rights

### Why land rights matter

Land acquisition is a major source of conflict in many natural resource investments. Taking land to enable project implementation can have a devastating impact on people, particularly where they depend on land for their livelihoods. In many countries, land also has strong and sometimes all-encompassing cultural and spiritual values, and it provides the basis for social identity. Issues concerning land acquisition tend to arise in the early stages of project implementation, at the land clearance and construction stages. But new land issues may arise later, for example if the project area is extended.

Where agriculture or extractive industry projects involve the acquisition of local land rights, fundamental human rights may be at stake – even if those land rights are not recognised in national law. This includes the human right to property, which is affirmed in several human rights instruments (for example, the UDHR, the ECHR, the ACHPR and the ACHR), and which international human rights bodies have consistently held to protect the collective, customary land rights of indigenous and tribal peoples even in the absence of formal titles or legal recognition under national law.

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Where people depend on land for their food security, land acquisition can affect the right to food, which is affirmed eg in the UDHR and the ICESCR. Evictions may violate the right to housing, also recognised in the UDHR and the ICESCR. The rights to culture, self-determination and non-discrimination are also relevant, as are several other internationally recognised human rights. The International Labour Organization's Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries protects the land and resource rights of indigenous and tribal peoples (see Section 5.2).

International guidance also points to the need to protect land rights affected by investment projects. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), endorsed by the UN Committee on World Food Security in 2012, call for the protection of all legitimate tenure rights that may be affected by decisions about large-scale land-based investments (see Box 32).

Project design can substantially affect the nature and extent of land acquisition. In agriculture, for example, large-scale land acquisitions for plantation farming have triggered much debate about 'land grabbing'. Designing agricultural projects so that the investment focuses on processing and sources produce from local farmers would minimise land acquisition, though these models may also raise other challenges (see Boxes 5 in Chapter 2 and 19 in Chapter 3).

### **Box 32.** The Voluntary Guidelines on the Responsible Governance of Tenure

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) are the first comprehensive global instrument that provides guidance to states and non-state actors on how to promote responsible land governance.

The Guidelines were unanimously endorsed on 11 May 2012 by the Committee on World Food Security (CFS), which is the top UN body in matters of food security. Endorsement by CFS followed two years of extensive multi-stakeholder consultations and one year of inter-governmental negotiations.

The VGGT call for the recognition and protection of all 'legitimate tenure rights' and provide guidance on land restitution, land redistribution, land tenure reform, agribusiness investments and land administration, among other issues.

With regard to land-based investments, the VGGT call for respect for all legitimate tenure rights in investment processes as well as for transparency, social and environmental impact assessments, benefit sharing, community consultation and – where indigenous peoples are involved – free, prior and informed consent.

While not legally binding per se, the VGGT have received widespread expressions of high-level political support, including from the UN General Assembly, the G8 and the G20. Some VGGT provisions reflect binding international law, including provisions on gender equality and respect for human rights.

Source: FAO, 2016.

### **Improving legal recognition of local land rights**

Land laws are extremely diverse, influenced by history, politics and the place of land in the local economy and society. However, a recurrent challenge in many low and middle-income countries is that indigenous peoples, small-scale farmers, forest dwellers, pastoralists and fisherfolk only have weak land rights under national law. Rural people often access land through 'customary' or other local systems of land tenure. These local land rights are often treated by national law as use rights, rather than ownership.

Depending on the jurisdiction, legal and practical factors often undermine the protection of these rights. Legal protection is often subject to evidence that the land is being used productively. This can undermine local claims to rangelands, hunting-gathering grounds or sacred sites, for example, or the farming rights of shifting cultivators, often affecting a large share of local landholdings (Alden Wily, 2011).

Where such local claims are held by minority or ethnic groups including indigenous and tribal peoples, as is frequently the case, this limited form of legal protection will disproportionately affect those groups and can constitute racially discriminatory legislation, whether this effect was intended or not.

Legal protection of local land rights is also often weakened by broadly interpreted powers of eminent domain, whereby commercial investments are considered justified on grounds of public purpose. This power is often used by governments



to justify state acquisition of land even against the will of landholders ('compulsory acquisition'). However, the arbitrary, discriminatory or disproportionate use of powers of eminent domain can violate international human rights law, and possibly the national constitution.

In addition, legal protection is often undermined by inadequate social impact or local consultation requirements, and by weak compensation requirements. For example, in some countries compensation is limited to 'improvements' such as standing trees and crops, to the exclusion of land values.

In many low and middle-income countries, few rural people hold formal documentation for their land. Much land is not titled, and land titles may only have been issued to local or national elites, who have the information, resources and relations necessary to navigate often cumbersome administrative procedures. So it may be difficult for affected people to prove that a piece of land is theirs, despite potentially many generations of continuous possession, use and customarily grounded ownership and management.

This legal context is a recurring source of tensions in natural resource investments. Weak land rights expose local groups to the risk of dispossession and investors to contestation and conflict. Affected people may mobilise against a project even if the investor has complied with applicable rules and was lawfully granted land rights by the government. This is often because compliance has been measured against only a selection of applicable rules, with the project being non-compliant with local customary law or international human rights law.

The VGGT call on states to legally recognise and protect all 'legitimate' tenure rights. They explicitly consider as 'legitimate' not only those tenure rights formally recognised by national law, but also those rights that are considered to be socially legitimate in local societies – even if these rights currently have no legal recognition under national law. For example, the VGGT call on states to safeguard customary and unrecorded rights in land allocation processes, and to protect the land rights of indigenous peoples.

Depending on the country, recognising and protecting local land rights may require legal reform and more effective enforcement of existing laws. In recent years, several countries have revised their legislation to strengthen local land rights. For example, some law reforms have:

- Legally recognised customary land rights where relevant, protected customary rights even if they are not formally registered, and provided these rights with the same legal protection available to land rights allocated by the state.
- Protected collective as well as individual landholdings, and recognised rights associated with diverse land uses including pastoralism and hunting-gathering.
- Promoted gender equality in land relations, for example through prohibiting discrimination, requiring joint titling for couples and promoting women's representation in land institutions.
- Established geographically, economically and culturally accessible systems to record land rights, building on local practice.

Protecting the land rights of vulnerable groups may require action beyond land law alone. For example, gender-discriminatory provisions in family and succession law can have important implications for women's access to land.

### Strengthening safeguards against compulsory acquisition

Compulsory acquisition involves public authorities acquiring land for a public purpose even against the will of landholders. The VGGT call for prior impact assessments to analyse the impacts that proposed investments would have on land rights and the progressive realisation of the right to food. They also call for laws to clearly define the notion of 'public purpose' enabling compulsory acquisition, and to allow judicial review of expropriation decisions.

Further, the VGGT call for minimising land acquisition, exploring alternatives, promoting consultation in acquisition processes, promptly providing just compensation and being sensitive about proposed expropriations in areas of particular social, cultural, religious or environmental significance. Section 5.2 below discusses the principle of 'free, prior and informed consent' as a basis for land acquisition.

Implementing the VGGT would require extending safeguards to all land and resource rights perceived to be legitimate in a given context, including rights falling short of formal ownership. Where land is held communally, issues arise about ensuring that compensation packages are distributed fairly within the group and reach all the people affected by the project; and about addressing social differentiation for example based on gender, generation, status, income and socio-economic activity.

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There is a difference between compensating for lost assets and restoring livelihoods to pre-project levels (Cernea, 1997). Cash compensation based on market value may achieve the former, but not necessarily the latter, because compulsory acquisition may have impacts beyond the lost value of the asset taken. This situation calls for mechanisms to ensure that livelihoods are restored or enhanced, which may involve going beyond payment of compensation.

In practice, many national laws governing compulsory acquisition present gaps and weaknesses, even in countries where 'progressive' land legislation applies. This legal context makes rural people vulnerable to dispossession, exacerbating power imbalances between government, companies and affected people.

However, some states have adopted laws or regulations that provide more robust safeguards in compulsory acquisition. For example, some laws require authorities to minimise compulsory acquisition, and link cash payments or in-kind compensation (such as the provision of alternative land) to what is needed to restore the livelihoods of affected people to a position that is better than their position pre-acquisition, or at least equivalent to it. India has adopted progressive legislation on land acquisition (Box 33).

### Box 33. Expropriation legislation in India

India's Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 regulates the acquisition by the government of private land for public purposes. The law replaces colonial-era legislation that had been widely criticised for failing to adequately protect affected land rights.

The 2013 law has been heralded as path breaking in its attempt to make the process of acquisition fairer. Innovative provisions include those dealing with compensating and rehabilitating affected families, ensuring acquisition of agricultural land as a last resort, more clearly defining what constitutes a 'public purpose', requiring a social impact assessment prior to acquiring land, and returning any unutilised land.

When the government acquires land for a commercial operation, the law requires the prior consent of at least 80 per cent of affected families. The threshold is reduced to 70 per cent for public-private partnership projects. The process to obtain consent must be implemented together with the social impact assessment study. The law also prescribes compensation at land market value, and provides specific guidance on how to calculate compensation payments.

However, a new government sought to amend the law in order to expedite the land acquisition process. New ordinances exempted from consent and social impact assessment requirements projects related to defense, rural infrastructure, affordable housing, industrial corridors and social infrastructure. But the ordinances subsequently lapsed, so the 2013 law still stands as passed. There is uncertainty on whether new changes may be introduced in future.

Source: Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013; Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance of 2015.

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### Making land rights real

The implementation of land legislation is limited in many low and middle-income countries, particularly in rural areas. This may be due to government agencies lacking financial resources and institutional capacity, lack of legal awareness among the rural population, formal or informal socio-political deals between the state and customary authorities, and, often, a lack of perceived legitimacy of official rules and institutions.

Legislation that builds on local practice is often easier to implement. Recognising that many rural people will continue to access land on the basis of undocumented customary rights, some innovative land laws protect customary land rights even if they are not formally registered, and grant customary rights the same legal protection available to land rights issued by the state. Examples of these include the Land Act of 1997 in Mozambique and the Village Land Act of 1999 in Tanzania (Knight, 2011).

Promoting better implementation may involve giving careful consideration to budget implications at law reform stage – avoiding costly administrative structures and making adequate budget allocations. Advocates can also make a difference. Many NGOs are helping affected people to defend land rights squeezed by natural resource investments, through means such as:

- Awareness raising via rural radios (Goïta and Coulibaly, 2012).
- Support to community 'paralegals' (Knight *et al.*, 2012; Tanner and Bicchieri, 2014; Box 34).
- Participatory land use mapping to document community land claims (Nguiffo and Djeukam, 2008).
- Community-based monitoring of land acquisition (Twesigye, 2015).
- 'Legal caravans' to strengthen grassroots capacity to claim rights (Keita *et al.*, 2014).
- Public interest litigation to challenge resettlement or compensation packages (Dhliwayo, 2013).
- Support to communities in negotiations with investors (Brinkhurst and Knight, 2014).
- Support for communities to use grievance mechanisms to protect their land rights (Lomax, 2015).

### **Box 34. 'Barefoot lawyers' in the Philippines: using community paralegals to help protect the land rights of people affected by mining**

In 1995, a new Mining Act in the Philippines made the national context more attractive for mining companies. For example, the law allowed 100 per cent foreign ownership of operating companies. This triggered renewed momentum in mining operations, exacerbating a squeeze on local land rights. Progressive legislation protects the land rights of indigenous peoples, but implementation faces challenges (see Box 39).

Advocates have been supporting communities affected by mining. One approach to protect local land rights is to train community paralegals. Paralegals are literate community members trained in basic aspects of the law (such as the constitution, human rights, land law and indigenous peoples' rights) and in use of legal and advocacy tools.

Paralegals work in a number of ways: disseminating information in their communities, supporting the creation of community petitions against mining operations, and liaising with government agencies to obtain documents and make inquiries. Their work appears to have prevented evictions and enabled local landholders to have more of a voice.

Source: Rebuta *et al.*, 2012.

### Protect local land rights

- In many societies, land provides the basis of social identity, of livelihoods and food security, and of local culture, spirituality and the collective sense of justice.
- International human rights law and international guidance call on states to recognise and effectively protect all socially legitimate land rights, including customary rights where present, irrespective of their formal registration.
- Any productive land use requirements would need careful consideration: ill-designed requirements can undermine the rights of shifting cultivators, pastoralists and hunter-gatherers.
- Best-practice social impact assessments include a thorough, participatory analysis of the impacts that any land acquisition would have, and options to minimise land acquisition.
- Safeguards against compulsory acquisition would need to cover all land and resource rights perceived to be legitimate in a given context including rights falling short of formal ownership. Safeguards should also feature strong public purpose, due process, consultation and compensation requirements; ensure that compensation packages are distributed fairly and reach affected people; and provide effective systems for appeals and judicial reviews.
- Best-practice rules require authorities to minimise compulsory acquisition, obtain consent and link compensation to what is needed to improve livelihoods or at least restore them to pre-project levels.
- Any land-related action should recognise and address social differentiation in land relations, including based on gender, generation, status, income, wealth and socio-economic activity.
- Failure to deal with land issues properly can expose investment projects to protracted contestation – even if the project benefits the national economy. Effective legal protection of local land rights will not necessarily deter investors, as many prefer to deal with people who have clear and uncontested rights.
- Advocates can help to secure local land rights for example by using rural radios, paralegals, public interest litigation and access to international human rights bodies. They can also help to identify alternatives to the project that would avoid or minimise land acquisition.

## 4.4 Labour rights

Jobs are often one of the most prominent benefits that companies and governments promise when they sign contracts for investments in agriculture and extractive industries. The trade-off between loss of land rights and promises of jobs presents complexities. Depending on the context, land and natural resources may confer collective benefits to rural people, while jobs typically involve opportunities for individuals.

It is often impossible for investments to provide jobs to all those who lose land, so distributive issues may be at stake. Also, while land transfers typically involve the loss of a permanent asset, jobs are often seasonal, for a fixed period of time or subject to changes in economic conditions.

Employment creation and labour relations raise a number of legal issues. Section 3.4 touched on performance requirements, including those that promote employment creation. But jobs can only be beneficial if labour standards are upheld to protect human dignity. While land issues primarily arise in the construction phase, labour rights issues are relevant throughout the duration of an investment project.

Labour relations in natural resource investments involve distinctive challenges. For example, temporary, seasonal or casual workers tend to account for a large share of the agricultural labour force. These workers often face low pay and precarious employment conditions. They also often face legal and practical challenges in joining trade unions or exercising labour rights. Some national laws set up a separate legal regime for agricultural workers.

Outgrowers – independent farmers contracted to supply the company – are also usually outside the protection of labour law, although some countries have adopted or announced legislation specifically aimed at protecting the rights of contract farmers. Use of child labour on agricultural plantations and occupational segregation (for example, with women concentrated in low-pay, casual employment) are other recurring problems.

### Applicable legal frameworks

National law typically provides the first reference point for protecting labour rights. Many constitutions affirm the human right to work, the principle of non-discrimination in labour relations (Box 35) and fundamental rights concerning employment conditions.

Many constitutions also protect the right of freedom of association, and some make explicit reference to the right of workers to form or join a trade union of their choosing. In addition, labour legislation typically regulates employment conditions, minimum wage, health and safety standards, trade union rights and social benefits.

International law is also relevant to labour rights, obliging states to bring their legislation in line with minimum international standards. The UDHR and the ICESCR affirm the right to freely choose an occupation, to enjoy a just and favourable remuneration, to work in safe and healthy conditions, and to form and join a trade union.

Under the CEDAW, women have a right to employment opportunities and treatment equal to men, including equal remuneration for work of equal value. Women also have the right to enjoy special protection during pregnancy and paid maternity leave, and the right not to be dismissed on grounds of pregnancy or maternity leave.

In addition, the International Labour Organization (ILO, a specialised agency of the UN) has developed many international treaties (called conventions) that cover a wide range of issues – from freedom of association and collective bargaining to child labour or discrimination, through to health and safety, working time and social security.

Some conventions regulate specific industries or economic activities (such as the poorly ratified Plantations Convention), or protect the rights of particularly vulnerable groups such as migrant labourers. ILO conventions are binding on the states that have ratified them, and ILO member states must submit regular reports on implementation to the ILO.

## Box 35. Gender and labour rights

A close examination of gender issues in labour legislation often highlights the major gaps that exist between law and practice. In many countries, the constitution and labour legislation prohibit discrimination on the basis of sex, pregnancy and marital status in recruitment, training, remuneration, employment conditions, promotion and dismissal.

However, some laws fail to tackle this issue effectively. Also, substantial gender differentiation and pay gaps often exist in practice, partly because of occupational segregation. In agricultural plantations, for example, women are often recruited as temporary workers, without contract and on piece-work. This means that labour law protections do not apply, and that women are paid low wages and are exposed to discriminatory practices.

The law often states that women are entitled to social benefits such as maternity leave and retirement pensions. But actual enjoyment of these benefits is often conditional upon presentation of documentation (identity cards, for instance) that many rural women do not have. And while women often have the legal right to join a trade union, women's participation in trade unions varies considerably across countries and sectors, and is often particularly low in the agricultural sector.

For a long time, family law in many countries allowed the husband to interfere in his wife's occupation, by requiring his consent for her signing employment contracts and by allowing him to terminate her contract if he deems it necessary for the fulfilment of her family obligations. Several countries have since repealed these norms, but restrictions remain in other countries. And even where the law has changed, entrenched socio-cultural beliefs often perpetuate the practice, particularly in rural areas. Some countries are yet to establish effective legislation to deal with sexual harassment on the workplace.

In several jurisdictions, legislation establishes arrangements to help bridge law and practice. For example, some laws provide that, where women allege discrimination and demonstrate facts from which it may be presumed that discrimination has occurred, the burden of proof is on the employer to prove that no discrimination took place. Some laws also require certain categories of employers to take 'affirmative action' to promote gender equality in employment.

Source: Cotula, 2007, with additions.

In addition, the 1998 ILO Declaration on Fundamental Principles and Rights at Work affirms the core principles and rights that all ILO member states must observe by virtue of their membership – irrespective of whether they have ratified the relevant conventions. These core principles and rights include:

- Freedom of association and the effective recognition of the right to collective bargaining (see ILO Conventions No. 87 of 1948 and 98 of 1949, which affirm the right of workers to establish and join trade unions of their own choosing, prohibit anti-union discrimination and interference, and promote collective bargaining to determine employment conditions).
- Elimination of all forms of forced or compulsory labour (see ILO Conventions No. 29 of 1930 and 105 of 1957).
- The effective abolition of child labour (see ILO Conventions No. 138 of 1973 and 182 of 1999).
- The elimination of discrimination in respect of employment and occupation (see ILO Conventions No. 100 of 1951 and 111 of 1958, which require states to eliminate discrimination in access to employment and in employment conditions).

on the basis of race, colour, sex, religion, political opinion, national extraction and social origin).

While the declaration refers to an obligation for all member states to respect, promote and realise these rights, there are no legal mechanisms to enforce compliance. Rather, follow-up is centred on periodic reports submitted by governments to the ILO. However, there is a complaints mechanism for promoting compliance with ILO conventions.

In addition to its implications for all ILO member states, the ILO Declaration is explicitly referred to in the UN Guiding Principles on Business and Human Rights (see Box 27) as being part of the internationally recognised human rights which the business has a responsibility to respect.

These international legal instruments provide important pointers for national labour laws. Effective labour legislation ensures freedom of association and the effective recognition of the right to collective bargaining, and stamps out forced and child labour as well as discrimination on the workplace.

Effective national legislation also sets parameters for employment conditions, including minimum wage, working hours, health and safety, social benefits and unfair dismissal, and ensures that people not in formal employment (outgrowers and casual labourers, for example) enjoy adequate protections.

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Independent and accessible systems for settling labour disputes, and robust government institutions to monitor and enforce compliance with labour legislation, are also an important part of effective legal frameworks governing labour rights.

### Leveraging the OECD Guidelines for Multinational Enterprises

Where they apply, the OECD Guidelines for Multinational Enterprises provide guidance on labour relations. Chapter V echoes the 1998 ILO Declaration, calling on companies to uphold the four core principles and rights enshrined in the declaration. But the OECD Guidelines also go beyond the scope of the 1998 ILO Declaration.

Indeed, the OECD Guidelines contain provisions on employment conditions, for example calling on companies to provide 'the best possible wages, benefits and conditions of work [...] related to the economic position of the enterprise [...] at least adequate to satisfy the basic needs of the workers and their families' (paragraph V(4)(b)).

The guidelines also call on companies to employ and train local labourers 'to the greatest extent practicable', and to provide 'reasonable notice' for changes that entail collective dismissals (paragraphs V(5) and (6)). Trade unions and NGOs have brought complaints to the National Contact Points established to oversee compliance with the OECD Guidelines, as a way of promoting compliance with the guidelines (Box 36).



### Box 36. Taking labour issues to OECD National Contact Points

On several occasions, trade unions and NGOs have taken alleged violations of labour standards to the National Contact Points (NCPs), which are the national institutions that oversee compliance with the OECD Guidelines for Multinational Enterprises.

Complaints can be filed with the NCP in the host country, or in the investor's (or the buyer's) home country. In at least one case, the company was a downstream buyer (a major cotton trader), rather than the producer directly engaged in the alleged violations.

Complaints typically allege non-compliance with the provisions of the guidelines that deal with labour standards. In at least one case, the NCP complaint followed unsuccessful court litigation in the host country (Malaysia).

In several cases, the complaint led to conciliation between company and complainants, and the complainants dropped the complaint after having been satisfied by the company's handling of their concerns.

Where conciliation failed, NCPs investigated the merits of the allegations. Where they found breaches of the OECD Guidelines, they made recommendations on ways to address the shortcomings and required follow-up reporting.

Source: Statements by National Contact Points for the OECD Guidelines for Multinational Enterprises ([www.oecd.org/daf/inv/mne/ncpstatements.htm](http://www.oecd.org/daf/inv/mne/ncpstatements.htm)).

### Dealing with labour issues in investment treaties

Improving labour standards can increase business costs. Depending on the circumstances, this could result in investor-state arbitration. In at least one known arbitration, the investor reportedly complained about costs linked to minimum wage increases, among other things (Peterson, 2012). Proper framing of investment protection standards is an important part of managing this risk (see Section 2.3).

Another issue is whether investment treaties can themselves promote protection of labour rights. Some recent investment treaties feature provisions dealing with labour rights. At the very minimum, these provisions are a mechanism for states that wish to increase their investment flows to reaffirm their commitment to upholding labour standards in relation to those investment flows.

For example, some treaties reaffirm the state parties' commitment to the ILO Declaration on Fundamental Principles and Rights at Work. Some treaties also require each state party to ensure that it will not derogate from, or fail to enforce, its labour laws as part of efforts to attract foreign investment – particularly where this would be inconsistent with the labour rights affirmed in the ILO Declaration or with other fundamental labour rights such as acceptable conditions of work.

Creating effective enforcement mechanisms for these 'non-lowering of standards' clauses is problematic. Because the provisions are not designed to benefit foreign investors, they are unlikely to be enforced through the investor-state arbitration system (Section 2.4). But while some investment treaties exclude these clauses from



Photo: Mikkel Ostergaard / Panos Pictures

**Do not drop labour standards – jobs can only be beneficial if labour rights are upheld to protect human dignity**

state-state arbitration, there is no reason why disputes over alleged violations of 'non-lowering of standards' provisions could not form the object of state-state arbitration.

Some treaties covering both trade and investment contain more extensive provisions on labour rights, either in a side agreement or in a chapter of the main treaty. For example, the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA) includes a labour chapter that, in addition to the above provisions, also contains rules on workers' access to national law remedies for alleged violations of labour rights. But even in these cases, there are questions about the enforceability of treaty provisions.

Under the CAFTA labour chapter, for example, a state party can bring a case against another state party only for very narrowly defined violations – namely, a sustained or recurring failure to enforce domestic labour law in a manner that affects international trade. This framing offers little safeguard, particularly in countries where national labour legislation is itself weak. Other important CAFTA provisions on labour have no effective enforcement mechanism (Morreale, 2010). Also, state-state dispute settlement gives government much discretion to decide whether to bring a case.

Another type of relevant investment treaty provisions concerns investor obligations (see Section 2.3). Depending on circumstances and formulation, investment treaties that establish obligations for investors to comply with national law, including in relation to labour issues, could exclude an investment from legal protection, or require arbitral tribunals to consider alleged violations when deciding on the merits of a dispute. They could also allow a state to file a counterclaim to seek damages from the investor for alleged violations of labour laws.

## 4.5 Environmental protection

### Environmental standards, agencies and liability

The expansion of the agricultural and extractive industry frontier has increased pressures on precious ecosystems, including tropical forests providing the habitat to endangered species. Large natural resource projects are often associated with major environmental impacts, for example through forest clearances or the use of fertiliser in agriculture, or cyanide in mining. Legal arrangements are an important part of strategies to prevent and remedy environmental harm.

The 1992 Rio Declaration on Environment and Development calls on states to adopt 'effective environmental legislation' (Principle 11), including legislation to regulate liability and compensation (Principle 13). Section 4.2 covered the requirement for the investor to conduct an environmental impact assessment before project approval.

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National law will also define the environmental rules that an investment project must comply with, such as restrictions on the use of certain chemicals or requirements for certain working methods or techniques to be used. Special rules may apply in environmentally sensitive areas. Further specific conditions applicable to an individual project may also be defined in the project's permit or licence.

Government institutions responsible for adopting regulatory measures are equally important. These issue environmental permits, monitor compliance and sanction non-compliance. Depending on the country, this could be a ministerial department or an independent environmental protection agency.

For environmental agencies to be effective, they must be equipped with adequate powers of inspection and investigation, including the power to enter premises, access records, take samples and measurements, and seize evidence. They must also be empowered to issue warnings and mandatory orders to prevent, stop or remedy damage, backed up by credible administrative and criminal sanctions.

The rules regulating legal liability are particularly important in preventing and remedying environmental harm. Some international treaties regulate liability for environmental harm in specific contexts – for example, treaties that set the liability rules applicable to oil pollution. In most situations, however, the terms of liability are determined by national law.

The Rio Declaration affirms the 'prevention' principle, which requires avoiding or minimising adverse environmental impacts (do no harm), and the 'polluter pays' principle, which requires that the costs of environmental degradation should be borne by the operator responsible for it (see Principle 16 of the Rio Declaration). Many countries have incorporated these principles into their legislation.

A corollary of the prevention principle is the existence of legal arrangements that empower government authorities to require the investor to take preventative measures in case of imminent threat of environmental damage. Best-practice laws also empower authorities to require remedial action if environmental harm has already occurred. This could include, for example, doing works, treating land, removing contaminants or planting trees.

In line with the polluter pays principle, some national laws require the investor to bear the costs of preventative or remedial measures – either because the investor executes the measures directly, or, failing that, because authorities take measures and recover costs from the investor. Some national laws also require companies to obtain insurance for environmentally risky activities.

Advocates can play an important role in supporting the implementation of environmental legislation, for example by bringing environmental threats or harm to the attention of government authorities, and inviting authorities to investigate and take action. Advocates can seek judicial review if the government refuses to act, and often can seek injunctions and damages in the public interest against the investor if the government fails to do so (Box 37).

### **Box 37.** Taking legal action to protect orangutan habitats in Sumatra, Indonesia

In Indonesia, forest fires to clear land for oil palm plantations have been a major driver of deforestation. In Aceh, northern Sumatra, a peace accord ending armed conflict was followed by renewed momentum for oil palm concessions in precious ecosystems hosting Sumatran orangutans, elephants, rhinoceros and tigers.

After local authorities issued a new concession in 2011, advocates took the matter to court, alleging violations of legislation prohibiting use of fire to clear land. The local administrative court dismissed the case, but advocates won in appeal and before the Supreme Court in Jakarta.

This privately initiated legal action resulted in the concession being cancelled. It also triggered criminal investigations, public prosecutions and ultimately some convictions. While habitats remain under threat, this experience provides insights on the factors that can facilitate the enforcement of environmental legislation that often remains dead letter.

These factors include advocates' precise, accurate and verifiable data collection and reporting; effective alliance building involving villagers and NGOs to feed into sustained national and international media campaigns; and government agencies willing to take action, often in the face of powerful vested interests.

Source: Singleton, 2015.

National law also determines the conditions under which private parties that have been adversely affected by environmental harm may bring claims ('civil liability'). This may include, for example, people whose property, health or livelihoods have been adversely affected by water pollution, fumes or other environmental degradation. Depending on the country, private parties may seek preventative injunctions, restoration orders and compensation.

A key issue is whether companies are liable only for environmental harm caused by their negligence (fault-based liability), or whether strict liability applies. Under a strict liability regime, the investor is liable for any environmental harm caused by its activities, even if there is no evidence that the investor acted negligently. The investor could only escape liability if it could prove that a defence specified in the legislation applies, such as damage caused by an armed conflict or natural disaster.

Proving negligence is often very difficult for environmental agencies, advocates and affected people. Therefore, a strict liability regime makes it easier for authorities to enforce remedial action and for third parties to obtain compensation, though for the same reason it can also increase business costs.

In some jurisdictions, legislation applies strict liability for specified hazardous activities such as the disposal of extractive industry waste, and fault-based liability for other activities. In some cases, different standards of liability apply to enforcement actions by regulatory authorities and to civil liability activated by private parties.

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In natural resource investments, the management of environmental issues is not limited to the duration of the project. After commercial activities end, materials in the project site may be a continuing source of pollution. In some cases, such as open-cast mining, the very nature of the project can require action to restore the environment to its pre-project state once activities have been completed.

Therefore, good-practice laws or regulations set rules for managing project closure ('decommissioning'). Well thought-out environmental permits also include restoration conditions and require the investor to provide securities as a guarantee in case of environmental harm.

### Environmental protection in investment treaties

If not properly thought through, environmental measures by administrative or judicial authorities can expose governments to legal liabilities. Several investor-state arbitrations have ultimately been rooted in action taken by national courts or government agencies over alleged environmental violations (see Tienhaara, 2009). Disagreements over the terms of fault-based and strict liability regimes have also come up in investor-state arbitration – for example, in the case of *Perenco Ecuador Limited v. The Republic of Ecuador*.



Photo: Paul Smith / Panos Pictures

**Environmental impacts are best assessed before a project is approved, with management plans then drawn up and applied accordingly**

Some recent investment treaties contain explicit provisions on the environment. For example, some treaties that prohibit performance requirements (see Section 3.4) nonetheless allow requirements for investors to use technology that meets environmental specifications, provided that these 'environmental performance requirements' are not applied in an arbitrary manner. These requirements could be included in national law or an environmental permit, for example.

Some investment treaties also clarify the conditions under which environmental action can be deemed to constitute an 'indirect expropriation' (see Section 2.3) requiring governments to compensate investors for losses. Despite much variation in their formulation, these provisions usually identify the criteria for determining whether an indirect expropriation has occurred, and state that – in principle at least – non-discriminatory environmental measures do not constitute an indirect expropriation.

Further, some investment treaties contain 'non-lowering of standards' clauses comparable to the ones discussed above in relation to labour rights (Section 4.4). For example, some recent treaties require each party to ensure that it does not derogate from, or fail to enforce, its environmental laws as part of efforts to attract foreign investment.

Some trade and investment treaties contain more extensive provisions, for example on judicial or administrative proceedings or technical co-operation in environmental matters. As with labour provisions, enforcement of these clauses is problematic, though there is no inherent reason why 'non-lowering of standards' provisions could not form the object of state-state arbitration.

Importantly, some recent investment treaties recognise the discretion of government authorities with regard to 'regulatory, compliance, investigatory, and prosecutorial matters' relating to the environment. This type of provision could help to shelter states from investor claims that government action discriminated against them (Johnson, 2012).

Investment treaties that establish obligations for investors to comply with national law (see Section 2.3), including environmental legislation, could have important implications for the ways in which arbitral tribunals decide on claims brought by investors. They could also allow a state to file a counterclaim to seek damages from the investor for environmental harm.

Environmental counterclaims present both pros and cons. On the one hand, counterclaims can help a government to secure a more easily enforceable ruling against assets located abroad. On the other hand, a situation might arise where important environmental claims are 'sacrificed' in a global settlement that also deals with the investor's claims on possibly unrelated measures.

The latter might be an outcome that the environmental ministry or affected people would not have agreed to, or an outcome that does not provide an actual remedy for environmental harm. Who in government has the authority to bring counterclaims, handle the arbitration and make settlement decisions, and the extent to which there is any public oversight of or participation in settlement agreements, are likely to influence the effectiveness of counterclaims in dealing with environmental issues.

### Ensure that labour and environmental standards are upheld

There is much that governments and advocates can do to ensure that natural resource investments uphold labour and environmental standards. Governments can:

- Enact and enforce labour and environmental laws to ensure compliance with international obligations, to manage environmental risks and to promote respect for rights affecting labour relations and employment conditions.
- Regulate labour and environmental issues arising over the entire duration of investment projects – from inception to decommissioning.
- Establish, resource and empower government agencies to monitor compliance and sanction non-compliance. Effective institutions need appropriate powers of inspection, investigation and sanction, and strong political support at the highest level of government.
- Protect the diverse labour rights of multiple groups, for example permanent and temporary workers, and in agriculture the rights of contract farmers and their labourers.
- Give government agencies powers to prevent environmental damage and to take or require remedial action if damage occurs. Establish clear and robust liability rules for environmental damage.
- Ensure that investment treaties allow policy space for public action to promote and enforce labour and environmental standards.

Advocates can:

- Harness international treaties and instruments in their advocacy to push for higher labour and environmental standards.
- Monitor compliance, bring violations to the attention of government agencies, and where appropriate seek judicial review if government refuses to act.
- Use national and international recourse mechanisms to denounce violations and help affected people obtain redress (Section 5.5).



## Useful online resources

- ELAW has developed a global database and comparative analysis of environmental impact assessment laws, and a 'digest' of environmental law cases ([www.elaw.org](http://www.elaw.org)).
- ELAW (2010) *Guidebook for Evaluating Mining Project EIAs*. Environmental Law Alliance Worldwide (ELAW), Eugene.  
[www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf](http://www.elaw.org/files/mining-eia-guidebook/Full-Guidebook.pdf)
- FAO (2008) *Compulsory Acquisition of Land and Compensation*. Food and Agriculture Organisation of the United Nations (FAO), Rome.  
[www.fao.org/docrep/011/i0506e/i0506e00.htm](http://www.fao.org/docrep/011/i0506e/i0506e00.htm)
- IPIECA (2012a) *Voluntary Principles on Security and Human Rights: Implementation guidance tools*. IPIECA, London.  
[www.ipieca.org/publication/voluntary-principles-security-and-human-rights-implementation-guidance-tools](http://www.ipieca.org/publication/voluntary-principles-security-and-human-rights-implementation-guidance-tools)
- IPIECA (2012b) *Human Rights Due Diligence Process: A practical guide to implementation for oil and gas companies*. IPIECA, London.  
[www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies](http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies)
- Morreale, J (2010) DR-CAFTA: The siren song for improved labor standards for Haitians in the Dominican Republic. *University of San Francisco Law Review* 44 707-728.  
<http://lawblog.usfca.edu/lawreview/wp-content/uploads/2014/09/44-3-C3.pdf>
- Rights & Democracy and Oxfam America (2010) *Community-based Human Rights Impact Assessments: Practical lessons*. Oxfam America, Washington DC.  
[www.oxfamamerica.org/static/oa3/files/community-based-human-rights-impact-assessments-practical-lessons.pdf](http://www.oxfamamerica.org/static/oa3/files/community-based-human-rights-impact-assessments-practical-lessons.pdf)

# Placing people at the centre of investment processes

## 5.1 A fundamental shift in perspective

Principle 1 of the 1992 Rio Declaration on Environment and Development places people at the centre of sustainable development. Giving real meaning to this statement requires more than just managing the risks of prevailing investment patterns. Fundamentally, it requires ensuring that public decisions on investment respond to a bottom-up, strategic vision of sustainable development, based on local and national aspirations.

Discussions about investment are often framed in macro-level, top-down terms. Many treat as a given the need to attract as much investment as possible, and do not question current patterns of investment. In progressive circles, the question is usually how to ensure that local people benefit from those investment flows. Good practice in agricultural and extractive industry investments involves the consultation of affected people before implementing a project. But time pressures and power imbalances tend to affect the quality of consultations for individual projects (Polack *et al.*, 2013).

The technical discussion in Chapters 2 to 4 aims to support government and advocates in getting the best possible deal in these circumstances. But top-down investment that trumps local and national aspirations is bad news even if it embodies a generous fiscal regime, or if it applies decent social and environmental standards.

In order to consider investment quality rather than quantity, policymakers need to depart from top-down approaches, and place people at the centre of investment processes. People should not have to wait until an investment project comes in before they are enabled to have their say. Rather, bottom-up deliberation should be part and parcel of the development process, and it should form the basis for public decisions on investment (Polack *et al.*, 2013).

In agriculture, for example, key questions for bottom-up deliberation at both local and national levels would include:

- What sort of agricultural development do people aspire to pursue, including what balance between small, medium and large-scale farming, and what strategies to ensure resilience in the face of economic cycles and climate change?
- What assets and capabilities can people build on to pursue that vision, and what are the main constraints?
- Can commercial operators help to address these constraints, and what types of investment would best respond to the shared development vision?
- What measures are needed to promote and regulate these investments?

This approach involves a fundamental shift from treating people as passive beneficiaries or victims of investments, or at best negotiators reacting to local consultation exercises, and instead places their aspirations centre stage. Such an approach would not only promote investment models that reflect local and national aspirations, it would also increase the legitimacy of investment processes locally.

Multiple tensions and complexities are involved. Economic realities do matter, and any realistic sustainable development strategy would need to consider comparative advantage, evolutions in global and regional economies, and the opportunities and constraints that investors are likely to face in the country.

In addition, in any given country there are likely to be competing visions of sustainable development, reflecting different worldviews and interests, and held by diverse social groups and opposing political forces. A country's long-term development trajectory can be the object of much contestation and struggle.

Also, local 'communities' are typically highly diverse, reflecting different interests, power and aspirations for example based on gender, generation, status, income, wealth and socio-economic activity. So any decision-making process would need to develop ways to mediate competing voices.

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Managing relations between the local and the national often involves tensions between respecting the rights and aspirations of those who are likely to be directly affected by investment processes on the one hand, and the imperative for government to pursue national development strategies on the other. Government and advocates are often divided on how to address these tensions – and in countries where government is authoritarian and political space restricted, opposition to top-down decision making can expose advocates to repression and intimidation (Polack *et al.*, 2013).

The law can provide spaces for facilitating the emergence of a bottom-up vision of national or sectoral development. For example, the adoption of framework legislation can provide an opportunity to debate sustainable development pathways, and some countries have enacted framework laws that incorporate elements of this bottom-up approach (Box 38). Rights of public participation can provide channels for bottom-up policy making, while access to justice provides redress for people who feel their voices have not been listened to.

This chapter discusses the use of legal tools to 'democratise' investment processes. It concentrates on the legal tools for bottom-up deliberation, transparency and public scrutiny, anti-corruption measures, and remedies for redress and accountability. Although the chapter focuses on the relevant laws, this is not to suggest that legal norms are the only or even the most important factor.

The nature of the government, how much political space there is for opinion and dissent, and the capacity of citizens to mobilise and take collective action in often difficult political terrains typically matter more than poorly implemented legislation – although effective legal tools can increase the leverage of well-organised citizens.

## 5.2 Legal tools for bottom-up deliberation

### Rights of democratic participation

A large number of legal norms influence the space for bottom-up deliberation on investment issues – many more than it is possible to review here. A country's constitution determines the formal rules for public participation in decision making, including the mechanisms for choosing legislators and the instruments for holding decision makers to account (such as in the relationship between government and parliament, and between government and parliamentarians on the one hand, and citizens on the other).

The constitution also determines the degree of protection of the human rights which are indispensable to the exercise of active citizenship, including freedom of expression, assembly and association. In many low and middle-income countries, multi-party constitutions adopted since the early 1990s have provided new openings for public participation in decision making. In practice, however, the degree of political openness varies significantly between jurisdictions, even in countries that formally have democratic constitutions.

Primary legislation also influences the nature, scope and content of rights of democratic participation. Examples include national laws governing the exercise of constitutional rights such as freedom of assembly and expression, and laws regulating the establishment and activities of NGOs. Some countries have recently tightened the regulation of NGOs, partly in connection with advocacy on natural resource investments. This restricts operating space for advocates.

International law also shapes opportunities for bottom-up deliberation. Human rights treaties affirm fundamental rights that are relevant to public participation – including the right of citizens to vote and, in addition, 'to take part in the conduct of public affairs, directly or through freely chosen representatives' (Article 25 of the ICCPR).

The UN Human Rights Committee, which oversees implementation of the ICCPR, has clarified that this right 'covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels' (General Comment No. 25 of 1996, paragraph 5).

The UN Human Rights Committee also clarified that, in addition to voting rights, citizens can take part in public affairs in other ways, including 'by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association' (paragraph 8 of General Comment No. 25). International human rights law prohibits discrimination in political and public life – for example, against women (CEDAW, Article 7) and on the basis of race (ICERD, Article 5(c)).

In many contexts, advocates have experienced harassment, intimidation and violence. International human rights law protects the rights of advocates. The UN Declaration on Human Rights Defenders of 1999 addresses this issue, as do guidelines and instruments adopted at regional levels. Human rights courts have sanctioned governments for repressing advocates, or for failing to protect them. In practice, however, advocates often remain vulnerable. Local and national mobilisation strategies would need to properly consider the risks that may be involved.

Under environmental law, so-called 'procedural rights' can give the public opportunities to influence decision making. These rights are usually defined to include access to information, public participation in government decision making and legal remedies against adverse decisions (Principle 10 of the 1992 Rio Declaration). National law typically regulates opportunities for citizens to participate in environmental decision making. Some international treaties also affirm procedural rights, and are binding for the states that have ratified them.

For instance, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters affirms the right of 'the public concerned' to be informed about proposed projects that are likely to have a significant effect on the environment. The 'public concerned' also have the right to participate in decision making 'when all options are open', and expect decision makers to take these views into 'due account'.

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The Aarhus Convention also affirms the public's right to obtain access to environmental information, although exceptions can be granted on grounds including confidentiality of commercial and industrial information. It clarifies that these grounds are to be interpreted in a restrictive way. Finally, the Aarhus Convention affirms the right of 'the public concerned' with a 'sufficient interest' (which explicitly includes NGOs) to access judicial review procedures to challenge the legality of decisions, acts or omissions.

The Aarhus Convention applies to ratifying states in the northern hemisphere, and specifically deals with environmental information. States in Latin America and the Caribbean are currently negotiating a comparable convention.

### **Framework laws, resource tenure and decentralised natural resource management**

Governments and advocates have used the process of drafting framework legislation that sets key directions for a given sector in order to catalyse public debate on strategic development choices – for example, in Senegal (Diouf, 2015) and Mali (Box 38).

In natural resource projects, resource tenure can influence the inclusiveness of decision making. In many African countries, for example, the state claims ownership or control of much of the land. Villagers may have claimed or used the land for generations, but under national law they often have only qualified use rights (see Section 4.3).

### **Box 38. Public debate on Mali's Agricultural Orientation Act of 2006**

Mali's Agricultural Orientation Act of 2006 embodies a vision for agricultural development in the country. The law recognises the role of both large and small-scale producers in agricultural 'modernisation'.

The law was adopted with the active participation of representatives of rural producers. The national federation of rural producer organisations drove a process to consult farmers at both local and national levels and fed input into the legislative process. The resulting law reflects several of the concerns raised by rural producers during the consultation.

Source: Djiré, 2008; FAO, 2016.

As a result, it is often the government, not landholders, that considers itself to have the legal authority to allocate land to commercial operators. In many large agricultural projects, land allocations have been decided over the heads of landholders (Vermeulen and Cotula, 2010). Granting villagers stronger rights over land and natural resources would help to increase their leverage in negotiations with government and investors.

Any legislation seeking to amplify local voices through stronger tenure rights would need to recognise the significant social differentiation that often exists within communities, for instance on the basis of gender, age, status, wealth and income. Examples may include legislation mandating gender equality in land rights (see Section 4.3) and ensuring women's representation in land governance institutions.

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Decentralised natural resource management can also increase local control over decision making. In some countries, land resource management responsibilities are vested with local government bodies – in Tanzania, for example. Depending on context, this type of legislation may provide a framework for village-level land use planning, which can provide the basis for the development of a local vision on how to use natural resources within the village.

However, local government bodies in low and middle-income countries often lack the human, economic and other resources that are necessary to exercise government responsibilities fairly and effectively. Local politics may also get in the way of long-term thinking about sustainable development.

Democratic processes, including non-discriminatory universal suffrage and accountability mechanisms, are supposed to provide checks and balances against the capture of local elected government bodies by local elites. Despite these checks and balances, elite capture may nonetheless take place, with many elected councils dominated by a few families with higher social status, greater capacity to mobilise relations, or access to greater economic resources. In addition, the central government often retains considerable powers and can compulsorily acquire land for a public purpose when large investments are at stake.

## Local consultation and consent requirements

The norms discussed so far create opportunities for bottom-up deliberation before any individual investment project enters a local arena. Once a given project is under consideration, there are other sources of guidance and regulation to facilitate community engagement. It is widely recognised that effective engagement in the early stages of project design is essential not only to respect local rights, but also to establish a company's 'social licence to operate'.

International guidance calls for local consultation before investment approval. This is the case in the VGGT, which also call for the negotiation of partnerships with local tenure rights holders. The OECD Guidelines for Multinational Enterprises refer to 'adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise' (paragraph VI(2)(b)).

In an interesting example of cross-fertilisation between different bodies of international guidance, the United Kingdom's (UK) National Contact Point for the OECD Guidelines has interpreted the consultation provisions contained in these guidelines in light of the CBD Akwé: Kon Guidelines, discussed above (see Box 29 in Chapter 4). The UK National Contact Point found that a mining company operating in India had not used local language and non-written forms of communication in consulting indigenous people, as called for in the Akwé: Kon Guidelines (Morgera, 2013).

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Where indigenous and tribal peoples are involved, international legal requirements on local consultation or consent may also apply. States that have ratified the ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries must comply with specific legal obligations. The convention requires governments to consult indigenous and tribal peoples 'in good faith', 'with the objective of achieving agreement or consent to the proposed measures' (Article 6).

The convention also requires local consultation before issuing extractive industry rights in ancestral lands, and the 'free and informed consent' of indigenous and tribal peoples for investment projects that involve relocation of those people. Some 20 countries have ratified this convention to date, mainly in Latin America, although the convention has had wider impacts by influencing the jurisprudence of regional human rights bodies.

The UN Declaration on the Rights of Indigenous Peoples of 2007 states that '[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned' (Article 10). The declaration also calls for good-faith consultation with indigenous peoples in order to obtain their free, prior and informed consent (FPIC) before states can adopt legislative or administrative measures that may affect those people.

International human rights jurisprudence both at global level (eg *Ángela Poma Poma v. Peru*; ICERD General Recommendation No. 23) and at regional level (eg *Saramaka People v. Suriname*; *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*) has established FPIC as an essential condition for protecting the human rights of indigenous and tribal peoples.

The involvement of indigenous peoples may also trigger the application of special lender policies. For example, IFC Performance Standard No. 7 on Indigenous Peoples requires IFC clients to seek free, prior and informed consent for projects that involve relocation of indigenous peoples, that impact on lands and resources subject to traditional ownership or customary use, or that may significantly impact on critical cultural heritage. The performance standard clarifies that 'FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree' (paragraph 12).

The concept of FPIC has emerged in relation to indigenous peoples, but it has sometimes been applied to protect all people that may be adversely affected by large development projects. In West Africa, for example, the Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector, adopted by the Economic Community of West African States (ECOWAS) in 2009, requires companies to obtain the free, prior and informed consent of 'local communities' before initiating mining operations.

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The wording of this provision does not restrict the term 'local communities' to indigenous and tribal peoples. Similarly, Resolution No. 224 of 2012 of the African Commission on Human and Peoples' Rights calls on state parties to the ACHPR to ensure participation including the free, prior and informed consent of 'communities' in decision making related to natural resource governance.

Legislation plays an important role in translating international guidance and obligations into national law requirements. Many countries have enacted legislation that makes local consultation or consent a legal requirement as part of investment approval processes. For example, Mozambique's Land Act of 1997 requires the consultation of legally defined 'local communities' before a land lease can be allocated to an investor. Legislation in the Philippines explicitly requires free, prior and informed consent for developments affecting the ancestral lands of indigenous peoples (Box 39).

Implementation of these consultation or consent requirements has often fallen short of expectations, however, not least due to the major asymmetries in information, capacity and negotiating power that affect relations between companies, governments and affected people. The quality of consultation processes has often come under criticism. Also, the outcome of a consultation is often not a legally binding agreement between the community and the company. This limits the ability of communities to hold investors to account in case of non-compliance.



Consent requirements have tended to cause concern among governments and companies, particularly out of fear that enabling local groups to 'veto' proposed projects may make it more difficult for governments to pursue the interest of the country as a whole, and for projects to go ahead. The implementation of FPIC processes is also typically constrained by difficult practical challenges – including, often, divisions within local communities.

However, a growing body of experience, evidence and guidance provides insights on how to implement FPIC processes effectively (see for example Colchester and Ferrari, 2007; Colchester, 2010; Oxfam Australia, 2010; Buxton and Wilson, 2013, FAO, 2014).

### **Box 39.** Free, prior and informed consent in the Philippines

Giving effect to constitutional provisions, the Indigenous Peoples Rights Act of 1997 recognises indigenous peoples' right to self-determination, to the legal protection and collective titling of 'ancestral domains', and to the application of customary rules in the management of land and natural resources. At the same time, this law guarantees gender equality and the human rights of indigenous women, balancing the recognition of indigenous peoples' autonomy with the protection of universal human rights.

The law recognises the right of indigenous peoples to express their free, prior and informed consent on proposed development projects. FPIC is defined as meaning 'the consensus of all members of the [indigenous people] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community' (Article 3(g)).

But the implementation of FPIC requirements, for example in mining projects, has faced major challenges. Research suggests that in many cases the required procedures were not respected, the information disclosed was biased, and consent was effectively orchestrated (Co, 2008; Cariño, 2005). These problems result from power imbalances, but also from the lack of the necessary resources and community facilitation skills in relevant government departments (Co, 2008).

Comparative analysis of experience in the Philippines and Canada suggests that the quality and attitude of institutions matter a great deal. In contrast to the Philippines, Canadian legislation does not formally require FPIC. But in practice the institutional structures for consultation and decision making appear to go a long way towards reflecting the 'spirit' of FPIC (Buxton, 2012).

### Promote bottom-up deliberation at local and national levels

- Placing people at the centre of sustainable development requires ensuring that public decisions on investment respond to a bottom-up, strategic vision of sustainable development, based on local and national aspirations.
- Effective engagement with law making and implementation can facilitate the emergence of this bottom-up vision, and ensure that this vision guides public decision making.
- This includes government protection and citizen exercise of fundamental human rights such as freedom of expression, assembly and association, and the various rights for public participation in decision making.
- It also includes government promotion of public participation in the elaboration of framework and ordinary legislation, and advocates' leveraging of these processes to catalyse public mobilisation on strategic policy choices.
- Effective safeguards to protect advocates from any repression, intimidation or compression of rights are an essential precondition for meaningful public deliberation.
- Decentralisation and rights of public participation in decision making offer opportunities for the public to participate and influence the process – so long as local governments are downwardly accountable and properly empowered, staffed and resourced, and advocates are equipped to seize opportunities.
- Laws that grant villagers stronger rights over land and natural resources can increase their leverage in negotiations with government and investors. Making such legislation work in the face of major power imbalances requires sustained capacity support for local organisations.
- Strict local consultation and free, prior and informed consent requirements can open space for local negotiation, but the quality and attitude of the institutions overseeing these processes also matter a great deal.

## 5.3 Transparency and public scrutiny

### Why transparency matters

Transparent investment processes are a precondition both for meaningful local deliberation and for public scrutiny of governments and investors. Lack of transparency facilitates corruption and investments that do not pursue what is in the public's best interest. Requirements for, and commitment to, transparency in the contracting process would send a signal that attracts 'quality' investors, and add pressure for fair terms.

Greater transparency is also a public good in itself. Citizens have a right to know how their government is managing the natural resources it owns or controls on behalf of the nation (Rosenblum and Maples, 2009). Access to information and public participation in decision making are key pillars in the concept of sustainable development (Principle 10 of the 1992 Rio Declaration on Environment and Development).

### Transparency in investment contracting

Legislative instruments to improve transparency can work at different levels. An important one concerns decision making and contracting for proposed investments. This relates to the process of making decisions on the use of natural resources, and developing and administering investment contracts or licences.

As discussed, some national laws determine all key terms and conditions, and natural resource rights are primarily allocated through standardised licences. In others, the investor and the government negotiate contracts that create tailored legal regimes for individual investments.

The imperative to ensure transparency in contracting applies across the board but is particularly pressing in the latter contexts. Yet most contracts for natural resource investments are negotiated behind closed doors, and few are in the public domain. Often, little information is available about who is behind an investment deal.

But pressure is mounting to open up decision making and contracting processes to greater public scrutiny. It is widely recognised that, for greater transparency to matter, it must intervene before a final contract is approved, or licence issued. This may involve, for example, disclosing information about the project and the investor and offering opportunities for public consultation at important stages on the way.

Disclosure of the 'beneficial ownership' of extractive industry or agribusiness companies is increasingly seen as a key part of promoting transparent governance and fighting corruption (see Section 5.4). Beneficial ownership refers to the natural persons who directly or indirectly own agribusiness or extractive industry companies. The EITI Standard, as revised in 2013, recommends that countries maintain a publicly accessible register of beneficial owners of corporate entities operating in extractive industries.

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In practice, it is often possible for investors to devise arrangements that obscure beneficial ownership, for example through fronts, shell companies and more generally opaque corporate structures. But guidance is increasingly available on designing well thought-out legislation. This includes legally mandating disclosure of beneficial ownership at key stages, for example when a company first incorporates or applies for public contracts or licences (Sayne *et al.*, 2015).

It also includes clarifying the scope of disclosure requirements, for example through specifying any minimum ownership shares that would trigger the application of disclosure requirements. Further, guidance includes establishing effective systems to verify information submitted by companies, and penalties for false or incomplete disclosures (Sayne *et al.*, 2015).

Mechanisms to increase transparency before a contract is signed must take into account the realities of the different sectors. It is common for petroleum contracts to be awarded through public auction. So a key issue is how to increase transparency in the bidding process.

On the other hand, open tendering is more rare in mining and agriculture. In these sectors, important parameters concern disclosure of project information in the early stages of community engagement. Disclosure and consultation in environmental and social impact assessment processes were discussed in Section 4.2.

A key issue concerns disclosure of investment contracts concluded between governments and investors, or at least their key terms. These contracts embody the real terms of the deal. They may raise important public policy issues warranting effective public scrutiny. These considerations support a presumption that, in principle, contracts should be disclosed, while also taking into account confidentiality of genuinely proprietary information.

International guidance calls for the disclosure of contract terms unless compelling reasons require otherwise. Examples include the EITI Standard, the IFC's Performance Standards on Environmental and Social Sustainability, and the UN Principles for Responsible Contracts.

In recent years, several countries have disclosed their extractive industry contracts, showing that disclosure is possible. Examples include the Democratic Republic of Congo,<sup>7</sup> Guinea,<sup>8</sup> Liberia,<sup>9</sup> Peru,<sup>10</sup> and Timor Leste.<sup>11</sup> Additional contracts have become available through open-access global databases such as [www.resourcecontracts.org](http://www.resourcecontracts.org) and [www.openlandcontracts.org](http://www.openlandcontracts.org).

In some jurisdictions, contract disclosure is a legal requirement under national law – for example, in Liberia under the Liberia Extractive Industries Transparency Initiative Act of 2009. This law was developed to establish the national process relating to the Extractive Industries Transparency Initiative. But its scope was also broadened to include agriculture and forestry (Box 40).

#### **Box 40. What governments can do to promote transparency: lessons from Liberia**

In Liberia, extractive industry, agriculture and forestry contracts are approved by parliament and are publicly available online. This situation has much to do with Liberia's recent history. In 2003, a peace agreement put an end to more than a decade of conflict. A transitional government came to power that signed several large investment contracts, including for extractive industries and agriculture. There were allegations of corruption. When some of the contracts were leaked, some commentators felt that the government had agreed to terms that were not in the best interests of the citizens of Liberia.

In 2006, a democratically elected government took office. The new government wanted to signal a clear break with past practices. It made it a priority to renegotiate the contracts awarded by earlier governments. In addition, parliament passed the Liberia Extractive Industries Transparency Initiative Act in 2009. This law provides that investment contracts for agriculture, mining, petroleum and forestry operations must be made publicly available. Contracts for natural resource investments in Liberia can now be downloaded from the official Liberia Extractive Industries Transparency Initiative website, see [www.leiti.org.lr](http://www.leiti.org.lr).

Source: Ford and Tienhaara, 2010, with additions.

7. <http://mines-rdc.cd/fr/index.php/contrats-des-ressources-naturelles/contrats-miniers> and

<http://mines-rdc.cd/fr/index.php/contrats-des-ressources-naturelles/contrats-petroliers>

8. [www.contratsminiersguinee.org/](http://www.contratsminiersguinee.org/)

9. [www.leiti.org.lr/contracts-and-concessions.html](http://www.leiti.org.lr/contracts-and-concessions.html)

10. [www.perupetro.com.pe/relaciondecontratos/](http://www.perupetro.com.pe/relaciondecontratos/)

11. [www.laohamutuk.org/Oil/PSCs/10PSCs.htm](http://www.laohamutuk.org/Oil/PSCs/10PSCs.htm)

Contract disclosure can only improve accountability if the people affected and the public at large can access and use the information disclosed in effective ways. This is a function of political space and, depending on the context, it may require sustained investment in capacity building.

### Freedom of information laws and human rights instruments

Depending on the jurisdiction, freedom of information (FOI) legislation grants members of the public the right to obtain information held by public bodies that is not already in the public domain. Public bodies have a legal obligation to disclose the information. FOI legislation usually contains exceptions, which commonly include trade and commercial secrets. In other words, the public body holding the information can refuse disclosure if it can show that disclosure would damage trade and commercial secrets.

Depending on the national legal system, for this exception to be applicable it may need to be shown that the information is not already in the public domain. This is an important caveat because information not available to advocates may be known in industry circles and as such deemed to be in the public domain (Rosenblum and Maples, 2009).

In recent years, advocates have used FOI legislation to seek access to unpublished, government-held information concerning investments and disputes arising from those investments (Box 41). In many low-income countries, however, FOI legislation does not exist or is ineffective. In order to facilitate wider adoption of FOI legislation in the region, the African Commission on Human and Peoples' Rights has developed a model law on access to information.

Advocates have also used human rights instruments to increase transparency and public oversight (Box 42). Where they apply, the OECD Guidelines for Multinational Enterprises call on companies to disclose 'timely, regular, reliable and relevant information [...] regarding their activities, structure, financial situation and performance'. They also provide guidance on how to implement corporate disclosure (OECD Guidelines, Chapter III).

#### **Box 41. Leveraging freedom of information legislation to access arbitral awards in Poland**

In 2012, an arbitral tribunal ruled on a dispute brought by a French investor against the government of Poland under the France-Poland BIT of 1989. The ruling was not made public. So a Polish NGO submitted a FOI application for the Polish government to disclose the award. But the government refused to consider the claim, arguing that Poland's FOI law did not apply to the relevant government body.

The NGO challenged this decision in the Polish administrative courts. The district administrative court dismissed the government's arguments and ordered the release of the award. In October 2013, the government released a redacted copy of the award.

Source: Hepburn and Balcerzak, 2013, with additions.

## Box 42. Taking contract disclosure to international human rights courts

The Inter-American Court of Human Rights has affirmed that access to government-held information is a human right in the case *Reyes and Others v. Chile*. The case was about an NGO request for information, including contracts, relating to a contested investment project. The government refused to disclose the information sought, and advocates took the case to court.

The Inter-American Court noted that the right to freedom of thought and expression, recognised by the American Convention on Human Rights, includes 'not only the right and freedom to express one's own thoughts, but also the right and freedom to *seek, receive and impart* information and ideas of all kinds' (emphasis added).

The court ruled that restrictions are only possible if they are established by law, they are for a purpose allowed by the ACHR, and they are justified by and proportional to a compelling public interest. The court found that the refusal by the government, without written justification, to provide information requested by advocates violated the convention.

Source: *Reyes and Others v. Chile*.

## Transparency in revenue management

One area where greater transparency and public scrutiny are particularly important concerns the management of public revenues flowing from natural resource investments. The social, economic and environmental outcomes of these investments will partly depend on whether their revenues are used to promote sustainable development or to enrich well-connected individuals. Transparency in revenue management would increase opportunities for accountability, and create incentives for better decisions about the use of public revenues.

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Transparency in revenue management has been at the core of the EITI since its establishment in 2002, though the EITI Standard has since expanded to include other issues such as beneficial ownership (see above). In essence, the EITI Standard requires implementing countries to disclose extractive industry revenues, including all material payments to government by oil, gas and mining companies, and to establish multi-stakeholder structures to oversee implementation.

Disclosure of public revenues provides advocates with an effective weapon to hold governments to account for the way they spend public money. Several states have passed legislation to ensure compliance with the EITI Standard, or more generally to promote transparency in revenue management. Examples include the Nigeria Extractive Industries Transparency Initiative Act of 2007 and the Liberia Extractive Industries Transparency Initiative Act of 2009 (Box 43).

Adoption of such legislation may be necessary in order to establish the institutions needed to facilitate compliance with the EITI Standard, including platforms for multi-stakeholder dialogue and mechanisms for public oversight of revenue management. Legislation may also be necessary to remove or neuter legal or contractual obstacles to transparency, such as contractual confidentiality clauses restricting disclosure of information (Gormley, 2013).

### **Box 43.** National legislation to promote transparency in extractive industry revenue management

Several national laws promote transparency in revenue management. An early (pre-EITI) if ultimately unsuccessful example was Chad's Petroleum Revenue Management Act of 1999 (see Box 24 in Chapter 3). This law was adopted as a condition for World Bank lending to the Chad-Cameroon oil development and pipeline project.

The law established an oversight committee, which included two NGO representatives. The committee was responsible for supervising the implementation of the legislation. However, implementation was riddled with difficulties, not least because the committee lacked the necessary resources. This experience highlights the limitations of approaches that rely on external sources, rather than grassroots pressure, to impose legal reform.

Ghana's Petroleum Revenue Management Act of 2011 includes several provisions promoting transparency in revenue management, including through the publication of records of petroleum receipts in the media; through parliamentary oversight; and through independent oversight by a Public Interest and Accountability Committee that includes NGO and trade union representatives. However, these provisions contain few specifics for EITI purposes and allow publicly held information to be classified as confidential. A 2015 amendment provided for the resourcing of the Public Interest and Accountability Committee.

The Nigeria Extractive Industries Transparency Initiative Act of 2007 and the Liberia Extractive Industries Transparency Initiative Act of 2009 are examples of legislation specifically adopted to implement the EITI. Both establish institutions and processes to comply with EITI requirements. As discussed, Liberia's law also mandates the disclosure of investment contracts.

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Legislation in third countries can also help to improve transparency of public revenues. In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires disclosure of payments made to the US or foreign governments by oil, gas and mining companies listed on US stock exchanges (Section 1504).

The adoption of the necessary implementing regulations by the US Securities and Exchange Commission has been accompanied by lawsuits. Most recently, the NGO Oxfam America took to US courts the commission's delays in issuing the regulations. The courts ordered the commission to act within a specified timeframe (*Oxfam America, Inc. v. United States Securities and Exchange Commission*).

In 2013, the European Union adopted a new Accounting Directive that features similar disclosure requirements for companies listed on EU-regulated stock exchanges, and also for unlisted companies that meet certain size criteria (turnover, total assets or number of employees). This European legislation applies not only to extractive industry companies, but also to logging firms. It requires companies to disclose all government payments above a minimum threshold.

These experiences highlight that, while national law in the host state remains the key reference point for improving transparency, advances can also occur through developments in other countries. US and EU transparency legislation applies to

many companies that operate in low and middle-income countries. It could facilitate access to data not available in those countries, opening up new spaces for public scrutiny and advocacy strategies.

### Transparency and public scrutiny in investment treaties and arbitration

Most investment treaties do not mention anything about transparency but some recent treaties contain provisions that require host governments to ensure transparency of the regulatory framework with regard to foreign investors. These include publishing laws and regulations, publishing proposed measures and seeking comments in advance, or ensuring transparency in administrative proceedings.

These provisions can promote transparency but they also raise questions. For example, some treaties require governments to provide foreign investors opportunities to comment on proposed legislation. But citizens may not have comparable rights under national law. Avoiding that treaty provisions entrench imbalances in power relations and legal rights requires considering these systemic aspects when negotiating treaties.

There are also other intersections between transparency and investment treaty standards. Some international arbitral tribunals have deemed transparency of government conduct with regard to the investor to be an important part of the fair and equitable treatment standard (see Section 2.3).

Transparency issues have also come up in relation to investor obligations. For example, there has been debate about options for investment treaties to require companies to disclose information and documentation. The SADC Model Investment Treaty contains provisions requiring investors to disclose contracts and payments.

There have been important developments affecting transparency in investor-state arbitration (see Section 2.4). Arbitrations can raise important issues of public interest, so there have been many calls for greater transparency in arbitral proceedings. But these proceedings have traditionally been mainly private, with restrictions on public access to oral hearings, the dissemination of information concerning the dispute and the publication of arbitral awards.

However, different arbitration rules vary considerably in this respect, and some have evolved significantly. Recent years have witnessed a trend towards greater transparency and public scrutiny in investor-state arbitration. NGOs have pioneered the making of submissions to arbitral tribunals, raising public-interest issues they feel the arbitral tribunal should take into account.

A NAFTA tribunal established under UNCITRAL rules first decided that it had the authority to accept such submissions in 2001 (*Methanex Corporation v. United States of America*). The first opening under the ICSID rules occurred in 2005 (*Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. The Argentine Republic*).



These innovative initiatives led to changes in some arbitration rules. The ICSID Arbitration Rules were amended in 2006 in ways that have increased opportunities for public scrutiny. For example, the amended rules explicitly empower arbitral tribunals to accept written submissions by NGOs, after consulting the parties to the dispute.

In deciding whether to accept an NGO submission, an ICSID tribunal would need to consider whether the submission would assist the tribunal to decide on a legal or factual issue; whether the submission is within scope; and whether the NGO has a significant interest in the dispute.

So far, ICSID tribunals have accepted NGO submissions in a wide range of investment disputes, including cases relating to contracts for the management of water and sewage services, investor challenges to legislation designed to reverse historical injustices, and contestation about mining projects (Box 44). On the other hand, some tribunals have denied submissions raising human rights issues that were deemed not to be relevant to the dispute, or submissions coming from organisations deemed of doubtful neutrality.

Restrictions remain. Under ICSID rules, access to hearings remains subject to the parties' consent, and was denied in several cases. Access to case documentation is also often restricted. So advocates may struggle to prepare an informed submission. But this is an evolving arena, including because the attitude of investors and governments to granting or withholding consent is itself subject to change.

Under ICSID rules, consent of the parties is also required for the publication of the award. ICSID is empowered to publish excerpts, however, and awards are commonly published on the ICSID website (<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>).

In 2013, UNCITRAL adopted new Rules on Transparency to increase transparency in investor-state arbitrations based on investment treaties. These rules provide for disclosure of key case documents; they empower arbitral tribunals to allow written submissions by 'third persons', which would include NGOs; and they require hearings to be open, subject to exceptions.

The Rules on Transparency apply to investor-state arbitrations brought under investment treaties and conducted under the UNCITRAL Arbitration Rules (see Section 2.4). They can also be applied to investor-state arbitrations conducted under other arbitration rules. However, the UNCITRAL Rules on Transparency only apply to arbitrations filed under investment treaties concluded after 1 April 2014 – unless the parties to a dispute (investor and state), or two states parties to a pre-2014 investment treaty, explicitly 'opt into' the new rules.

This means that, as a default position, the UNCITRAL Rules on Transparency do not automatically apply to arbitrations based on the many investment treaties currently in force worldwide. Governments committed to transparency and public scrutiny can issue unilateral statements for opting in. The statement would take effect if the investor makes a similar statement when filing an arbitration (CIEL *et al.*, 2013).

In 2014, the UN General Assembly adopted a new multilateral treaty, the Mauritius Convention, that promotes application of the UNCITRAL Rules on Transparency to pre-2014 investment treaties. The UNCITRAL Rules on Transparency apply to treaty-based arbitrations involving a state party to the Mauritius Convention and either an investor from another state party to the convention or an investor that has agreed to the application of the Rules on Transparency. Should this convention be widely ratified, it could bring about systemic change in transparency of treaty-based investor-state arbitration.

While the UNCITRAL Rules on Transparency were designed for application in treaty-based investor-state arbitration, there is nothing preventing a modified version of them to be applied in arbitrations under investor-state contracts or national investment laws. In at least one ICSID arbitration based on national law, the agreement between the parties led the tribunal to apply a modified version of the UNCITRAL Rules on Transparency (*BSG Resources Limited v. Republic of Guinea*). States could make transparency rules a mandatory part of any investor-state contract or investment codes that contain arbitration clauses.

#### **Box 44. Bringing community perspectives to investor-state arbitration: the case of a mining dispute in El Salvador**

A company carried out mining prospecting in El Salvador. It then applied for the environmental permits necessary to initiate mining operations. But government agencies did not issue the permits. In 2009, the company took the case to investor-state arbitration, seeking compensation from the government for the frustration of its business prospects.

In 2011 and again in 2014, an alliance of local, national and international NGOs made written submissions to the arbitral tribunal. The first submission developed legal arguments calling on the tribunal to rule that it lacked jurisdiction to hear the case – an objection also raised by the host government.

In 2012, the arbitral tribunal declined jurisdiction to hear important aspects of the investor's claim. The decision referred to the NGO submission, although it also distanced itself from some of the arguments contained in that submission. The case is still pending.

This experience highlights the importance of local-to-global alliances in making NGO submissions. NGO engagement with the arbitration process was underpinned by an alliance including grassroots groups based in the affected mining areas; national NGOs able to turn local issues into national policy debates; and international organisations with the legal expertise and campaigning clout to take the issue to a global level.

Source: *Pac Rim Cayman LLC v. The Republic of El Salvador*; Orellana *et al.*, 2015.

Some recent investment treaties also provide for transparency in investor-state arbitration, and allow NGO submissions where specified criteria are met. Some of these treaties require hearings to be open to the public and documents to be made available to the public, though they often feature exceptions for confidential information. These rules would apply independently of the chosen set of arbitration rules.

There is little empirical evidence on the difference that NGO submissions can make in arbitration processes. Tribunals have paid varying degrees of attention to NGO submissions, but some awards have made explicit reference to arguments developed in those submissions.

Outside the arbitral proceeding, NGO submissions can help to improve public awareness and catalyse popular mobilisation (Orellana *et al.*, 2015). As arbitration is an eminently legal process, submissions are deemed to be more effective if they stick to professional legal arguments and strategies, avoid general political statements and comply with prescribed procedures (A4ID, 2012).

#### TIP 17

### Promote transparency and public scrutiny

Transparency in investment processes is a precondition both for meaningful local deliberation and for public scrutiny of governments and investors. Both governments and advocates can play a role. Governments can:

- Promote transparency through such means as disclosure in investment contracting, 'freedom of information' legislation that gives citizens a right to obtain information held by government bodies, and legislation designed to implement the Extractive Industries Transparency Initiative.
- Disclose contracts unless compelling reasons require otherwise, bearing in mind that contract disclosure can only improve accountability if affected people and the public at large can get organised and use the information disclosed in effective ways.
- Ensure that national institutions mandated to ensure transparency are properly resourced and truly independent. This includes oversight committees to monitor revenue management.
- Support transparency in investor-state arbitration, including through 'opting into' the UNCITRAL Rules on Transparency, becoming a state party to the Mauritius Convention and favouring more open and transparent arbitration systems.

Advocates can:

- Use freedom of information legislation to obtain information held by public bodies and challenge government refusals to disclose information before national courts or international human rights bodies.
- Exploit the opportunities to access information created by transparency legislation in third countries.
- Use the increasing opportunities for scrutinising investor-state arbitration and make written submissions. Press for more open proceedings where these opportunities are restricted.
- Ask the government to ratify the Mauritius Convention, and ask investors to commit to arbitrate under the UNCITRAL Rules on Transparency.

## 5.4 Anti-corruption measures

Corruption can distort decision making about natural resource investments in ways that run counter to the public interest. An unworthy project may receive the necessary approvals and government support, and a company without the necessary resources and track record (including environmental and human rights) may be favoured over more deserving competitors (Moran, 2006; MacInnes, 2015).

In addition, potential environmental and social risks and impacts may be underplayed or neglected (MacInnes, 2015). Corruption can also reduce the financial benefits accruing to the host state, and undermine efforts to secure accountability for harmful practices.

Corruption in natural resource projects has become increasingly sophisticated. Research has shed light on complex deals whereby the investor pre-finances the acquisition of an equity stake in the project company by a relative or close associate of a high-level decision maker; the company then never claims back the loan, and interest payments are deducted from dividends. As a result, the local partner actually does not pay for the equity stake, which can be sold for cash (Moran, 2006).

Greater sophistication makes it harder for anti-corruption authorities to enforce legislation. Powerful vested interests may get in the way of anti-corruption efforts, particularly where high-level political corruption is involved. Over the years, however, states have developed a number of measures that can help to fight corruption.

Effective anti-corruption legislation, institutions and sanctions are an important part of strategies to tackle corruption. This is, first and foremost, a matter for the legal and institutional framework in the host country, including through integrating anti-corruption measures in land, natural resource and corporate governance legislation. The involvement of transnational corporate entities, however, also creates the need and the opportunity for anti-corruption measures at international and transnational levels.

Regulatory efforts started in the United States, where legislation adopted in the 1970s criminalises the bribing of foreign public officials by US-based entities (Foreign Corrupt Practices Act of 1977, FCPA). Since then, the US government has pushed for comparable legislation at the international level and in major industrialised countries, so as to avoid placing US companies at a disadvantage.

Progress has been slow but a range of global and regional treaties are now in force, and major industrialised countries have adopted legislation that criminalises corruption in activities overseas. International treaties include the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the widely ratified 2003 United Nations Convention against Corruption (UNCAC).

At the regional level, relevant treaties include the 1996 Inter-American Convention against Corruption, the 1999 Council of Europe Criminal Law Convention on Corruption and the 2003 African Union Convention on Preventing and Combating Corruption.

All these treaties require states to enact legislation that criminalises the bribing of government officials. The scope and terms of the treaties vary considerably, however. For example, the OECD Convention specifically concerns certain types of corruption of foreign government officials while the UNCAC is more comprehensive, because it applies to a wider set of public (foreign and national) officials and private-sector officials. It also requires states to criminalise solicitation or acceptance of bribes, and it covers forms of corruption that are not addressed in the OECD Convention (such as trading in influence or abuse of function).

Anti-corruption treaties create obligations for states to take measures to combat corruption. They do not directly create obligations for companies. Therefore, rules governing private sector activities depend on applicable national laws. A number of countries have adopted national legislation to implement international treaties – for example, the UK Bribery Act of 2010, adopted to implement the OECD Convention.

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While international treaties promote harmonisation of national legislations, there is still considerable diversity in applicable laws and in the resourcing and activism of enforcement agencies. A distinctive feature of some anti-corruption legislation, including the FCPA and the UK Bribery Act, is that it has extraterritorial application: it empowers US or UK authorities to investigate and prosecute corruption that occurred overseas.

Despite much national and international law making, many loopholes remain. For example, unlike the FCPA the OECD Convention does not prohibit the funding of foreign political parties (Hawley, 2000). Also, enforcement of anti-corruption legislation in the investors' home countries has not always been a priority, not least because significant economic interests are often at stake.

The UNCAC establishes mechanisms for the international recovery of assets obtained through corruption, including provisions on the tracing, freezing, confiscation and recovery of assets. There is growing experience with transnational litigation spearheaded by governments from low and middle-income countries to recover assets held overseas by former political leaders. These efforts have had varying degrees of success (Davis, 2010; for a practical guide, see Brun *et al.*, 2011).

At the national level, effective, independent and well-resourced anti-corruption agencies are key. In some countries, anti-corruption agencies primarily have a preventative role through conducting research, raising awareness, monitoring trends and coordinating efforts. In others, anti-corruption agencies have strong



Photo: Robin Hammond / Panos Pictures

There is growing recognition that transparency and public scrutiny are an important part of contractual and arbitration processes

investigative powers, and can either prosecute offences or – more commonly – refer them to public prosecutors. In yet others, the preventive and enforcement functions are combined in a single, powerful watchdog.

Other measures often deployed to fight corruption include reducing unnecessary administrative hurdles that give officials excessive discretionary powers, and requiring ministers and high-level officials (sometimes called 'politically exposed people') to declare assets and conflicts of interest.

Transparency of beneficial ownership, disclosure of contracts, impact assessments and other important project documents, and publication of public revenue data are other important measures, and were touched upon in Section 5.3. However, where corruption is entrenched at the political level, many 'technical' anti-corruption measures can themselves become corrupted by the vested interests of those in power.

The UNCAC recognises that advocates can also play an important role in anti-corruption strategies. Depending on the context, this may include public scrutiny in the host country, but also providing information to authorities in the investor's home country (for example, in the US, to the Department of Justice, which investigates violations of the FCPA). Public information including company records, contract publication and revenue transparency are key to ensuring effective public oversight.

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In international investor-state arbitrations, there have been cases where governments have managed to get lawsuits dismissed because the contract providing the basis for the arbitration was tainted by corruption. However, corruption allegations in investment arbitrations (and elsewhere) typically involve an onerous burden of proof. In at least one arbitration, the tribunal found that the government had failed to provide clear and convincing evidence. So it may be difficult for the government to have a case thrown out due to corruption.

Arbitral awards involving corruption are quite rare, not least because governments may not have much incentive to raise the issue, and because – if evidence of corruption surfaces during the arbitral proceeding – the parties may prefer settling the case to avoid an award that makes public the instance of corruption.

There is growing experience with investment treaties that include explicit commitments for the states parties to tackle corruption (for instance, the Japan-Mozambique BIT of 2013). There have also been calls for investment treaties to create obligations for investors not to engage in corruption.

### Establish effective anti-corruption mechanisms

Effective strategies to tackle corruption involve action at multiple levels, including:

- Ratifying and implementing international treaties to tackle corruption, including the United Nations Convention against Corruption.
- Increasing transparency in decision making and reducing administrative hurdles that give officials excessive discretionary powers.
- Publishing contracts, licences, impact assessments and other important project documents, taking into account confidentiality of genuinely proprietary information.
- Publishing beneficial ownership information for all companies with a significant share in extractive or agribusiness contracts and require 'politically exposed people' to declare their interests.
- Publishing detailed and disaggregated revenue data for payments received from companies in the extractive and agribusiness sectors, and keeping public company records.
- Criminalising and prosecuting corruption.
- Establishing effective, independent and well-resourced agencies to prevent, investigate and prosecute corruption, backed up by political support at the highest level.
- Creating and using mechanisms for advocates to report corruption and pass relevant information to public authorities, including protection for whistle-blowers.
- Establishing anti-corruption commitments in investment treaties.

## 5.5 Remedies

Legal norms and rights would be of little use if they were not backed up by effective remedies. In any given investment project, multiple sets of remedies affect different relationships. Government agencies may be legally empowered to impose sanctions on an investment project if certain breaches occur (for example, see Section 3.3 in the case of tax avoidance; and Section 4.5 in the case of environmental liability). Investors too can use remedies if the government adversely affects their investment. These remedies are provided by national courts and, where applicable, international arbitration (see Section 2.4).

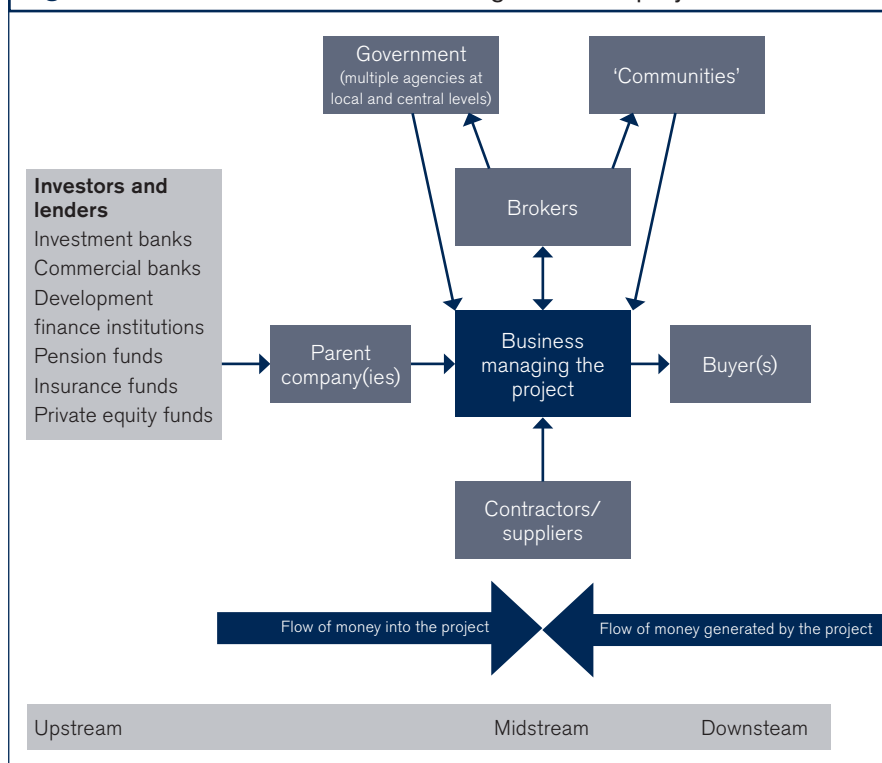
People affected by natural resource investments, and advocates supporting them, can also activate remedies for violations of applicable law and standards. This includes remedies vis-à-vis the government – for example, in relation to challenging investment approval or land acquisition decisions. It also includes remedies vis-à-vis the companies implementing the investment.

Relevant companies include the firm that operates the project. Other companies may be relevant too. Any given investment may involve a complex network of companies that make the project possible – from lenders and end investors to service providers, subcontractors, intermediaries and ultimate buyers. This network is the 'investment chain' underpinning an investment project (Cotula and Blackmore, 2014).

Money flows from financiers ('upstream') to the enterprise that leads project implementation and its contractors and suppliers ('midstream'), and flows back from buyers of the produce ('downstream'). Remedies may be applicable to different companies in the investment chain, including lenders upstream and buyers downstream. So mapping the chain can help advocates identify 'pressure points' where action can have greatest effect (Cotula and Blackmore, 2014; Blackmore *et al.*, 2015; Figure 9).



**Figure 9.** The investment chain of an agribusiness project



Source: Cotula and Blackmore, 2014.

This section briefly reviews some of the remedies that may be available to people affected by investments, and advocates supporting them. Depending on the applicable legal system, those who bring a legal action are called plaintiffs, claimants or petitioners.

### National courts

The courts in the host country are usually the first port of call for a wide range of situations – from challenging the legality of adverse decisions through to seeking compensation for harm suffered. For example, villagers or advocates have challenged the legality of investment projects, arguing that no adequate consultation or impact assessment was carried out as may be legally required, or that the decision-making process otherwise did not comply with prescribed procedures.

In other cases, affected people or advocates supporting them have alleged damage to health, crops or the environment. Depending on the jurisdiction, lawsuits involving such claims against a company for damages could be filed under the law of torts – the norms whereby any person who wrongfully harms others must bear responsibility for the actions, including by paying compensation as appropriate.

Where human rights are at stake, national courts are typically empowered to hear cases involving alleged violations of the constitution or, in some countries, of international treaties. In many jurisdictions, national human rights commissions are specifically competent to investigate complaints of human rights violations. In many countries, constitutional courts have the power to strike down legislation or government measures found to violate the national constitution, particularly any 'bill of rights' that constitutions typically include.

In practice, affected people may find it difficult to take cases to court, especially if no external support is available. Apart from the practical impediments that often limit access to court for people affected by investment projects, legal constraints under national law may include requirements on standing, that is *who* is allowed to sue. For instance, community-based organisations may not be recognised as a legal entity, affected communities or 'peoples' may lack collective juridical personality, and NGOs may struggle to demonstrate that they have a direct interest in the case.

The burden of proof (proving causation between activity and damage, and negligence on the part of the investor if this is required to establish liability) is often onerous and statutes of limitation (whereby lawsuits can only be brought and heard within a specified timeframe) are often too short relative to the time it may take to overcome lack of resources and legal awareness. Where projects are perceived to be in the national interest, the availability of injunctions is often limited and even where there is a successful claim, levels of compensation may be low.

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Many countries do not have effective and independent judiciaries, so advocates and affected people often have little trust in national courts. Governments have the primary responsibility to propose legislation that minimises legal barriers and ensures the independence of national courts – for example, through rules on the appointment, remuneration and career progression of judges.

Advocates have developed approaches to make the most of available judicial avenues, particularly in countries that do have functioning courts. Some social movements and NGOs have established legal units to handle litigation as part of wider advocacy strategies (Box 45).

### International human rights remedies

Where legal routes under national law fail, remedies may be available under international human rights law at both regional and global levels (see Box 26 in Chapter 4). As discussed, the 2011 UN Guiding Principles on Business and Human Rights affirm the corporate responsibility of business to respect human rights, but a treaty that would create binding obligations for companies is still in the early stages of discussion (Box 27 in Chapter 4). So the primary duty bearer under international human rights bodies is the state, and claims brought to international human rights bodies would usually be made against governments, rather than companies.

#### **Box 45. Social movements and access to courts: lessons from Indonesia**

Good strategy and effective institutions can help to overcome constraints on access to courts. The Indonesian Peasants' Union – a national federation of peasant organisations – has established a legal unit that handles legal advocacy, public interest litigation and constitutionality challenges.

One of the actions led by the unit was a constitutionality challenge to aspects of the Investment Act of 2007. The legal case was taken to the Constitutional Court as part of wider mobilisation by a civil society coalition, of which the Indonesian Peasants' Union is a member and hosts the secretariat.

The case reportedly led to some aspects of the law being struck down, particularly provisions that enabled investors to acquire very long-term land rights. During the consultations that preceded the filing of the lawsuit, members of the Indonesian Peasants' Union had raised concerns that these provisions could pave the way to 'land grabbing' for plantation agriculture, to the detriment of small-scale farmers.

Source: Fathoni, 2014.

A notable exception is the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, which promotes the implementation of the Guiding Principles on Business and Human Rights. This working group can receive communications concerning the activities of private companies and may make representations directly to the company concerned if such action is warranted.<sup>12</sup>

Several human rights treaties create remedies that involve combinations of legal and political pressure. Victims of violations can take the matter to regional human rights courts where these exist and the host state has ratified relevant treaties. In Europe, the Americas and Africa, for example, depending on the country victims of alleged human rights violations might be able to take their case to the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights, respectively.

There is no global human rights court. Some global human rights treaties allow victims to bring disputes to quasi-judicial bodies. For example, the First Optional Protocol to the ICCPR, adopted in 1966, established an individual complaint mechanism for alleged violations of the covenant. Complaints can be filed with the Human Rights Committee, which is the United Nations body responsible for overseeing the implementation of the covenant.

Similarly, the Optional Protocol to the ICESCR, adopted in 2008, established a mechanism for complaints from individuals or groups alleging violations of economic, social and cultural rights, including the rights to food, work and health. This protocol entered into force in 2013, but has had few ratifications to date.

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12. See [www.ohchr.org/EN/Issues/Business/Pages/Submittingcomplaints.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/Submittingcomplaints.aspx) for more information.

In both the ICCPR and the ICESCR complaint procedures, and under most regional human rights systems, those bringing a case must first exhaust legal avenues under national law ('exhaustion of domestic remedies'). In other words, petitioners must first take their case to national courts. This may involve protracted proceedings and multiple degrees of appeal.

There are exceptions to this rule where domestic remedies can be shown to be unavailable, ineffective or unreasonably delayed. Unless circumstances are such that an exception can be justified, the requirement for petitioners to exhaust domestic remedies compounds the case for at least trying to seek justice in national courts even where the prospects of success are doubtful (Lomax, 2015).

Global and regional human rights treaties also offer less direct avenues for raising human rights complaints. For example, governments must periodically submit reports to the regional and United Nations treaty bodies that monitor compliance with the human rights treaties ratified by those governments. Examples of such bodies include the Human Rights Committee for the ICCPR, the Committee on Economic, Social and Cultural Rights for the ICESCR, the Committee on the Elimination of Racial Discrimination for the ICERD, and the African Commission on Human and Peoples' Rights for the ACHPR.

Advocates have submitted 'shadow reports' to bring violations to the attention of the relevant committee. The committee then issues its concerns along with recommendations on how to address the problem. The recommendations are not binding, but governments tend not to like being put on the spot in this way.

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Also, these UN human rights committees are widely considered to provide authoritative interpretations of the treaty to which they refer. Therefore, their views should not be dismissed lightly by state parties and domestic courts. Determined non-compliance from the state can mainly be challenged through political pressure and continued campaigning.

Advocates have also submitted communications to one or more of the various UN Special Rapporteurs, Independent Experts and Working Groups appointed by the UN Human Rights Council to follow specific rights, themes or countries. Regional human rights mechanisms sometimes have similar 'special procedures'. For example, the African Commission on Human and Peoples' Rights has generated mandates for a Working Group on Indigenous Populations/Communities in Africa, and a Working Group on Extractive Industries, Environment and Human Rights Violations.

Where the host government allows it, mandate holders such as Special Rapporteurs can visit contested project sites and make recommendations, which would add authority to the advocates' messaging. The UN Working Group on Business and Human Rights can also conduct country visits and provide recommendations, including in response to communications received from community based organisations, NGOs or their advocates.

Submitting shadow reports to treaty bodies and making communications to special procedure mandate holders can be done at any time and do not require exhaustion of domestic remedies. So they can be a useful initial step in generating supportive statements or reports from legally authoritative bodies which can be cited in support of complaints being brought in national courts or other advocacy fora.

Some environmental treaties offer opportunities for international complaints. With Decision I/7 of 2002, the Meeting of the Parties to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (see Section 5.2) established a compliance committee that can consider, among other things, submissions made by states parties with regard to alleged non-compliance by other states.

The committee can also consider communications submitted by the public, unless the relevant country has explicitly opted out of this procedure. The committee reports to the Meeting of the Parties, which may make recommendations, provide advice, issue declarations of non-compliance and suspend the rights of the relevant state under the convention.

### Transnational litigation for corporate accountability

In addition to remedies offered by international law, there is experience with transnational litigation for corporate accountability. This often involves suing a parent company in its home country, or in a third country, over damage caused by its foreign subsidiaries. The justification for this type of litigation is that the parent company ought to be directly liable for harm caused by its subsidiaries if that harm is the result of the parent's own acts or omissions.

Transnational lawsuits have also been brought against other companies related to the local subsidiary, including affiliates belonging to the same business group. They have also been brought against companies that belong to different business groups but are linked to a venture through the investment chain, for example the ultimate buyers of the produce.

There are many practical reasons why claimants may want to litigate in a country other than their own. Claimants may have little faith in the independence or effectiveness of their national courts. They may have inadequate legal support in their country. There is also symbolic value in bringing a case against a parent company in a highly visible public arena.

In addition, claimants may be able to obtain higher damages and more easily enforceable judgements in countries other than their own, for instance if enforcement overseas is required. Courts abroad will not necessarily recognise and enforce a judgment issued by courts in the host state.

Opportunities for transnational litigation depend on the jurisdiction. In the United States, the Alien Tort Statute (ATS) of 1789 empowers US federal courts to hear

civil lawsuits filed by foreigners alleging violations of customary international law. Over the years, US courts have heard cases brought by victims of alleged human rights violations in different parts of the world – even where all the relevant conduct took place outside the United States and where neither the plaintiff nor the defendant were directly related to the United States.

In recent years, however, US courts have clarified the boundaries of the ATS. The overall trend is towards restricting the application of the ATS. A recent significant judgment of the US Supreme Court restricted the extraterritorial reach of the statute, holding that a connection with the United States is required for US courts to have jurisdiction (*Kiobel v. Royal Dutch Petroleum*).

Limited options for transnational litigation for corporate accountability in the United States still remain, for example before state courts based on general tort law (rather than under customary international law). As discussed, the law of tort regulates legal responsibility for harm caused by wrongful acts or omissions.

Opportunities for transnational litigation for corporate accountability under the law of tort have also been pursued in other jurisdictions, including Canada, England, France, the Netherlands and Thailand.

Although the United Kingdom has no legislation comparable to the US Alien Tort Statute, the English courts have ruled that they had jurisdiction, under specified circumstances, to hear tort-law cases brought by people who claimed to have suffered damage as a result of actions committed by British-controlled companies operating overseas. Several such lawsuits have led to payment of compensation based on out-of-court settlements (see for example *Connelly v. RTZ Corp plc*; *Lubbe and Others v. Cape plc*; *Yao Essaié Motto & Others v. Trafigura Ltd and Trafigura Beheer BV*).

Major legal barriers constrain opportunities for this type of transnational litigation. For example, parent and subsidiary companies are distinct legal entities. Judges are usually not prepared to 'pierce the corporate veil' and allow claimants to sue the parent company. Usually, the plaintiffs would need to show that, because of the particular functions that the parent company performed, the parent company directly owed the plaintiff a duty of care, and breached it.

Another important legal hurdle in transnational litigation concerns jurisdiction – because in many countries the courts would have no jurisdiction to hear claims concerning plaintiffs, companies, activities and damage located overseas. Also, the *forum non conveniens* doctrine applies in some anglophone jurisdictions, whereby a court can refuse to hear a case where there is some other available forum in which the case may be tried more suitably. In this type of litigation, the most obvious forum to hear the dispute is the courts of the host country, where the investment and the alleged violations took place.

The scope for litigating in countries that are member states of the European Union has increased significantly as a result of the EU regulation known as 'Brussels I'. This regulation allows companies to be sued in the country where they are 'domiciled'. The domicile of a company is defined by the regulation as the country in which the corporate headquarters or registered office are located.

However, rules applicable to EU member states have made European courts a less attractive prospect for litigation than they once were, as damages are assessed according to the rules and procedures of the jurisdiction where the violations took place. In many cases this has resulted in the prospect of significantly lower damages claims than previously, when damages were assessed according to the rules and procedures of the jurisdiction where the case was heard.

There are many practical barriers too, and in most cases only effective external support can make these lawsuits possible. In several successful cases, advocates have facilitated contact between people affected by natural resource investments and specialised law firms overseas.

Advocates have also facilitated ongoing communication, especially in lawsuits that involve a large number of plaintiffs. Financing is a major challenge, particularly as legal aid budgets are being cut in several countries. Where 'no win, no fee' arrangements are allowed, they enable the law firm to pre-finance the lawsuit, and receive payment if the claim is successful.

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In the past, developments with transnational litigation for corporate accountability mainly concerned national courts in Europe and North America. But the landscape of international investment flows is changing, and a growing share of outward investment now comes from emerging economies. There have been some innovative legal developments in some of these contexts.

In Thailand, the National Human Rights Commission has been prepared to hear complaints involving natural resource investments, including agricultural plantations, made by Thai companies operating in Cambodia (Box 46). Also, advocates have adapted their legal strategies to leverage opportunities for litigation in the West, even where the business is owned by companies located elsewhere – for example, by suing a buyer rather than the parent company (Box 46).

Transnational litigation for corporate accountability is a response to shortcomings in national and international remedies. It can open options in contexts where local courts do not provide suitable redress. In practice, opportunities for transnational litigation tend to be limited both in law and in practice.

Also, success tends to primarily result in cash compensation, which might not address the communities' primary concerns and might in fact cause internal conflict (Lomax, 2015). On the other hand, a 'win' can have important symbolic value, and the case can help to raise public awareness about a grievance.

## Box 46. Transnational advocacy on land concessions in Cambodia

In recent years, the government of Cambodia signed many commercial land concessions for agribusiness investments, including for sugar plantations. Advocates have used a variety of transnational avenues to promote accountability.

For example, NGOs filed lawsuits with Cambodian courts and, in cases involving Thai companies, with the Thai National Human Rights Commission. In 2012, the Thai National Human Rights Commission found that it had jurisdiction to examine cases.

In 2013, villagers filed a lawsuit based on Cambodian property law against a UK buyer before the courts of England and Wales. A mediation procedure (now closed) was also initiated vis-à-vis a US buyer before the US National Contact Point responsible for overseeing compliance with the OECD Guidelines for Multinational Enterprises. The companies involved deny any wrongdoing.

NGOs have also taken concerns about land concessions for sugarcane production in Cambodia to the attention of the European Commission. The sugar produced in Cambodia is exported to the European Union under a preferential trade arrangement for least developed countries called 'Everything But Arms'.

Under this trade scheme, imports from least developed countries are free of duties and quotas, with the sole exception of armaments. EU legislation empowers the European Commission to suspend these preferences, in whole or in part, including in cases where an investigation documents 'serious and systematic violations' of internationally recognised human rights.

Wielding evidence including a report by the then UN Special Rapporteur on the Situation of Human Rights in Cambodia, advocates called on the EU to carry out an investigation and suspend trade preferences for sugar imports from Cambodia. The process gained support from the European Parliament, and in late 2014 the European Commission announced a mechanism to audit claims and ensure any necessary remedial measures.

This case illustrates the variety of transnational mechanisms that affected people and advocates can use to seek redress.

Source: Cotula and Blackmore, 2014; Blackmore *et al.*, 2015.

## Complaint mechanisms

In addition to formal legal processes, a wide range of complaint mechanisms also provide opportunities for redress. In countries adhering to the OECD Guidelines for Multinational Enterprises, complaints of non-compliance with the guidelines may be brought to the relevant National Contact Point (see Box 36 in Chapter 4, and Box 46). The relevant National Contact Point is that of the country where the alleged violation has occurred, or the country where the investor, a buyer or other relevant project stakeholder is based.

Where multilateral lenders like the World Bank, the IFC or regional development banks are involved, they typically provide grievance procedures to deal with complaints that the lender has not complied with its own institutional policies or performance standards. Establishing grievance mechanisms is an important part



of the Equator Principles, an international benchmark adopted by commercial lenders to determine, assess and manage environmental and social risk in project finance transactions.

Complaints to lender-based grievance mechanisms have been made in relation to a wide range of natural resource investments – including the financing of palm oil processing facilities that sourced biodiesel from contested plantations (Box 47). Commodity-based, multi-stakeholder certification bodies like the RSPO also provide grievance mechanisms (Lomax, 2015).

Many companies have also established their own grievance mechanisms as an avenue to address local grievances that may arise in connection with project implementation (for guidance on effective grievance mechanisms, see Wilson and Blackmore, 2013).

Access to remedy is one of the three fundamental pillars of the UN Guiding Principles on Business and Human Rights (see Box 27 in Chapter 4). These principles provide guidance on remedies for alleged human rights violations, including remedies offered by national courts and human rights commissions, and also grievance mechanisms established by companies.

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The UN Guiding Principles include a number of criteria to ensure effectiveness of non-judicial remedies. Namely, these remedies must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.

### Strategic choices and cross-cutting issues

Pursuing redress requires careful thinking through. There is growing experience with mobilising multiple avenues for redress, including local and foreign courts, international human rights institutions and grievance mechanisms established by lenders or certification bodies (Lomax, 2015; Blackmore *et al.*, 2015; Box 46). However, scarce resources often force advocates to prioritise among options. This requires clarity on the objectives pursued and the legal remedy sought (for example, compensation or land restitution).

Dialogue is often an important element of redress strategies. While legal or grievance mechanisms are often perceived to be confrontational, they can also create space and incentives for negotiated settlements (Box 47). It sometimes takes filing a formal complaint before a company or a lender resolves to listen to community grievances.

When advocates act on behalf of affected people, ensuring that communities are in the driving seat tends to require significant investment in time and effort. It typically involves meetings with as many sections of the 'community' as possible (Lomax, 2015), knowing that communities are often highly differentiated on the basis of gender, generation, status, income, wealth and socio-economic profession,

### **Box 47.** Use of IFC complaint mechanisms leads to land return in Indonesia

Palm oil expansion in Indonesia has been linked to deforestation and land dispossession. In July 2007, a group of community organisations and NGOs led by the Forest Peoples Programme, Sawit Watch and Serikat Petani Kelapa Sawit lodged a complaint with the IFC Compliance Advisor/Ombudsman (CAO). The complaint raised concerns about adverse environmental and social impacts of oil palm operations in Indonesia.

The IFC was not directly involved in the plantations but it made investments in trading and processing ventures that sourced palm oil from the Indonesian plantations. Companies belonging to the same business group also owned plantations and palm oil trading and processing facilities.

The NGOs alleged that the enterprise had cleared land without appropriate community approvals, legally required permits or environmental impact assessment. They argued that this conduct violated national law, RSPO standards and IFC procedures.

In 2008, the CAO facilitated a settlement agreement between the enterprise and some 1000 community members. The agreement provided for community access and use of land that had not been converted to plantations; compensation for households who lost land; and enhanced community funds. A joint monitoring and evaluation team was established to follow the implementation of this agreement, and the CAO remained involved until 2013, when the parties signalled that the agreement had been substantially implemented.

In 2009, the CAO also released an audit report which concluded that the IFC had failed to apply its own standards. The report found that the IFC had misclassified the project's social and environmental risks because it only assessed risks in relation to the trading and processing operations, without considering risks in the palm oil supply chain.

Following this case, the IFC developed a new strategy for investment in the palm oil sector and changed its approach to classifying risk in its investment – recognising that supply chain risks must be considered when investing in downstream operations.

Source: Case documentation available at [www.cao-ombudsman.org/cases/case\\_detail.aspx?id=76](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=76)

for example, and that different groups within the community may have different perceptions and aspirations in relation to an investment project.

In addition, ensuring that communities are in the driving seat requires fully informed community decisions at all key stages, based on clear information from advocates about all options and their pros and cons (Lomax, 2015). It also requires a good understanding of relations of power and authority within the community, recognising that customary leaders are sometimes co-opted or corrupt and ensuring that decisions are not made only by local elites (Lomax, 2015).

Redress strategies can expose community members to backlashes and intimidation. This requires serious consideration of the risks involved, and disclosure of these risks to the community. It also requires mechanisms to mitigate the risks, for example through maintaining confidential the identity of community members that have signed or initiated complaints (Lomax, 2015).

## Help affected people obtain remedy

Advocates can:

- Bring lawsuits to national courts to challenge the legality of decision making, including the investor-state contract and the impact assessment.
- Seek injunctions and judgments to change government or investor conduct and/or to obtain compensation for affected people.
- Challenge the constitutionality of legislation or government measures.
- Take cases to regional or global human rights bodies.
- Make submissions to a UN or regional human rights mechanism special procedure mandate holder such as a Special Rapporteur, Independent Expert or Working Group, or submit 'shadow reports' to provide information to UN bodies monitoring compliance with human rights treaties.
- Help affected people to obtain redress in the parent company's home country, or in other countries.
- Bring cases to the National Contact Point that monitors compliance with the OECD Guidelines for Multinational Enterprises.
- File complaints with grievance mechanisms established by the investor, lenders or multi-stakeholder certification bodies.
- Make strategic choices on the pathways chosen, ensure that communities are in the driving seat, consider divisions and differentiation within the communities, and consider, disclose and address any risk of backlashes.

## Useful online resources

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Blackmore, E, Bugalski, N, and Pred, D (2015) *Following the Money: An advocate's guide to securing accountability for agricultural investments*. IIED, London.  
<http://pubs.iied.org/12583IIED.html>

Buxton, A and Wilson, E (2013) *FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects*. IIED, London. <http://pubs.iied.org/16530IIED.html>

Goldwyn, DL (ed.) (2008) *Drilling Down: The civil society guide to extractive industry revenues and the EITI*. Revenue Watch Institute, Washington, DC.  
[https://eiti.org/files/Drilling-Down-Eng\\_1.pdf](https://eiti.org/files/Drilling-Down-Eng_1.pdf)

Lomax, T (2015) *Asserting Community Land Rights Using RSPO Complaint Procedures in Indonesia and Liberia*. IIED, London.  
<http://pubs.iied.org/12584IIED.html>

Martin, T (2013) *International Bribery Law and Compliance Standards*. Independent Petroleum Association of America, Washington DC.  
[www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA\\_BriberyLawPrimer\\_v10.pdf](http://www.ipaa.org/wp-content/uploads/downloads/2013/08/IPAA_BriberyLawPrimer_v10.pdf)

Wilson, E and Blackmore, E (2013) *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms*. IIED, London.  
<http://pubs.iied.org/16529IIED.html>

## Looking at the bigger picture

The previous chapters have raised issues and mapped options for using the law to make foreign investment work for sustainable development. This final chapter reflects on the fundamental questions about the interface between natural resources, foreign investment, law and sustainable development. These reflections raise systemic questions about applicable law, and call for a rethink of fundamental aspects of the design and implementation of legal norms.

### Promoting innovative and systemic approaches

Over the past few decades, economic globalisation has been accompanied by extensive developments in the national and international legal frameworks that regulate cross-border economic activities. Compared to the norms that governed international investment just a few decades ago, this 'law of the global economy' (Ortino and Ortino, 2008) now includes many more rules, regulates a wider range of situations and is far more effective in shaping the behaviour of states and economic actors (Faundez, 2010).

To fully understand the terms applicable to a foreign investment in agriculture or extractive industries, it may be necessary to examine everything from a country's petroleum, mining or land code, environmental legislation, tax code and labour law to investment treaties, double taxation agreements and human rights treaties, through to a wide range of international standards and guidelines.

These different bodies of norms and standards reflect different values, historical trajectories and normative content. For example, international human rights law protects human dignity, recognises the important socio-cultural dimensions of land and natural resources, and ties resource rights to self-determination and the realisation of socio-economic rights. On the other hand, international investment law protects commercial assets and is centred on reciprocal treaties to facilitate cross-border investment flows between the state parties.

There is also diversity in approaches within each body of law, and some features of legal frameworks tend to promote greater diversity within and between bodies of law. One example is the central place of bilateral and regional treaties in the development of international investment law, coupled with the fact that states have followed different approaches to treaty drafting. In contrast, some legal arrangements tend to promote convergence within and between bodies of law. Under international investment law, for example, MFN clauses in investment treaties would tend to level the playing field upwards (Schill and Jacob, 2013).

The different bodies of law are closely interconnected. For example, international law may influence the development of national legislation, investors may rely on investment treaties to challenge national measures, investment contracts may require

a project to comply with international standards, and affected people may seek to enforce the rights affirmed by international law through recourse to national courts.

The authorities called upon to apply norms and standards have also facilitated cross-fertilisation within and between bodies of law: international arbitrators have cited each other's awards and, in some cases, human rights jurisprudence; international human rights courts and bodies have cross-referenced each other's work; and, outside the realm of hard law, one OECD National Contact Point has referred to guidance developed under the Convention on Biological Diversity (Box 29).

Importantly, the law governing foreign investment has not emerged through one-off multilateral codification, but through a highly dynamic process involving decentralised negotiation and contestation (Pauwelyn, 2014). This is reflected, for example, in relations between the governments that develop law through negotiating investment and tax treaties, contesting the content of customary international law and elaborating national regulation.

The dynamic, decentralised nature of law making is also reflected in relations between legislators and those called upon to interpret and apply the law. For example, some governments have refined the wording of their investment treaties as a response to interpretations developed by arbitral tribunals (Section 2.3).

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Another dimension of this decentralised development of law concerns the role of private actors who articulate and claim legal rights. This would include investors whose lawyers develop sophisticated legal arguments to make the most of the investment protection regime – an important intellectual engine of the sometimes expansive interpretation of investment treaty standards by arbitral tribunals.

It would also include advocates that work to change the law through precedent-setting legal action. For example, affected people, and the lawyers assisting them, have developed new legal strategies of transnational litigation for corporate accountability (Section 5.5). Also, the now relatively established practice of NGO submissions in investor-state arbitration was initiated by pioneering advocacy work (Section 5.2).

This situation highlights the importance of imaginative approaches that push the boundaries of law design and implementation, including by pioneering new methods and sharing lessons from innovation. The handbook has referred to many examples of initiatives that broke new ground – from Brazil's novel approach to investment treaty making (Box 12 in Chapter 2) to advocates' efforts to pursue new avenues for accountability (Section 5.5), through to testing of tools to strengthen grassroots capacity to claim land rights (Section 4.3).

In addition, harnessing of the multiple legal norms in a strategic way is essential to using the law to its full potential. In order to increase space for bottom-up deliberation, for example, advocates may mobilise the national constitution,



Photo: Robin Hammond / Panos Pictures

**Negotiating multiple levels of governance is critical in ensuring that foreign investment contributes to sustainable development**

international human rights treaties, labour rights (including rights of collective action), legislation on decentralisation, 'procedural rights' of access to information and public participation, transparency requirements in home and host countries, and local consultation or consent requirements (Section 5.2).

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And in order to regulate investment effectively, governments have a diverse array of legal levers they can use, for example under investment, tax or environmental law. Because of the interconnectedness of the multiple bodies of law, and of the way in which claims under different bodies of law may come into contest, it is also important for law makers to move away from ad hoc approaches to treaty negotiation and legislative drafting, and to legislate instead in a more systemic, strategic way.

This would require improving coordination between departments responsible for different areas of regulation. It would also involve making informed decisions on the basis of systemic reviews that consider how each new legal instrument would affect, and fit within, the wider balance of legal claims established under applicable law – recognising, for example, that strengthening investment protection without also strengthening the social and environmental safeguards can lead to lopsided legal frameworks that are unlikely to promote sustainable development.

Legal scholarship is often confined in neatly defined disciplinary spaces. But discussing the law relevant to natural resource investments highlights the close links that exist between different bodies of national and international law in real-life situations, and calls for a more holistic approach to the design and implementation of legal norms.

## Rebalancing legal frameworks

There is considerable diversity in the law governing natural resource investments in low and middle-income countries. Much depends on the treaties that a country has ratified, the laws that it has enacted and – importantly – how applicable norms are implemented. But a recurring theme is the existence of imbalances in legal frameworks.

On the one hand, investment treaties, national law reforms and investor-state arbitration have gone a long way towards strengthening the legal protection of foreign investment. On the other hand, efforts to improve the preparedness of legal frameworks to ensure that investment promotes sustainable development have made slower progress.

For example, openings created by tax treaties and laws allow companies to shift profits to low-tax jurisdictions, thereby capturing wealth generated from natural resources. Advances in international human rights law have not kept the pace with the legal safeguards that international law offers foreign investment.

This is not to deny that the law does provide opportunities for promoting sustainable development – for example, establishing environmental safeguards, protecting local land rights and establishing arrangements for public participation in decision making. In many countries, national law reforms since the 1990s have augmented these opportunities. New human rights treaties have been adopted, existing treaties have been more widely ratified and growing international jurisprudence has clarified the normative content of human rights law.

In practice, however, the legal options available to people affected by natural resource investments are often limited. In many contexts, national law empowers the government to allocate land to a company with little consultation and transparency, without social impact assessment and with small compensation payments for affected people. In many contexts, it is legal for companies to pay little tax in the host country. In social and environmental matters, much is still left to norms, standards and guidelines that have little legal bite.

The overall result is a legal regime that is geared more towards enabling secure transnational investment flows than it is towards ensuring that these flows respond to local and national aspirations and benefit people in recipient countries. In other words, the law is geared more towards investment promotion than investment preparedness and more towards investment quantity than investment quality.

This analysis has direct implications for law makers committed to ensuring that increased investment flows respond to a national vision of sustainable development as well as to commercial considerations, and to ensuring that increased investment results in positive social, environmental and economic outcomes at local and national levels. These law makers will be interested in strengthening investment preparedness so as to improve the quality of investment and manage pressures on natural resources.





Photo: Oliviero Olivieri / Robert Harding

When people are put at the centre of investment processes, all sorts of innovations are possible



The different bodies of law mapped in this handbook offer law makers opportunities to intervene on the multiple pressure points that can influence investment processes. Law makers can legally recognise and protect local land rights, introduce or strengthen FPIC and ESIA requirements, tighten up labour legislation and norms to minimise room for tax avoidance, all the way up to rethinking important aspects of investment treaties.

Law reform may occur through formal law-making processes at both national and international levels. Governments can negotiate treaties, or enact legislation. Enacting laws is a notoriously difficult and slow political process, however, and strong vested interests often get in the way.

Power asymmetries in treaty negotiations may make it difficult for low and middle-income countries to meet their objectives. Very importantly, fast-evolving investment landscapes mean that, in many contexts, there is not enough time for the complex legal reforms that would be required.

But advances can also be made through pushing the boundaries of existing law. International human rights institutions have not shied away from progressive interpretations of existing human rights norms. Some national legislation establishes progressive legal tools that could be used more effectively than they currently are – including, for example, local consultation and impact assessment requirements.

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Legal provisions regulating land ownership often leave significant room for interpretation, and political and judicial acceptance of progressive interpretation could shift the balance of legal rights without formally altering the legislation.<sup>13</sup>

Importantly, this is not just a job for government. The variety of bodies of law offers many opportunities for advocates to push for change and redress through action at local, national, international and transnational levels. No single legal tool can bring change but the strategic harnessing of multiple tools can make a real difference to the design and implementation of natural resource investments.

### Addressing the implementation gap

Implementation and enforcement are paramount for the law to matter in real life. Without proper implementation, any discussion of law is useless. Much 'progressive' law remains a dead letter, particularly in low and middle-income countries where the practical barriers to implementation are often more acute.

Enforcement issues are rife with conceptual as well as practical challenges. For example, much ink has been spilled in legal scholarship to distinguish 'hard' from 'soft' law – that is, binding norms from non-binding guidance. Conceptually, it is important to separate what an actor must do as a matter of legal obligation from conduct that is merely encouraged or promoted.

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13. This point is based on conversations with Malian jurist Moussa Djiré.

In contrast to the legal arrangements to protect and promote foreign investment, the arrangements to address social and environmental considerations are often left to non-binding guidelines and standards that struggle to address the major power asymmetries at stake. A key challenge ahead is to install into hard law the principles reflected in these voluntary instruments – for example, through reforming national law to implement the VGGT (Box 32), and establishing standards of responsible investment in investment treaties (Section 2.3).

But regardless of whether an instrument is considered to be legally binding or not, the effectiveness of mechanisms for compliance matters a great deal. Binding treaties not backed up by effective enforcement are harder to implement. Conversely, the grievance mechanisms that assist compliance with lender standards can facilitate real change on the ground (Box 47). So promoting compliance involves not just entrenching regulations into binding law, but also establishing robust enforcement mechanisms.

Effective institutions are essential in making law work. This point is illustrated by many situations discussed in the handbook – from investment promotion agencies (Section 2.2) and Peru's 'response system' to international arbitration (Box 15), to the importance of effective government agencies in collecting taxes (Section 3.2) or ensuring compliance with environmental regulation (Sections 4.2 and 4.5), through to the law unit that handles public interest litigation on behalf of the Indonesian Peasants' Union (Box 45).

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Budgeting is another important dimension. Implementation can have significant resource implications, for example where environmental legislation empowers government authorities to scrutinise proposed investments and monitor compliance throughout the project cycle (Sections 4.2 and 4.5). Adequate financial resources are essential to support the implementation of legislation, including to establish and resource the administrative agencies responsible for implementing the law.

In addition, rigorous financial analyses of the costs of implementing proposed legislation can facilitate informed design of 'implementable' laws. Indeed, the formulation of legislation influences how easy it is to implement them. For example, laws that import 'one-size-fits-all' models and require costly administrative machinery in resource-constrained countries are bound to face implementation challenges. On the other hand, laws build on local practice (for example, in land tenure matters – Section 4.3) are more likely to be implemented.

### **Developing partnerships to address capacity challenges**

Making law work in practice calls for sustained investment in capacity building at a number of levels. Government agencies need to be in a position to manage investment effectively. They need to be able to fulfil their international obligations and properly implement national legislation.

Foreign investors will have access to the best tax and legal advice available, so it is often difficult for governments to regulate economic activities effectively within their jurisdiction. This is the case in high-income countries, and even more so in low and middle-income countries. Capacity asymmetries also affect negotiations between high and low-income country governments, for example for investment protection or double taxation treaties.

Governments in low and middle-income countries may consider options for strengthening their own capacity. This would include effective arrangements for mobilising the expertise available within the country. In some jurisdictions, private practice and academia offer expertise that governments could tap into more effectively than is often done. The arrangements for harnessing this expertise when it is most needed should be put in place if they are not already due to gaps in information, communication or resourcing.

External support, where appropriate, could come through a number of channels. These could include technical co-operation projects funded through development aid, partnerships with leading universities, provision of legal and technical advice from global firms on a pro bono (voluntary) basis, pooling of experience and expertise among countries, and secondments of staff from the private sector or from government agencies in other jurisdictions.

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The issue of capacity is not limited to government. NGOs need to be in a position to influence and scrutinise public action effectively and hold decision makers and investors to account. National federations protecting the interests of rural producers and of workers must be properly equipped to have a strong voice, and to help their most vulnerable constituents to exercise their legal rights as a basis for pursuing their development aspirations.

Options for augmenting capacity in the non-governmental sector may include better harnessing of existing internal capacity – for instance, through documenting success stories and sharing lessons from experience. It may also involve strategic local-to-global alliances between organisations that can contribute complementary capacities – for example, technical and legal expertise, skills and channels for outreach and campaigning, and capacity to mobilise politically vocal constituencies.

### Politics, long-term vision and citizen action

The law regulating natural resource investments involves highly technical legal issues. Detail and specialised expertise are therefore critical. The handbook has discussed some of these technical issues, although in order to keep the text accessible more complex matters have had to be simplified.

Yet, at a time when legal professionals are under growing pressure to specialise in ever narrower fields, harnessing the law in a strategic way calls for those professionals to be able to take a 'big-picture' view of the multiple bodies of law



Photo: Jez Coulson / Panos Pictures

**Advocates can play an important role in shedding light and raising awareness on developments in investment law**

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involved and how these interconnect. Also, the fact that legal norms are embedded in complex social processes highlights the limitations of conventional, formalistic approaches to the law (Perry-Kessaris, 2013; Tan, 2013).

Using the law effectively is not just about word-smithing or legal plumbing – fixing the flows and connections amongst applicable norms. Laws cannot be drafted out of context – they require clear policy choices and a solid grasp of the underlying social, environmental and economic issues. Legal specialists working on investment and sustainable development need to understand how best to adapt legal categories to the wide diversity of contexts and investment models.

More fundamentally, harnessing the law to ensure that investments contribute to sustainable development is not just about dealing with technical aspects. It calls for developing a vision for the development and implementation of the law in light of real-life trajectories towards sustainable development. Politics are essential to this process.

The governance of foreign investment is an eminently political issue, as is the governance of land and natural resources. Different approaches to law making in these fields assume important political choices about the extent and nature of government intervention in the economy. Use of the tools discussed in this handbook in itself would reflect political choices.

For example, few would argue that investment projects should not undergo effective impact assessment processes but there are major political considerations involved in policy choices concerning taxation, the balance between investment promotion and policy space, the use of performance requirements, and land ownership, to name just a few examples. In advocacy strategies, legal avenues alone are typically not enough: collective action and political mobilisation can help to give real leverage to legal rights.

This is why this handbook has placed so much emphasis on the political rights citizens can leverage to influence public decisions. Harnessing the law to make investment work for sustainable development is not a task for government regulators or legal experts alone. It also requires vibrant NGOs and social movements to advocate, scrutinise, challenge and influence. Perhaps most importantly, it requires citizens themselves to be able to appropriate and wield legal tools in their efforts to shape their own future.

#### TIP 20

##### Look at the bigger picture

Governments and advocates can:

- Use the law in imaginative and systemic ways, pioneering new methods and considering how different legal instruments interact and affect each other.
- Rebalance legal frameworks to strengthen preparedness, emphasise investment quality and manage pressures on natural resources.
- Invest in better implementation of existing law, through stronger institutions, more effective enforcement mechanisms, smarter legislative design and proper resourcing.
- Develop arrangements for capacity support in both governmental and non-governmental sectors, including through harnessing local expertise, developing alliances with international centres of excellence and distilling lessons from international experience.
- Recognise the need and create space not just for technical solutions and expertise but also for long-term vision and political action.

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## 2. International treaties and instruments

### Treaties on trade, investment and arbitration

(by date of signature/adoption, most recent top; includes model treaties)

Angola-Brazil Investment Facilitation and Co-operation Agreement (Acordo Brasil-Angola de Cooperação e Facilitação de Investimentos), signed 1 April 2015, not yet in force. <http://tinyurl.com/z2lvxdg>

Brazil-Mozambique Investment Facilitation and Co-operation Agreement (Acordo Brasil-Moçambique de Cooperação e Facilitação de Investimentos), signed 30 March 2015, not yet in force. <http://tinyurl.com/h3lb359>

Convention on Transparency in Treaty-Based Investor-State Arbitration ('Mauritius Convention'), adopted in New York on 10 December 2014, not yet in force. [www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf)

Japan-Mozambique BIT of 2013: Agreement between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment, signed 1 June 2013, into force 29 August 2014. [www.mofa.go.jp/mofaj/files/000005929.pdf](http://www.mofa.go.jp/mofaj/files/000005929.pdf)

Model Bilateral Investment Treaty of the Southern African Development Community (SADC), released in July 2012. [www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf](http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf)

Investment Agreement of the Common Market for Eastern and Southern Africa (COMESA), signed 23 May 2007, not yet in force. [www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment\\_agreement\\_for\\_the\\_CCIA.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf)

Dominican Republic–Central America–United States Free Trade Agreement (CAFTA), signed 5 August 2004, into force 1 March 2006 for El Salvador and the United States, 1 April 2006 for Honduras and Nicaragua, 1 July 2006 for Guatemala, 1 March 2007 for the Dominican Republic, and 1 January 2009 for Costa Rica. [www.sice.oas.org/trade/cafta/caftadr\\_e/caftadrin\\_e.asp](http://www.sice.oas.org/trade/cafta/caftadr_e/caftadrin_e.asp)

Germany-Philippines BIT of 1998: Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, signed 18 April 1997, into force 24 July 1998. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1392>

General Agreement on Trade in Services (GATS), Annex 1B to the Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994, into force 1 January 1995. [www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf)

Agreement on Trade-Related Investment Measures (TRIMs). Annex 1A to the Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994, into force 1 January 1995. [www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf)

North American Free Trade Agreement (NAFTA), signed 17 December 1992, into force 1 January 1994. [www.nafta-sec-alena.org/](http://www.nafta-sec-alena.org/)

France-Poland BIT of 1989: Accord entre le Gouvernement de la République Française et le Gouvernement de la République Populaire de Pologne sur l'Encouragement et la Protection Réciproques des Investissements, signed 14 February 1989, into force 10 February 1990.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1272>

Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention'), adopted 18 March 1965, into force 14 October 1966.

[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc\\_en-archive/ICSID\\_English.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), adopted 10 June 1958, into force 7 June 1959.

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## Arbitration rules

(in alphabetical order)

ICSID Arbitration (Additional Facility) Rules, adopted by the Administrative Council of the International Centre for Settlement of Investment Disputes. [https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf)

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UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. United Nations Commission on International Trade Law, 30 July 2013. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)

## Tax treaties and guidelines

(by date, most recent top)

United Nations Model Double Taxation Convention between Developed and Developing Countries. 2011 Edition. [www.un.org/esa/ffd/documents/UN\\_Model\\_2011\\_Update.pdf](http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf)

Articles of the OECD Model Tax Convention on Income and Capital. Updated 22 July 2010. [www.oecd.org/tax/treaties/47213736.pdf](http://www.oecd.org/tax/treaties/47213736.pdf)

Convention on Mutual Administrative Assistance in Tax Matters, opened for signature on 25 January 1988, amended by the Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, signed on 27 May 2010. Amended Convention into force 1 June 2011. [www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf)

## Environmental treaties and instruments

(by date of signature/adoption, most recent top)

Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. Endorsed by the Conference of the Parties of the Convention on Biological Diversity on 9-20 February 2004. COP 7 Decision VII/16.

[www.cbd.int/doc/publications/akwe-brochure-en.pdf](http://www.cbd.int/doc/publications/akwe-brochure-en.pdf)

Decision I/7 of 21-23 October 2002, Meeting of the Parties to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Doc. ECE/MP.PP/2002/2.

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Espoo Convention on Environmental Impact Assessment in a Transboundary Context, adopted on 25 February 1991, into force 10 September 1997.

[www.unece.org/env/eia/eia.html](http://www.unece.org/env/eia/eia.html)

United Nations Convention on the Law of the Sea (UNCLOS), opened for signature on 10 December 1982, into force 16 November 1994.

[www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

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## Human rights treaties

(by date of adoption, most recent top)

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted 10 December 2008, into force 5 May 2013.

[www.ohchr.org/Documents/HRBodies/CESCR/OPProtocol\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CESCR/OPProtocol_en.pdf)

African Charter on Human and Peoples' Rights (ACHPR), adopted on 27 June 1981, into force 21 October 1986. [www1.umn.edu/humanrts/instree/z1afchar.htm](http://www1.umn.edu/humanrts/instree/z1afchar.htm)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, into force 3 September 1981.

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American Convention on Human Rights (ACHR), adopted 22 November 1969, into force 18 July 1978.

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First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, into force 23 March 1976.

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International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, into force 23 March 1976. <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 19 December 1966, into force 3 January 1976.

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International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted 21 December 1965, into force 4 January 1969.

[www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx)

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted 4 November 1950, into force 3 September 1953.

<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

## United Nations human rights documents: General Comments, Special Rapporteurs and Special Representatives

(by date, most recent top)

Guiding Principles on Business and Human Rights: Implementing the United Nations 'protect, respect and remedy' framework. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (John Ruggie). 21 March 2011, UN Doc. A/HRC/17/31. United Nations.

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## Natural Resource Issues

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# Foreign investment, law and sustainable development

## A handbook on agriculture and extractive industries

As foreign investments in agriculture and extractive industries increase pressures on land and natural resources, the effective use of legal tools, by government and advocates alike, has become an important ingredient of public efforts to ensure that foreign investment contributes to sustainable development.

This handbook is about how to use law to make foreign investment work for sustainable development. It aims to provide a rigorous yet accessible analysis of the law regulating foreign investment in low and middle-income countries – what this law is, how it works, and how to use it most effectively.

The handbook takes an integrated approach that cuts across areas of law typically treated in separate literatures – including investment treaties, extractive industry legislation, land tenure, human rights norms, environmental legislation and tax law. The main target audience is governments and advocates in low and middle-income countries.

### Natural Resource Issues No. 31

Product code: 12587IIED  
ISBN: 978-1-78431-299-2  
ISSN: 1605-1017

International Institute for Environment and Development  
80-86 Grays Inn Road, London WC1X 8NH, United Kingdom



Knowledge  
Products

### Tool

February 2016

### Law

*Keywords:* Legal tools, investment treaties, extractive industries, agriculture, land rights, capacity

