Handbook on Extractive Sector Investment Negotiations

Guidance for Government Officials in Developing Countries

Howard Mann and Ciata Bishop

The Commonwealth

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Foreword

Across the Commonwealth, extractive industries hold immense promise – yet that promise too often goes unfulfilled. For many of our 56 member countries, these resources represent an immediate economic opportunity and a potential foundation for long-term, inclusive development.

That is why we have produced this handbook. It responds directly to the needs of our governments for practical, credible support in negotiating fairer, more sustainable contracts in the extractive sector.

At its heart is a simple but powerful idea: that better negotiation is not just a technical exercise – it is an enabler of economic security, sustainable growth, and national resilience.

The global context is shifting rapidly. The race for critical minerals, the urgency of the climate transition, and new international tax rules are raising the stakes. Yet too many countries remain disadvantaged by asymmetries of information, capacity, or leverage at the negotiating table. This must change.

This handbook offers governments the means to meet these challenges – providing not only the technical know-how, but also a clear, principled framework for planning, conducting and sustaining effective negotiations. It draws on real-world experience and offers checklists, tools and strategies designed to level the playing field. It can empower governments to secure better deals – that serve their people, protect their environment and reinforce their sovereignty.

Ultimately, this publication is part of a wider commitment by the Commonwealth Secretariat to produce resources that are demand-driven, focused on implementation and grounded in our shared goals of good governance, equity and prosperity.

I hope this becomes part of the Commonwealth's transformation toolkit – practical, timely and deeply needed. I commend it to all our member countries and the dedicated officials working to secure a more sustainable and secure economic future.

Hon. Shirley Botchwey
Commonwealth Secretary-General

Acknowledgments

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Acronyms and Abbreviations

AG	Attorney-General
CPI	Corruption Perception Index
EIA	environmental impact assessment
EITI	Extractive Industries Transparency Initiative
EMP	environmental management plan
ESIA	environmental and social impact assessment
FDI	foreign direct investment
GHG	greenhouse gas
IGF	Intergovernmental Forum on Mining
ILO	International Labour Organization
MMDA	Model Mine Development Agreement (of the IBA)
MNE	multinational enterprise
OECD	Organisation for Economic Co-operation and Development
PPP	public–private partnership
SDGs	Sustainable Development Goals
UNCTAD	UN Conference on Trade and Development

Chapter 1

Introduction

Chapter 1
Introduction

As developing countries strive to fully utilise and develop their natural resources, their capacity to not only attract viable projects, but also to negotiate long-term investment agreements that contribute to sustainable development in their countries and local communities, is crucial. The difficulties and complexities of doing so continue to mount. At the time of writing, for example, the global dynamics for trade, investments and fiscal incentives are in flux in two distinct processes, both of which impact developing countries. First, is the adoption, in September 2023, of the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule (OECD/G20, 2023), negotiated under the auspices of the Organisation for Economic Co-operation and Development/Group of Twenty (OECD/G20) Inclusive Framework on Base Erosion and Profit Shifting, to protect the right of developing countries to ensure multinational enterprises pay a minimum level of tax on a broad range of cross-border intra-group payments. Second, is that climate change negotiations continue to play out globally, with old and new energy projects very much on the line, especially with the increasing global interest in critical minerals needed for the transition to clean and sustainable energy.

The ongoing demand boom in critical minerals is stimulating new explorations and discoveries, presenting development opportunities for countries, but also enormous risks for developing countries that remain weak and vulnerable when negotiating contracts with foreign investors. These are but two examples of the changing dynamics that developing countries must carefully understand and note for their impacts on foreign direct investments and the overall negotiation process.

This *Handbook on Extractive Sector Investment Negotiations* (the 'handbook'), which is aimed at developing country officials, is intended as a guide for teams involved in negotiations with foreign investors to ensure that processes are designed and followed to achieve positive, sustainable outcomes that produce 'win-win' results. This handbook attempts to bring a holistic approach to such negotiations, which includes a

multidisciplinary approach through the involvement of all relevant stakeholders. It sets out a structured process from the evaluation of the project, establishing negotiating goals, the negotiations themselves, and the handoff activities that are required post-negotiation. As each component is reviewed, the handbook provides a simple checklist that can assist in keeping the process on track.

The goal is to empower government officials with the requisite tools, processes and commitment to professionalism necessary to bring a relative balance of power in the negotiations, through enhanced knowledge and expertise about the project, the resources at issue, and the negotiating process itself. Where appropriate, the handbook signals the need for outside expertise to support government efforts, but not to take them over.

This handbook also brings to bear the experiences of the authors and others whom they have worked with in diverse negotiating contexts to consolidate many lessons learned during such negotiations. They hope the handbook can assist others to build on past positive outcomes and to minimise, if not altogether avoid, errors and mistakes.

1.1 Why this handbook?

This handbook is designed to assist government officials in developing countries and their designated professionals understand the processes and procedures of negotiating long-term extractive industry contracts with multinational companies to enhance a project's contribution to sustainable development in the developing host country. While the negotiating teams or individuals involved in a negotiation may differ, the process should remain the same or quite similar; and while differences will exist in the precedents and processes leading up to the final negotiations, the roles and desired outcomes should also be similar. The handbook prepares the negotiating team to establish standards, processes and procedures that are consistent, and which enable officials to achieve the government's desired outcomes. At the same time, the handbook should be applied in a flexible manner, adapting to the unique circumstances of each jurisdiction and each proposed project that is the subject of a negotiation. It is not a rigid instrument, but one that has functionality at its core.

The handbook reflects the reality that negotiations occur daily among two or more parties who intend to reach mutually beneficial outcomes. Negotiations can take place almost anywhere or at any time, but government–investor negotiations are more likely to occur in formal settings where the negotiating parties aim to agree on a myriad of issues to achieve mutual benefits. In this handbook, the focus is on the negotiating process between governments and their counterparts, primarily multinational investors, seeking long-term contracts in the extractive industry.

1.2 Foreign investments and sustainable development

For many years, developing countries operated on the expectation, indeed assumption, that all foreign investment was good for the receiving country. This equation was simple but was eventually – and inevitably – recognised by most development agencies as overly simplistic and not necessarily true. The UN Conference on Trade and Development (UNCTAD), in its critically important 2015 Investment Policy Framework for Sustainable Development, noted that a new generation of domestic investment policies was emerging in developing countries specifically to avoid reliance on such assumptions in the future.

> *"As a result of the developments described above, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate. This new generation of investment policies has been in the making for some time, and is reflected in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalise investment regimes and promote foreign investment, on the one hand, and to regulate investment in the pursuit of public policy objectives on the other. It reflects the recognition that liberalisation, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks."*
>
> Source: UNCTAD (2015)[1]

1 See the introductory section of UNCTAD (2015) generally on this need.

This handbook focuses on one aspect of the necessary institutional frameworks: good negotiating practices and processes.[2] These do not come about by accident, but by deliberate design and practice. The cost of bad practices and processes, or even no processes, however, can burden the negotiating government for decades to come.

In a broad sense, the scale and scope of negotiations from a sustainable development perspective is set out in the UN Sustainable Development Goals (SDGs), with a strong focus on Goals 1–10.[3] In Africa, this is supported by the African Union Agenda 2030; in Latin America and the Caribbean, by the Economic Commission on Latin America and the Caribbean 2030 Agenda for Sustainable Development; while the Economic and Social Commission for Asia and the Pacific (ESCAP) supports the Asia–Pacific region. It should be noted that while these plans are overarching, most individual countries have their own plans based on their own development goals and priorities. For example, in Botswana, under its Vision 2036, the government has adopted an ambitious plan to achieve high-income status by 2036.

In seeking to achieve the SDGs, foreign direct investment (FDI) can play an important role. This is because governments are often negotiating with investors who are themselves striving to maximise supply chain values and company profits, making it essential to bridge gaps between these two notional goals. Developing countries, through contracts and agreements, have in large part focused on achieving SDGs 1 through 10 (see also Sauvant & Mann, 2017), and have embedded aspects of community, technology and skills transfer, local economic linkages through value-added processing and local procurement, gender and youth employment and diversity, and more aspects of domestic laws governing trade and investments. The integration of climate change concerns is now an omnipresent factor for many large-scale investments as well. What is known today is that none of these goals will be achieved simply by attracting FDI; however, they can be progressed by a focused effort and a strong negotiating team.

2 This handbook can be seen as a complement to another recent Commonwealth publication – *Environmental, Social and Economic Development Provisions in Investment Contracts: A Resource for Government Lawyers in the Commonwealth* (Aizawa & Mann, 2021).

3 See UNDESA (no date); see also Addendum 1 of this handbook.

From an institutional perspective, achieving a coherent set of sustainability goals requires an integrated approach by government, one that sets aside traditional governmental silos that limit co-operation within governments. This becomes a focal point of a good institutional design for government negotiations and is a theme that runs through this handbook.

Box 1.1: OECD Guiding Principles on the Negotiation of Durable Extractive Contracts

The present handbook focuses on the process of negotiations, while other instruments have focused on the substance of negotiations. In 2020, for example, the OECD adopted its Guiding Principles on the Negotiation of Durable Extractive Contracts. These highlight key substantive issues including that the negotiations/contracts? should be:

1. aligned with host government long-term vision and strategy;
2. anchored in a transparent quality long-term relationship;
3. balance the legitimate interests of the host state, community and investor;
4. seek to maximise value, including economic, social and environmental value;
5. are negotiated upon the ongoing sharing of key financial and technical data;
6. operate in a sound and fair investment and business climate;
7. are consistent with applicable laws that reflect acceptable international standards; and
8. are underpinned by a fiscal system that provides for a fair sharing of economic rent between the investor and the host government.

Source: OECD (2020).

1.3 Overcoming asymmetries of skill and knowledge

A significant goal of structured negotiating processes is to help overcome what are traditionally known to be 'asymmetries' of knowledge and negotiating skills between multinational enterprises (MNEs) and developing countries. This handbook attempts to address this issue by providing guidance to governments on the establishment of negotiating processes that ensure they obtain maximum benefits from the development of their natural resources.

As developing countries demand more in return from the licensing of their natural resources to foreign investors, including land, fossil fuels and minerals, they must be fully prepared, knowledgeable and competent to negotiate with their

counterparts. It is no secret that large knowledge gaps exist between government negotiators and international investors from large multinational corporations. Hence, it is crucial that members of negotiating teams be knowledgeable on current trends in mining, natural resource management, fiscal regimes and incentives, and on all aspects of long-term contracts. This does not mean that each negotiating team member must be an expert on each issue, but rather that the collective team, working together, must have access to the requisite knowledge and experience to negotiate effectively. Moreover, while knowledge gaps may exist, the lack of intergovernmental co-ordination and/or competing interests can sometimes lead to the overlooking or underutilisation of team members who have the requisite knowledge and experience to actively contribute meaningfully to the team. By carefully evaluating its domestic expertise – a crucial step in the creation of a team that understands its strengths but also recognises limitations, and how to overcome those limitations through access to external expertise – governments can be better prepared to negotiate with MNEs.

The handbook further intends to improve the overall capacity of the team by helping to close the knowledge gap. It does so by providing processes to identify what knowledge is needed for a negotiation, what is actually available within the government, and what needs to be either further developed or sourced externally. In addition, the handbook provides guidance on the general capacity of the negotiators, an overview of the importance of domestic laws and regulations in the negotiated agreements, as well as the importance of international law and its place within contracts.

The potential outcomes of negotiated contracts should align with the government's long-term goals and development strategies. Hence, the government's negotiating team needs to be intergovernmental and, preferably, this needs to be statutorily enshrined. There is also the need to avoid conflicts of interest, prevent corruption, and to protect the legality of the contract and its terms.

1.4 Types of contracts covered

Contracts covered in this handbook relate mainly to investor–state contracts in the extractives sector (that is, in oil, gas and mining), which include but are not limited to permit-based contracts, long-term land leases, and negotiated concession agreements, including greenfield and brownfield contracts.[4] While the content of this handbook focuses primarily on the extractives sector, the overall knowledge levels, skill sets, intergovernmental team approach and process can be applied to other sectors, including agriculture and infrastructure development. It is important that the processes and procedures for negotiations be similar if not uniform, to bring consistency and order to negotiations.

In addition, as governments shift from broad contract negotiations to regulatory permit-based processes for concessions, infrastructure and other large investment projects to avoid unnecessary complexities in negotiations and implementing contracts, 'mini negotiations' may still be required to implement parts of the regulatory processes. Here, there is a notable shift from creating project-specific legal regimes at one end of the spectrum, to using narrowly constructed negotiations to implement specific legal requirements in the regulatory process. This can include, for example, specific environmental obligations flowing from an environmental impact assessment process, to establishing specific local hiring obligations, or the inclusion of local purchasing requirements. Each of these types of issue requires specificity that reflects the particular context of the local community, the local environment, the project's technology platforms and so on. So even where there is a well-developed permitting process, some negotiation is likely to be needed to complete that process.

The handbook will cover negotiations of unsolicited contracts, as well as renegotiations of existing contracts or permits that are already in force. While certain variations on theme will be required, the guidance set out in this handbook is relevant to all these contexts as well.

4 Greenfield contracts relate to projects that involve constructing new facilities on undeveloped land or site, while brownfield contracts relate to projects that involve redeveloping or repurposing an existing facility, land or site.

1.5 The single biggest negotiating error: the contract is an end point

The focus on negotiating investment contracts to maximise the sustainable development benefits in the host country highlights the long-term nature of FDI in developing countries. This in turn highlights one of the major structural difficulties in some countries for negotiating these contracts: the short-term objectives of some government officials versus the long-term objectives of promoting sustainable development. In particular, there is a large incentive for some government officials to see the conclusion of a contract negotiation as the end point. For example, a minister or other official may receive great credit for negotiating a contract and securing an investment but will not be in the same ministerial position when the investment starts and negative impacts arise due to gaps or errors in the contract or because of a lack of specific obligations on investors to secure sustainable economic benefits.

There is a time lag between concluding a contract and seeing its balance of positive and negative impacts. This time lag creates pressures to see concluding a negotiation as the goal, as opposed to the long-term perspective of seeing the optimal benefits for all parties as the goal. 'Optimal benefits' does not always mean maximum possible benefits. Rather, it reflects the reality that some resources may not be harvestable for environmental or social reasons, and that maximising resource use is not always the best approach.

The guidance in this handbook takes a long-term approach. It clearly understands that the conclusion of a contract is the starting point of a long-term relationship, which is intended to last decades in most cases. The guidance here focuses on this long-term relationship and what is needed to make it succeed, not just what is needed to finalise a deal. Several of the steps set out limit the ability of individual officials to focus only on concluding a contract as a goal, in order to maintain the focus on the longer-term success of the project for the host country's development benefit.

1.6 Negotiations, contracts and the rule of law[5]

All long-term contracts initiated and executed by governments should have one goal – to maximise benefits to citizens. With that in mind, contracts are, or at least should be, negotiated under the host government's domestic laws, with careful references, in some cases, to international law and/or international standards. This should be the standard starting point for any contract negotiation. This may seem obvious today, but it has not always been the case. Even up to 2018, the World Bank model clauses for public–private infrastructure projects advocated the use of the national law of the foreign investor or a neutral law such as that of the United Kingdom or France as the governing law of the contract. These colonialist practices are, however, now firmly rejected by host governments, as they should be.

Yet, this is just the starting point. There is a further critical question of whether to include expansive references to international law or 'principles of international law' as part of the governing law of a contract. We recommend against doing so and leaving it clear that the law of the host state is the governing law of the contract. In some instances, such as where the domestic law is considered by the government as antiquated or incomplete, specific references to pertinent international standards might be used to fill a specific gap or need. Those references should be well circumscribed, taking into account the local context to ensure proper adaptation during implementation.

In addition, there is a critical question of what law or rules prevail in the event of legal conflicts: the obligations and rights set out in the contract or the applicable law of the host state? Again, up until recently, many contracts had clauses stating that in the event of such a conflict, the rights and obligations in the contract prevailed over applicable domestic law. In our view, this is not appropriate. Rather, in the event of such a conflict, the generally applicable domestic law should prevail over the contract. In this regard, it is the obligation of both negotiating parties – not just that of the government – to ensure that what they negotiate is consistent with the applicable domestic laws and does not create any conflicts that would prevent the contract being implemented.

5 This section is a condensed version of Chapter 3 of Aizawa and Mann (2021). Readers who wish more detail are invited to consider this chapter.

These domestic laws set the basis for the provisions within the contracts, administrative regulations pertaining to the specific industry, fiscal policies and any other relevant actions. Domestic laws also set out the provisions for recourse and dispute resolution when needed. Therefore, the primary focus of this handbook in terms of laws governing contracts will support the rule of law under the specific host country's domestic law. Indeed, many contracts have what are known as 'severability' clauses to ensure that if one provision in a contract is found to be illegal under the applicable law, it can be severed from the contract while the remainder of the contract remains in effect. In the domestic laws of many jurisdictions, severability is even a rule of interpretation applied by the courts when interpreting contracts and other instruments and this handbook fully supports it.

One aspect of the domestic law worth noting here is the provisions that enable government negotiators to negotiate contracts with the investor in the first place. These provisions should set out the scope of the government's authority to negotiate, what, if any, deviations or exceptions to domestic law may be negotiated, what incentives may be offered, the duration of a contract, the scope for stability provisions, if any, and so on. In other words, negotiators should have a clear understanding of the scope of negotiations they are allowed to embark on, and should not be given carte blanche to negotiate beyond such limitations. The enabling clauses for this purpose should be clear, binding and enforceable by judicial declarations that could strike down clauses outside the legislated parameters. This not only limits the ability of government officials to act outside the law, but it also reduces the incentives of investors to seek provisions that are outside those legal parameters.

1.7 Professionalism, ethics and corruption in the negotiation process

Finally, given the importance of promoting transparent and consistent interactions with investors, there is certainly a need for professionalism and consistent rules, processes and procedures that 'level the playing field' for government negotiators and investors. The level of professionalism, the avoidance of corrupt or unethical behaviour, the preparation on the part of the negotiators, and the preferred approach to

negotiations, will enable governments to achieve the goals intended with mutual benefits for all – development, extraction, and fiscal goals for the government with profits for the investor.

Long-term investment contracts often involve hundreds of millions, if not billions, of dollars, and there is often an incentive for the people involved to engage in inappropriate activities. There is a growing expectation globally of the need to curb corruption through a more transparent and consistent way of doing business, especially as developing countries seek to attract foreign direct investment. Transparency reporting provides an insight into how companies and governments interact on a global basis and many developing countries have found themselves under scrutiny for inappropriate business practices. Therefore, open and transparent reporting enables the public to hold the government to account. It also allows governments to know who (individual) or what (legal entity) stands to benefit from the exploitation of its natural resources under the beneficial ownership principle, which requires the disclosure of the beneficial owners of a company.

The most notable Corruption Perception Index (CPI) is published annually by Transparency International, where 180 countries are ranked from 0 to 100 – with 100 being perceived as 'very clean'. In the CPIs, which have been consistently published since 1995, numerous developing states have found themselves below the midline. Many developing host countries have for some time been working to improve their legislation to more effectively combat corruption. The developed home states of many MNEs have also been enacting anti-corruption laws that apply to the extraterritorial conduct of their MNEs, especially to criminalise the bribing of foreign government officials to secure business overseas. While these legislative responses have helped to improve the image of many countries, the reality is that corruption is still prevalent in investor–state relations in many developing countries, which continue to fall below the midline in CPIs.

In many instances, corruption is hard to prove as it is difficult to gather sufficient information to convict the culprits. Furthermore, in many cultures families are so heavily intertwined, violations are most often handled in a 'family or cultural' way. Hence, to curb some of these activities, government ministries are now focusing on ways in which to

Box 1.2: Ethical behaviours and suspicious activities

As the evaluation of a project is being conducted (see the steps set out below), suspicious acts to note include, but are not limited to, the following scenarios:

A. Government official holding a licence

For example, John Jones, an Assistant Minister at the Ministry of Mines in charge of administrative permits, has been employed for the last three years. Six years ago, he obtained an administrative permit for an exploration license along a well-known gold vein. As a part-time venture, he spent his weekends exploring and gathering data on the site.

As a part of his normal duties, two years ago he issued an administrative permit to XXX company for the exploration of a gold vein. The company has been exploring and gathering data on the reserve and is coming towards the end of the permit, at which point it hopes it will be granted a Class A Mining License. It realises that John Jones holds a permit in the general vicinity of its own exploration area. The company is also fully aware of John's position at the ministry, which could be helpful to it when it applies for the mining license. The company approaches John and purchases the license for an undisclosed amount in a private transaction and incorporates the section under the request for a Class A Mining License.

While John owned the licence prior to joining the ministry, what should he have done upon joining the Ministry of Mines? Is transaction with the mining company a corrupt act or a simple business transaction? What are the issues associated with this activity?

B. Confidentiality: Discussing the details of the technical assessment with an investor or someone else who is not a member of the technical assessment team

For example, a senior government official invited a member of the project technical assessment team out to a Sunday afternoon brunch at a secluded resort. During the brunch meeting, the senior official begins to discuss the process of the technical assessment and what the findings are so far. An interested investor just happens to be having brunch at the same location and the senior government official introduces the investor as a friend of many years. He continues to ask about the technical assessment process in the presence of the investor. At the end of the meal, the senior official offers an amount to reimburse the technician for his petrol and time. What, if any, are the implications?

C. Bribery

An exceptionally good friend of the lead of the technical committee calls him and invites him to meet downtown for a drink. He then gives his friend an envelope containing money in the name of another friend whose project he is working on. The technical lead later finds out by chance that many such envelopes have been passed out. Assuming that the current project is the most prominent among those being considered for a licence, what, if any, are the issues and challenges?

develop and support ethical behaviours with a view to improve openness and transparency. Ethical training focuses on using the values and moral actions expected of leaders to promote behavioural change, with an emphasis on global standards of transparency and their application to government officials – especially as they relate to dealings with foreign economic actors.

Corruption is one of the most difficult activities to track or report, not only because it has many forms but also because in its simplest form, it is a transaction between consenting parties, even though it is illegal. Notwithstanding the development of new laws, there will still be those who attempt to influence decisions on behalf of interested parties in negotiations with governments.

Corruption exists in all countries, but it seems to occur frequently – or rather its deleterious effects are most perceptible – in countries where poverty, low wages and 'donations' seem to be a part of the culture. Can ethical behaviour be legislated for? Across the developing world, domestic laws are being enacted to help stymie the corruption associated with the acquisition of contracts. Cultural norms of 'gifting' exist in many countries globally; however, the amount and intent are significant. Studies show that under the guise of 'facilitation payments', such cultures have often been exploited by MNEs (Girard, 2021). In 2016, a joint initiative of the African Development Bank and the OECD published Anti-Bribery Policy and Compliance Guidance for African Companies, a tool for companies operating or seeking to operate in Africa (AfDB & OECD, 2016). It noted that many countries still operate on a cash basis and 'paying bribes is still perceived as the "only way to survive" in some African countries, whether as a company or individual'. Therefore, there remains a question of the expectations of at least some multinationals, despite them being fully aware of laws against corruption, as to whether they still see 'gifts' as a part of the process?

How can a culture of bribery, corruption and unethical behaviour be eliminated, or at least minimised? As teams evaluate project proposals, they must be aware of circumstances where there are loopholes allowing dubious, corrupt and unethical behaviours. Most of all, there must be solutions for dealing with these situations from both sides.

As negotiating teams are assembled, it is crucial that the government team should not only be selected from diverse departments and ministries but also from diverse backgrounds, socio-economic groups, and even financial and social capacities. Therefore, it is important to remind the team of the overall guiding principles of good governance and professionalism that are intended to represent the government.

1.8 A commitment to success

A different issue of professionalism also arises in government negotiating contexts: that is, the commitment to success. In many developing countries, there are what can best be described as 'self-defeating' approaches to negotiations. Three classic examples of this are reflected in the following statements.

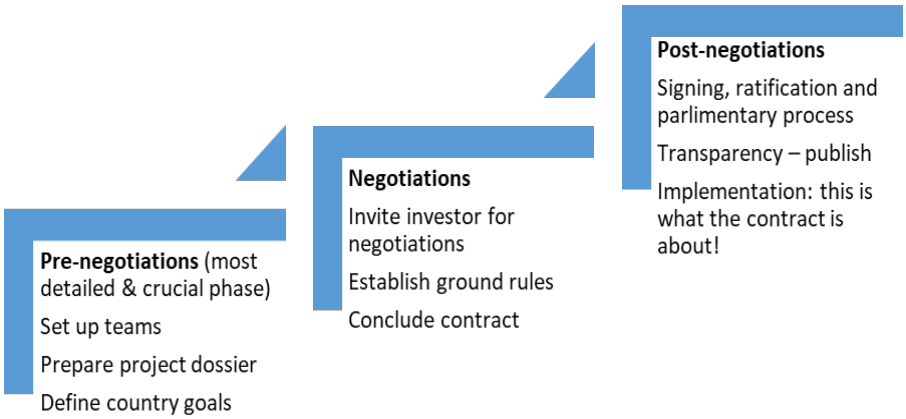
1. We are outmatched and lack the necessary capacity – so it does not matter what we do, we cannot win anyway.
2. We are beggars for investment, so we just have to accept what they say and that is it.
3. We can just finish the negotiations with whatever 'they' want, and then make changes in the contract unilaterally later because we are the government.

All these types of approaches foreshadow a negotiating team that is more prepared to fail than succeed. It is making excuses for failing before even beginning the process. This handbook offers remedies to such self-defeating approaches by setting negotiating standards and processes that enable government officials to succeed in achieving strong, sustainable investment contracts that reflect the national interest. It does so not by ignoring the root causes of such approaches, but by identifying them and addressing them so that success is within reach.

1.9 Three phases of this handbook

A negotiation process is a little like building a house. The first part of the process is often the longest and most arduous: building a foundation, framing the walls, installing the floorboards and roof, framing out the windows and doors, and so on. This is similar to the pre-negotiations process, in which

Figure 1.1: The three phases of this handbook



the foundation and framing for the negotiations must be set before the actual negotiations can begin. Like building a house, it also always takes more time to do this work than anticipated, as it is detailed work that must be done right. To do this, one needs an array of different skills and knowledge, a co-ordinated process to gather and collate all relevant information, and the proper assessments and analysis to make sure the job has been done well. Then the rest of the house will sit square, can be finished properly and will stay solid for decades to come.

When it comes to putting up the plasterboard on the walls, putting in the windows, and selecting the right cupboards, floors and countertops, and paint, this is like the negotiation process: it is the shiny nice things we see, but they would not work if the first stage of building the foundation and structure was not done right. The hard work has to come first.

After the negotiations, like a home, comes the maintenance phase. A beautiful house still needs regular maintenance, starting soon after it is built, and extending throughout its life. So, too, a contract needs regular maintenance after it is concluded to ensure its goals are fully achieved over the long term. It is to these phases that we now turn.

Chapter 2

Pre-negotiations

Chapter 2
Pre-negotiations

The pre-negotiations phase is when questions in relation to the project are asked and, hopefully, answered. The screening of investors occurs, consultations are held where necessary, and a systematic process and sense of structure and order should emerge for the decision to negotiate and the negotiations themselves.

Negotiations of long-term contracts should be viewed largely as apolitical, because they fall within the ambit of achieving the country's national economic and sustainable development goals. In this sense, the contract and associated FDI is not a goal in itself, but a means towards achieving broader development goals. The contract should reflect, as noted above, a long-term vision that goes beyond short-term political considerations. The negotiating team and process should reflect this apolitical approach as much as possible, ensuring, for example, that a wide range of expertise is available to the government throughout the process. In the process of attracting investments and FDIs into the host country, the objective of the negotiating team is to know what is wanted, and to get the maximum benefits that can be derived from the leveraging of its natural resources or other investment opportunities. To be broadly based and systematic, every negotiation preparation process should be intergovernmental and multi-disciplinary, and with input from the requisite community leaders where relevant. The team is charged with the responsibility of negotiating on behalf of the host government using the necessary tools, internal and external expertise, and international standards that promote good governance, sustainable development and modern environmental practices, while ensuring basic human rights, gender and youth equality, community development, social

Box 2.1: EITI Principles

The use of the Extractive Industries Transparency Initiative's (EITI's) guiding principles on fiscal issues and contract transparency (2023) can help strengthen a country's negotiating position. See Addendum 2 for more details on these principles.

and economic development. This must all take place within the ambit of domestic law.

2.1 Defining the scope of negotiations: the role of domestic law in the start-up, pre-negotiation phase

The first issue that officials should address is the scope and nature of the law(s) applicable to a negotiation with an investor in the sector involved. The range of applicable laws and regulations may set out who must be at the negotiating table, the scope of potential negotiations on different issues, especially fiscal, labour and environmental issues, and will set the baseline for ensuring the contract is consistent with the full scope of applicable laws. In short, applicable laws will help determine what is negotiable, and who will be involved in the negotiating process.

There are several types of laws that may have relevance to a contract negotiation in the natural resources sector, as follows.

- A general foreign investment law may contain provisions mandating certain steps in a negotiating and investment-making process. It could also set out incentives and stabilisation rights and obligations, and may indicate who must be involved in the negotiations.
- The national tax law may have requirements that are relevant for determining fiscal obligations that are negotiable and the role of the finance minister in any negotiation involving the fiscal regime. It could also set specific rules on taxes for the sector, including limits on incentives or other fiscal matters.
- A mining, oil or gas and land-use law may have specific requirements, including regarding royalties and other charges.
- An infrastructure or public procurement law (sometimes a public–private partnership (PPP) law) may set out requirements in that sector that might still apply for any infrastructure elements of a natural resource project.

- Environmental laws can have a large impact on the design of an investment, while also containing requirements for specific agreements.
- There may be environmental laws that are more specific, such as water-use and -quality laws. Many states are moving to have biodiversity and climate change laws in place, along with special protections for indigenous lands.
- Labour laws may impact the design and implementation of employment demands by the government.
- Immigration laws will apply to when foreign workers are to be admitted to the host country.
- There may be other laws that are also relevant.

The legal review needs to be holistic to ensure that the investment does not run counter to any extant law in the country.

Box 2.2: Papua New Guinea

In Papua New Guinea, the Resource Contracts Fiscal Stabilisation Act 2000, enables the government to negotiate certain types of stabilisation clauses, but also sets limits on negotiating them and prohibitions on negotiating certain incentives. It is a short Act of five sections, but is legally critical for negotiators to know, understand and apply.

Therefore, in addition to potentially defining at least some of the negotiating personnel, the applicable law may also be relevant to defining what may and may not be negotiated. These legal provisions must also be respected. For example, a mining law may allow negotiations with a potential investor to cover fiscal incentives if the investment in the mine is of a certain minimum size, but not if it is below that size. Or environmental impact assessment laws may require certain processes to be followed by all potential investors when the precise scope and technology for a project is fully known, and thus prevent the government from guaranteeing a transition by an investor from the exploration phase to the exploitation phase. This is an issue we return to specifically below. It is critical for the negotiating team to know what the scope of a negotiation can legally be, and the potential limits of any project, as early as possible in the process. This is

so the team can assess the project proposal, the options for the government in response, and the limits of any negotiation it can undertake.

In addition to knowing the full scope of the applicable laws and regulations, it is also important for the team to know if any international or bilateral treaties and conventions apply. These can range from international environmental agreements on using mercury in treating certain ores to tax treaties with complex tax implications for mining tax regimes.[6] International investment agreements may also be relevant to certain relationships between an investor and host state negotiating a contract, including for dispute settlement purposes. Government officials should, therefore, be equally aware of what treaties may potentially apply to their relationship with the investor before beginning any negotiations.

2.2 Indigenous Peoples

There are Indigenous Peoples in many parts of the Commonwealth. For example, in the Oceania region, Indigenous Peoples include but are not limited to the Polynesians, the Aboriginal Australians and the Papuans. In Canada, there are the First Nations, the Inuit and the Metis as the main indigenous groups in the country. In the Caribbean, the Tainos, the Caribs and the Arawaks are among recognised Indigenous Peoples. There are also numerous indigenous peoples in Asian regions. Canada, Australia and New Zealand have extensive laws and obligations in relation to natural resource projects taking place on or adjacent to indigenous lands and territories in terms of their impact on Indigenous Peoples.

In Africa, most African peoples are indigenous in the sense that they originate from the continent. However, in practice, an identity as an *Indigenous People* per the modern definition is more restrictive, and certainly not every African ethnic group claims identification under these terms. This has often made it more difficult for those groups and communities who do claim this recognition to have it applied by governments. Those who,

6 The Intergovernmental Forum on Mining (IGF) has just released a draft practice note on the role of tax treaties in mining that will be finalised in the next months. This can be tracked at: https://www.igfmining.org/financial-benefits/global-mining-tax-initiative/international-tax-treaties/

Checklist 2.1: Establishing the laws that apply to the proposal

	YES	NO	
Are there specific domestic laws that apply to the question of which ministries must be involved in the negotiation? At a minimum, verify the following laws and which ministry they may identify.			Ministry identified
• Foreign investment law			
• All fiscal laws			
• National procurement law			
• Environmental and social impact assessment and monitoring laws			
• Water laws			
• Constitutional land ownership laws			
• Land tenure/rights/ laws			
• Sectoral law (mining, petroleum, etc.)			
• Immigration laws			
• Labour laws			
• Subnational levels of government			
• Any laws identifying community or Indigenous Peoples' roles			
Are there any laws that set limits to what government officials may negotiate (for example, constitutional prohibitions of foreign ownership)? At a minimum verify:			Nature of limits on negotiations
• Foreign investment law			
• All fiscal laws			
• National procurement law			
• Environmental impact assessment and monitoring laws			
• Water laws			
• Land tenure/rights/ laws			That is, is there a legal mandated timeframe during which an investor may use the land? In some instances, land tenure prohibits granting of 50-year rights.
• Social and human rights impact assessment laws			
• Sectoral law (mining, petroleum, etc.)			
• Immigration laws			
• Labour laws			
• Subnational levels of government			
• Any laws identifying community or Indigenous Peoples roles and rights			

	YES	NO	
What laws and regulations will apply to the proposed project in terms of regulating the establishment and operation of the project?			Limits on negotiations:
• Foreign investment law			
• All fiscal laws			
• Tax revenue laws			
• National procurement law			
• Environmental impact assessment and monitoring laws			
• Water laws			
• Land tenure/rights/laws			
• Social and human rights impact assessment laws			
• Sectoral law (mining, petroleum, etc.)			
• Immigration laws			
• Labour laws			
• Subnational levels of government			
• Any laws identifying community or Indigenous Peoples roles			

by a variety of historical and environmental circumstances, have been placed outside of dominant state systems, and whose traditional practices and land claims often come into conflict with the objectives and policies implemented by governments, companies and surrounding dominant societies, are often the groups seen to claim this internationally protected status in all countries (Anaya, 2004).

The use of the term 'Indigenous Peoples' brings with it recognised international law rights set out in International Labour Organization (ILO) and UN instruments, the most important being the UN Declaration on the Rights of Indigenous Peoples (UNPFII, no date).[7] States and investors must comply with these rights, highlighted by the principle of free, prior and informed consent (FPIC), in relation to natural resource projects. We will not enter here into a discussion of the definition of 'Indigenous Peoples' or their rights and remedies. It is an extensive subject. For present purposes, it is sufficient to clearly highlight this as an issue that governments and investors must, in relevant circumstances, address.

The term 'Indigenous People' should not be used interchangeably with 'community'. 'Communities' are a group

7 The UN Declaration on the Rights of Indigenous Peoples has a specific list of tribes and peoples that are designated as indigenous.

of persons living together in a specific location, such as a town, clan, village or city. 'Indigenous Peoples', also referred to as 'first people', 'aboriginal people' or 'native people', are culturally distinct ethnic groups who are native to a particular place. Peoples are usually described as being 'indigenous' when they maintain aspects of an early culture that is associated with a given region.

In Commonwealth countries, care must be taken to protect Indigenous Persons and their tribal lands, to ensure that they are fully engaged in the process and that the agreement, while promoting development, also ensures that their cultural heritage is preserved. The protection of Indigenous Peoples in countries where they are recognised should be operationalised in the negotiations through the incorporation of principles and terms that facilitate the preservation of their interests.

Checklist 2.2: Indigenous Peoples

Are there Indigenous Peoples in the area of the project?	
If so, who represents them for interactions with the government or economic actors?	
Has an assessment been carried out of the impacts of the proposed project on Indigenous Peoples, their lands and waters, and their cultural heritage? • Have they been consulted in this process? • Have they been given the opportunity to review and comment on any reports?	
What government agency is designated to lead interactions with Indigenous Peoples? • Have they been notified and engaged?	

2.3 Building a negotiating team

Before building a negotiation team, one needs to understand the purpose of the team. Each negotiation must reflect the development agenda of the government and must be inclusive. This means 'inclusive' with respect to factors such as gender and reflecting all aspects of development including employment, infrastructure development, education, health and sanitation, to name a few. In addition, the negotiating team must bring to the table the best expertise available within the government to succeed at the task at hand. When positions on the negotiating team are being considered, it is important to focus on the expertise needed and not simply on the title or ministry an official comes with. This is especially so when, as will generally

be the case, a minister personally will not be participating but delegating the ministry role. In short, the negotiating team must reflect the breadth of issues likely to be involved in the negotiation, and the skills and expertise needed to address these issues.

The importance of a cohesive and inclusive intergovernmental team that will evaluate and ultimately negotiate an agreement that is fully in keeping with the government's social, economic and development goals cannot be overstated. The advantages of such a team are obvious – the country will benefit from its extractive resource development, the government will benefit from increased fiscal revenues that can be used to support sustainable development, and the people will benefit from the prosperity of their country. On the other hand, a disunified or non-inclusive team risks undermining the potential economic, social and financial benefits to the country. If one minister feels that fiscal benefits to the country are too low, he/she can undermine and undercut the inflows of FDI into the country. If another minister feels the protections on the country's watersheds and mangroves are too restrictive, she/he can undermine the environmental protection efforts of the country if that minister is not represented. If any minister does not understand community rights or the rights of the Indigenous Peoples, he or she can undermine the long-term stability of the project – as communities and Indigenous Peoples might continuously disrupt and stall works. Therefore, it is important that every member of the team understands and respects the laws, regulations and national objectives, while working together in a cohesive manner and as a single unit in the negotiation of sustainable, long-term, extractive contracts.

Therefore, for extractive industries, and more generically for all sectors, a government should build a negotiating team that will interact directly with the investor on behalf of the government. That team should include:

a. the Ministry of Justice (preferably the Attorney-General's (AG's) office) as the highest legal authority in the land, along with competent legal drafters;

b. the Ministry of Finance as the authority on financial matters;

c. the National Revenue Authority as the authority on managing the fiscal regime and collecting taxes;

d. the minister responsible for investments, as the legal authority on investment incentives and possible investment contracts;

e. the Ministry of Mines – if the project involves mining;

f. the Ministry of Petroleum – if the project involves petroleum;

g. the Ministry of Land – as the authority on the land mass is being discussed;

h. the Ministry of State – as the representative of the highest office (President);

i. the minister of internal or development affairs, as the representative of communities, Indigenous Persons, etc. – if the project impacts Indigenous People or communities;

j. the Ministry of Environment (and the Ministry of Water when separate); and/or

k. Any other ministry or department as necessary.

There may be additional ministers that, by law, must be included in any negotiations. There may also be additional support from a technical committee that the negotiating team can draw upon, but where all the members of the technical committee may not be on the negotiating team (see Section 2.2.1).

This list assumes that there are separate ministers for each department, which is not always the case. For example, in many jurisdictions, the Tax and Revenue Authority is embedded within the Ministry of Finance, while the Ministry of Lands may be responsible for the environment. Hence the team should reflect government ministries directly involved with the project.

It is the role of this team to adequately reflect an intergovernmental position and negotiate an investor/state agreement in the best interests of the host country. Therefore, the final composition of the team will be determined by the specifics of any given investment process. The most apolitical way to phrase the question is simply, what is the composition of the team that will be best placed to deliver the results needed by the government and country as a whole?

It should also be noted that the negotiating team need not be static. As more information is processed, it may be necessary to add more representative ministries. It may also be that some expected expertise is not needed – so some officials can be dropped from the process. For example, if the environmental impact assessment and management plan are statute-based and outside the negotiation, a participant from the environmental department may have a liaison role or could play more of an assurance role in the negotiating team, as opposed to taking a more active position.

Team leadership is a further issue. Domestic law may identify who the lead negotiator is or should be designated by. When such legislation exists, the lead negotiator will be so identified. In some states, there are established investment or procurement laws detailing the processes to be followed based on project

Box 2.3: Sample legislation mandating the establishment of a negotiation team for concession agreements (long term agreements)

Composition of the Inter-Ministerial Concessions Committee

The Inter-Ministerial Concessions Committee for a particular Concession shall consist of nine (9) persons constituted on an ad hoc basis as required in accordance with subsection (3) of this Section. Any reference to 'the Inter-Ministerial Concessions Committee' with respect to a specific Concession means the Inter-Ministerial Concessions Committee as constituted for that Concession.

Within fourteen (14) days after notice of approval of the evaluation report by the Inter-Ministerial Concessions Committee pursuant to clause (a) or (b) of subsection (1) of this Section, the President shall appoint a Negotiation Team upon a recommendation of the IMCC for the conduct of the negotiations with the highest ranked bidder. Each Negotiation Team shall consist of the Head of the Concession Entity, the chairperson of the National Investment Commission, the Minister of Justice, the Minister of Finance, and three Persons designated by the President, two of whom shall be Cabinet members. The chairperson of a Negotiation Team shall be a Cabinet member designated by the President. Each Negotiation Team will report to and will be responsible to the President.

(6) Each Negotiation Team shall organise a technical committee to support its work. The team shall include qualified Government employees and relevant qualified legal and technical advisers (who may include paid or pro bono international advisers) retained in accordance with Section 78 of this Act.

Source: Excerpted from Public Procurement Act, as amended 2010, Liberia[1]

1 Amendment and Restatement of the Public Procurement and Concessions Act, 2005 (2010), Republic of Liberia.

type, size and other variables. If the natural resources project fits within such legislation, the lead negotiator will be clear.

If domestic law does not contain such provisions, then it will be up to the lead minister – the prime minister or the president – depending on the political structures in any given country, to appoint the lead negotiator. While it is unusual, it is possible that a person who is not a sitting government official may be appointed as the lead negotiator. When this is the case, it is important for the person to have a constructive reputation that crosses political divisions and partisan politics, to avoid a sense of the position and the process being politicised or being used for partisan political purposes. The lead negotiator should have no vested interest in the mining project or vis à vis any other project that may be related to it. The lead negotiator should be someone who is widely respected for her or his skill

Checklist 2.3: Who is on the negotiating team?

Have all the laws been reviewed to ensure all legal requirements are met? If so, who is designated by law to be on the team? • Is the lead negotiator designated by law?	Ministries designated:
Is the sectoral minister on the team? That is, the minister of mines or petroleum?	Name:
Are there significant social and environmental issues likely to need relevant ministries on the team? If so, which?	Names:
Is there a need for Indigenous Peoples' participation or local community participation? If so, who? • If not, who will be charged with representing these interests?	Names:
Are all the skills needed in the negotiation reflected in the team members? If not, what other skills are needed? Examples include the following. • Legal: drafting, international law, domestic law • Economic: investment law, national development agenda • Economic: project modelling, fiscal issues • Technical: geological and extraction technologies • Environmental: national environment laws, management • Others (specify):	Name: (Experience) _____ Y/N _____ Y/N _____ Y/N _____ Y/N _____ Y/N
Are the additional skills needed available inside government? If so, who has these skills? If not, where can they be obtained?	Names:
Does the team have access to requisite tools? • Is there an economic model to support the evaluation of proposals and developing counter positions?	Y/N
Who will be responsible for ongoing reviews of negotiating team needs and ensuring these are met on an ongoing basis?	Name:

and leadership capacity, which can lead to widespread support for the project when the negotiation is completed. The lead should also be aware of the overall development goals of the government and how the project may support them.

2.3.1 Technical committee

In many cases, the government should consider establishing a technical committee to support the negotiating team. This technical committee should consist of at least one member each of the ministries on the negotiating team, with a strong focus on the technical expertise needed to review and understand proposals, build negotiating positions, and create clear and cohesive national negotiating goals.

In addition, and where relevant, at least one member representing the communities of the affected areas and a representative of a civil society organisation (CSO) with expertise that is relevant to the type of investment concerned may be included. This is relevant especially in the instance were community lands and social interests are likely to be affected. This will provide transparency and build stakeholder confidence in the process. Additionally, the inclusion of at least one community representative will allow a smoother process and avoid the likelihood of the community rebelling against the government and/or the investor on the basis of them either not being aware of the project or outright rejecting it.

It may also be important to have Indigenous Peoples' participation in the negotiating or technical committee, as already noted above. This will depend on the nature of their interest in the project, where relevant.

It is the objective of the all-inclusive government negotiating team to bring a total level of expertise and knowledge to the team. In some instances, this can be done through the combined skills of the negotiating team and the technical committee. While appointments on the negotiating team will reflect a mix of skills, and may have some political overtones at times, the technical committee should be based purely on knowledge and skills.

The technical committee may also be slightly different from the negotiating team. For example, while the team may be considering a mining proposal, there may be port or railway

components to the project that also need to be addressed, making a member of the team with thorough knowledge of domestic ports, rail and related matters important. But it may not be necessary to have these skills on the actual negotiating team.

Since the committee is (or at least should be) apolitical and comprises members with technical expertise (such as surveyors, engineers and technology experts), as well as lawyers and financial, economic, environmental and investment experts who specialise in the relevant sector, each respective member should be well versed in his or her area of expertise, as well as bringing expertise in each area of domestic law and regulations. For example, financial and economic experts will bring financial and fiscal modelling tools that are useful for the evaluation of the cashflow, what the government will receive, and other factors over the life of the project. They should also understand applicable fiscal laws and regimes. Note, economic and financial models differ for different types of extractive projects – for example, with production share agreements where government participation is involved or with mining projects where government freehold interests are proposed.

In addition to individual proficiencies, collective efficiencies and skillsets relating to negotiation, a thorough understanding of international mining or oil and gas trends, international environmental trends and so on are necessary. Knowing about and understanding these trends is important, but knowing how to relate the trends to the national context and the specific attributes of the project is even more important.

The technical committee can be broader than the negotiating team, but should at least include all ministries on the negotiating team. The checklist on the negotiating team (Checklist 2.3) can help inform the formation of the technical committee.

2.3.2 Assessing the need for external support

In addition to identifying government officials for the team, we have already signalled the need for the government to undertake an assessment of gaps in government resources and expertise, and what domestic or external resources may be needed to fill these gaps. In many instances, it has been observed that governments seek such external support from international

organisations, development non-governmental organisations (NGOs) and other agencies very late in the day, often just before a negotiation is being convened. There is no shortage of organisations willing to provide such support (see Addendum 3). Indeed, this is the 'sexy' part of the process and finding support for the negotiation process is relatively easy as a result. However, there is a high risk that getting external support just at the negotiation stage is 'too late in the day'. Rather, it is highly recommended that an analysis of what support is needed be done as early as possible in relation to any possible proposal, so that expertise can be brought in early enough to support defining all the issues, analysing all the financial, environmental and geological data, understanding the potential for maximising economic linkages and so on. In short, the earlier this is done, the better.

It is also worth noting that many development agencies will also provide this support early in the process when asked. Otherwise, governments can purchase this support through professional financial, consulting, legal and other sources. It is critical to understand here that governments of all levels of national development seek outside support in complex negotiations. Doing so is not a mark against the government, but rather an indication of its seriousness in seeking to achieve the best deal possible from a long-term perspective.

It is equally important to understand that seeking such expertise is part of the government's own investment in the success of the project. Whether support is provided on a *pro bono* basis or a fee-for-service basis, the investment by the government can return the costs many times over. In the fiscal sphere, for example, financial modelling skills can identify optimal tax and royalty benefits for the government. A modeller can also help avoid giving unnecessary tax incentives that may result in companies not paying hundreds of millions of dollars in taxes or royalties when the project could have gone ahead without giving such incentives. Literally, a government investment of US$0.5–1 million in necessary expertise can lead to hundreds of millions in extra financial returns and lowered environmental liabilities for the government over the life of a project. Of course, we are aware that resources to invest in a negotiation are not always available. Here, again, if a government acts swiftly enough with the resources it has available inside government, it can almost

always find the institutions that are able to provide the external support it needs early in the process.

A key area of concern is often assistance with the review of complicated financial models and financing plans that accompany, or should accompany, a complete proposal. Local accounting and transactional firms might have the expertise and can be used as resources for a smaller fee than leading international firms. International expertise in more complex contexts may be needed. Building in-house expertise is also possible.

Legal expertise and senior negotiating skills may also be needed in some cases. These skills are often more accessible than economic and finance expertise, which can be quite specific to a certain mineral or metals or to certain sources of oil and gas.

The need for external expertise is often especially acute for developing countries that have either just started entering into long-term agreements – including PPPs, joint ventures, production sharing agreements or concession agreements – in the resource sectors or are renegotiating older long-term agreements. There are also instances where governments may only expect to negotiate one or two such contracts, such that the time and costs of building internal expertise would outstrip the costs of buying in the needed expertise. Again, governments should see resources used in this context as a long-term investment that will, if made early and effectively, lead to a return that can be 100 or more times the actual investment over the term of the project.

Box 2.4: The OECD's Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations

In 2017, the OECD developed a contract template and other tools to engage external support in complex extractive contract negotiations. This guidance provides more detail than it is possible to include here on this issue, as well as a useful template for securing quality external advisers. The scope of assistance reviewed by the OECD includes geological, engineering and industry (sometimes mineral-specific) knowledge, and financial, environmental and legal expertise.

A key factor identified in the OECD's guidance is the need for external experts to work with government officials to help build longer-term expertise within government. This is a critical part of the relationship with any external advisers and is well set out in the template.

Source: OECD (2017)

Checklist 2.4: Assessing the need for external support

Are all the skills needed for this negotiation available to government? • What are the criteria for assessing and identifying the requisite skills needed? • What is the scope of the negotiation likely to be? • What factors will help determine the government's position? • How much fiscal negotiation will be involved? • How much will domestic law be relied upon? • For the skills needed, do we have senior people available? Or junior people? • Do we need to train people in-house before the process starts?	
For the skills we need and do not have, where can they be found? • In other sectors in government? • In academia or the private sector? • External sources: international development agencies? • External sources: paid consultants? • External sources: civil society organisations with relevant expertise?	
Have we considered potential conflicts of interest regarding the external organisations?	
Are the costs of such services within reach or must pro bono services be found? • If the latter, what options or sources are available for these specific services?	
What methodology and training will ensure adequate transfer of knowledge and capacity building to mid-career and younger staff for the next negotiation? • What is the process for identifying appropriate mentees/trainees across government?	
Will the service providers agree to include training and skills development for the negotiating team or specific individuals? • Does the engagement arrangement provide for training and skills/knowledge transfer? • Will this training include ongoing briefings and post-negotiating session briefings? • Will it include on-the-job shadowing and training?	

Where a government decides external support can be helpful, it is useful to ensure, as noted in the OECD Guidance, that part of the mandate from the support providers should be the training of government officials to negotiate contracts. Whether the task is financial modelling, environmental management, closure planning and financing (critical in natural resource investments), legal drafting or more generalised negotiating expertise, all of the skills and knowledge being sought outside government can be used to develop skills and knowledge inside government. This is with a view to not only building capacity

in a specific negotiation, but also to transferring and improving skillsets government-wide in other similar contexts. Agreements with such service providers should expressly include training and debriefing sessions to transmit as much information as possible to government officials, to be built on in future negotiation processes.

Outside of any specific negotiation, governments should also consider continuous training and upgrading of skills as changes caused by improved technology, methodologies and global frameworks in the extractives industry occur. An approach that considers ongoing training needs can improve the skillsets of negotiators for all the negotiations a country may undertake. With the growth of various in-person, online and hybrid training webinars over the past decade, legal and financial skillsets can be more easily realised. For such a strategy to work, however, governments must also provide opportunities for officials to remain engaged in negotiations for more extended periods of time than they would usually spend in any given position.

2.4 Reviewing the proposal by the technical committee

One of the first substantive roles of the technical committee is to review the proposal of the potential investor. (For clarity, in this context we use the term 'proposal' to mean the generic proposal described in the information documents provided by the potential investor, as opposed to a draft proposed contract, though a draft contract might be one of the documents the investor provides.) This includes a factual review of the investor proposal, including analysis of its contents for basic information including financial viability, fiscal benefits to government, benefits to communities, social challenges triggered by the potential project, and the overall net benefits or negative impacts of the proposed project. In short, technical committee must provide a comprehensive technical analysis of the company's proposal from the government perspective. And in so doing, the review of the proposal must meet three key thresholds.

1. Was this proposal presented in accordance with the government's procurement laws; that is, did it follow a

public bidding process or was the proposal submitted unsolicited?

2. Does this proposal meet the guidelines, if any, as set by the investment and other relevant laws for long-term contracts?
3. Is the proposal in conformity with the relevant laws and, if not, what if any are the areas of potential conflicting objectives – for example, the environment and local content.

As discussed below, an in-depth review of the proposal then would follow these initial baseline reviews. The technical committee must also undertake a proper review of the investor itself. Who is the investor? What is its history elsewhere? What are its tax and fiscal practices? What are its environmental and social records? And so on. Also critical is the need to know who the beneficial owner of the investment would be, not just a possible paper company that is a shield for the actual owner. It is also incumbent on the government to ensure that the source of funds is legal and legitimate, and that the investment is not being used as a vehicle to launder money.

There must be a clear understanding and agreement among the technical committee (and then with the negotiating team) with respect to the viability of the proposal. As noted, this needs to be ascertained as early as possible in the process to avoid wasting valuable time, as well as to provide the opportunity to the investor to either alter or withdraw the proposal. The goal at this stage is not final approval or legal acceptance of the project. Rather, it is to understand whether there is a sound basis to begin the detailed analysis, legal and negotiating work necessary to reach the stages of final approval and acceptance.

This section of the handbook, with its issue-specific subsections, reflects the reality that this stage of work is, undoubtedly, the most difficult and longest aspect of the negotiation process. It cannot be over-emphasised that contract signing and implementation depends on the successful negotiation of the agreement with mutual benefits to the parties involved. Careful and clear analysis and understanding of the core issues is paramount to the long-term success of any agreement. Preparations are at the core of all aspects of the negotiations and centre around the evaluation of the proposals and the recommendations for the contract.

Best practices and standards may change periodically. But at the core of all successfully negotiated long-term contracts are fundamental and in-depth knowledge and understanding of the needs, wants and expectations of the parties involved. In an effort to attract foreign direct investment and development partners, governments may well yield to political requests for the development of natural resources in specific areas of the country. However, there may be times when it is in the best interests of the country not to develop a resource; for example, when the exploitation of a tropical forest area is requested, where there is an abundance of endangered flora or fauna; or where the environmental impact would outweigh the benefits of the project. Otherwise, the economics may not be viable; for example, in the case of iron ore when the iron content is so low relative to the market price that exploitation does not make economic sense. Or one may find an investor who at face value appears to have all the right answers, but with just a little due diligence is found to be quite unsuitable and deficient is several key areas such as management, financial control and/or performance. In reviewing the viability of a proposal, the technical committee should endeavour to strike a reasonable balance between the economic, social and environmental dimensions of the proposed project, taking into account the local context in which the project will be carried out.

Therefore, as emphasised above, the successful execution of the contract depends on the preparation and full understanding

Box 2.5: Technical committee must determine the overall viability of the project

The initial review by the technical committee should determine if the project is financially, environmentally, technically and socially viable. All these issues are highly relevant today. If, for example, a major natural resource project cannot secure a social licence to operate from the local communities or Indigenous Peoples it affects, the project is unlikely to ever succeed. A notable example is the South Korean company Daewoo's failure to get a social licence to begin and operate a project in Madagascar, which ultimately brought down the entire government (Andrianirina Ratsialonana et al, 2021). We have also seen multiple international arbitrations concerning projects that were never socially and/or environmentally viable, but the governments involved did not say so early enough in the process and thus did not terminate the investment making process at the earliest opportunity (Beharry & Kuritzky, 2015). Delays like this allow a potential investor to build up legalised expectations of being able to proceed. In some cases, investors have won more than US$1 billion in damages as a result of the final determination that the project cannot go forward.

of the project, the people involved, and their objectives and expectations. Having reviewed the proposal, recommendations should be made to the negotiating team for review, bearing in mind the following questions.

- Is the proposal in the best interests of the country?
- Can appropriate government goals be set out in relation to the proposal to maximise its economic and social development benefits, while minimising its potential negative impacts?
- If the project is generally seen to be promising, the next steps will involve establishing the government's goals in relation to the project. This is the final section of this part on pre-negotiations.

2.4.1 Reviewing the proposal in detail

Once the negotiating team and technical committees are established, an initial meeting should be held to begin the review of the proposal. This will incorporate the initial work already discussed, determining what laws apply and the impact of those laws. The first step in the review will be to set a timeline for completing reviewing all the proposed project documents. This is necessary to avoid any long delays or extenuating circumstances that may affect the project unduly. The timeline should reflect the complexity of the project and any legal obligations that may need to be completed before moving on to a detailed assessment of specific issues. For example, what are the environmental assessment obligations, when must they be completed, and by whom?

The key issues at this stage include the following.

- Creating an overview of the project proposal.
- Determining, as an initial matter, if the project is viable and attractive and, if so, why.
- Determining if there any obvious barriers to the project.
- Deciding if the financial analysis of the project is valid. For example, is there a robust model with it? Do the assumptions seem fair? What, if any, are the issues?

Checklist 2.5: Proposal overview

Technical	Brief notes
What is the natural resource? • Gold, iron ore, silver, coal, green energy mineral and metals, etc. • Are there secondary minerals also? • Oil, natural gas, shale gas?	
What is the proposed technology for the project? • Is the technology new or well-known and widely used? • Is the technology financially viable? • Does it fit with the environment? • Does it minimise risks? • Does it maximise production?	
Is it a brownfield project or an ongoing operation being taken over? If yes, do the requisite data exist to understand the history of the site and prior project/investment? • What is the reason for the turnover to a new owner/investor? • What is the current status of the operation of the project – active or inactive? • Did the previous company have financial difficulties? If so, why? • What, if any, are the outstanding obligations to the government? To financial institutions? To other creditors? • What are community relations like around the project? Do they present major hurdles? • What are the outstanding environmental obligations or conditions? • Has the project been profitable in the past?	
Is the project in transition from exploration to exploitation? • If so, has the line ministry collated the data to have a sense of the life of the mine, quality of resource, etc.? • Are the exploration data available to the government and verifiable? • Has an environmental and social impact assessment (ESIA) for exploitation been carried out and approved? • What are the local community's views on exploitation?	
In a greenfield operation, the team must rely on qualitative and quantitative information from the mining department and the project proponent/investor. • What is the economic value of that resource or project? • Is the area in question part of an area designated for resource exploitation in any national development plan? • What other economic activity currently takes place in the area? • Does Infrastructure exist? If not, outline the requirements, if any.	
Financial	(See also feasibility study checklist, below)
• What is the economic value of that resource or project?	
• What is the estimated government share of this value?	
• Is the investor seeking any tax or other incentives?	

• Are the fiscal and financial elements consistent with the applicable law (including percentage of debt)?	
• Does the proponent have a sound financial record?	
Environmental	
• What is the environmental condition of the site?	
• What are the environmental concerns around the proposal, if any? – Of the government? – Of the community? – Of Indigenous Peoples?	
• Has the proponent produced a preliminary or complete environmental impact assessment (EIA) and environmental management plan (EMP)? If so, have they been approved by government authorities?	
• Have climate change resilience and adaptation, and water access, been fully addressed in their planning?	
Social	
• What are community relations like around the project? Do they present a major hurdle?	
• What are the related potential economic and social development values/impacts of the project?	
• Have local employment and local business participation in the project been considered?	
• Has downstream business promotion been considered or is the project only for export?	
• Has gender equity been considered?	
• Have youth issues been considered?	
• Have other human rights issues been considered?	

- Carrying out a fiscal analysis. That is, asking if the fiscal assumptions in the financial model are realistic? Do the parameters match the government's current fiscal regime?
- Determining what the total fiscal benefits to government are under various project profitability scenarios?
- Deciding if, compared to the proposed investment and size of the project, the project proposes a reasonable sharing of the benefits.
- Asking, are there obvious environmental risks?
- Asking, are there any obvious social issues?
- Determining if there is sufficient infrastructure available?

The precise issues and level of detail will vary project to project based on the nature of the project, the location, technology, proximity to communities and environmental features, the amount of the investment, and so on. So no single checklist prepared in advance can account for all the issues and possible screening questions. Nonetheless, Checklist 2.5 should help avoid major gaps. We begin with an overview and then look at how to drill down on some key issues. As the analysis increases in seriousness and if negotiations do in fact begin, further and more detailed work will be required on many of these same issues.

Feasibility studies, business plans and financing proposals

Obviously, the economics of a project are critical. Is it financially viable? What are the major financial risks? Who will underwrite those risks? And so on. The project proponent should have already collected a significant amount of information on these issues. That information needs to be shared with the government.

A note of caution here: for many years, it was widely known among large foreign investors that the financial documents they provided to a government were part of 'the sell'. Prospective investors would inflate good numbers and bury bad ones, producing the most optimistic possible picture of the potential investment, and the level of government financial benefits in taxes or royalties. Governments simply accepted the numbers as presented. But the investors often had a second set of numbers behind these proposals that were purely internal and told 'the truth' about their expectations. With this practice well known today, it is important for governments to do two things in relation to the financial proposals and supporting information they get from the investor. One is to verify as much as they can independently. The second is to make sure their domestic law deems it a legal offence to fraudulently provide incorrect numbers to the government in the making of an investment. This notion is now well accepted in international investment law that investments cannot be made legally through fraud. It is perfectly legitimate for governments to ensure the same result in their domestic law.[8]

8 As one clear example, the Canada–EU Comprehensive Economic and Trade Agreement (CETA) makes this clear.

Economic feasibility studies are a key factor in the initial proposal analysis. It is here that the economic viability of the project is established and the economic value for each partner is formed. These studies may or may not include the social and environmental challenges that could undermine the viability of the project, but for present purposes we separate out this issue here. Feasibility studies are the fundamental basis for business plans that include the financing and funding aspects of the project.

The financing plan is essential. Governments must know who is paying for the project in terms of capital and equity, who is financing debt, and what is the proportion of each. Many countries, for example, require minimum percentages of equity investment for qualified foreign investments and have limits on debt financing for tax purposes. These are critical questions relating to the financial security of the investor, the project and the fiscal regime. Knowing the identity of the equity owner and financing agency is equally critical for operational and negotiating reasons, as well as for preventing corruption and money laundering.

The fiscal plan addresses the amount of revenues the government can expect from a project. This is critical information for the government. In many cases, the country's applicable tax, investment, mining, petroleum or other laws will set out the fiscal regime. However, there are still many instances where governments agree to negotiate different rules for individual investors. When the government does allow negotiations on the fiscal regime, it must do so very carefully. It must ensure that it is not giving away tax incentives for no good purpose – to attract an investment that would be made anyway, for example (IGF, 2020) – and is not offering to stabilise all applicable laws, fiscal and non-fiscal.[9] These are complex issues in many cases and there is a need for governments to act prudently and to be limited by legislation in the fiscal terms they can negotiate, if entering into such negotiations.

Environmental impact assessment and management

It is critical for an initial assessment to contain some evaluation of the environmental issues associated with the proposed project. Is the project area in or near a national park, for

9 OECD (2017: Principles VII and VIII); Aizawa and Mann (2021: Section 5.5).

Checklist 2.6: Feasibility study

What are the proposed phases of the project?	
• Is the project beginning at the first phase (greenfield) or taking over at some other stage?	
In particular in the natural resource sector, has the investor had, or is it a current holder of, an exploration license or permit? • If so, has that phase been fully reported on? • Have the reports substantiated the feasibility of the project? • Are the reports independently verifiable? • Are renewals for an exploration period being proposed or sought? If so, why?	
What is the term proposed for the project? • Are there any renewals being proposed? • Is the project in line with applicable law?	
Are the financial projections based on independently verified assumptions as to costs and value of the production? • Financial analysis of the project: does the financial plan appear to be in line with the proposed project? • Are the costs based on industry standard costings? • Are there projections to illustrative the impact of various levels of costs on project profitability and government revenue? • Are the projected sales prices based on independent sources? • Are the sales prices tied to market values or pre-sold buyers? • Are the prices based on 'arm's length' pricing values? • Are any sales tied to the repayment of loans in kind, which can impact government revenues? • Are there projections to illustrative the impact of various levels of costs on project profitability and government revenue?	
Financing plan: review of feasibility study or business plan as presented by the investor. • What is the debt–equity ratio for financing the project? • Is it in line with comparable projects/industry standards? • What impact/risk does the debt–equity ratio represent? • Who is proposed as the financing company or companies? • Is the financing arm's length or within the MNE corporate structure? • Are there any fiscal incentives being asked for by the investor in the financing proposal? • How will any state participation be funded?	

Fiscal assumptions: What are the assumptions made on the fiscal regime? Are there specific tax rates being proposed?
• Is the fiscal regime in the proposal in accordance with applicable law? If not, where does it differ?
• What is/are the applicable royalty rates?
  – Do they differ from the applicable law?
  – If so, why?
• What are the applicable tax rates versus the rates proposed?
• Are tax holidays or other incentives being sought?
  – If so, what is the amount of these incentives in practice?
  – What revenue will the government forego?
  – Are these incentives needed?
• Are there any fiscal stabilisation elements being proposed?
  – If so, what is the nature of the stabilisation? Does it cover fiscal issues only or non-fiscal issues also?
  – How broad and how long are the stabilisation elements?
  – Are these needed?
  – Are they reciprocal in nature?
  – What revenue will the government forego?	

Does the applicable law (investment, tax, mining, etc.) allow incentives to be given? • If not, is the proponent requesting them? • If not, is the government still offering any?	

Government revenues: What is the overall level of government revenue from the project?
• What is the timing of government revenues?
• When are material revenues expected? For example, year 5 versus year 15?
• Are there years when government revenue will be zero or minimal? Under what conditions could this arise?
• What is the projected total government revenue from the project?
  – How does this change under different project profitability levels?
  – Is it a reasonable share?
  – Is it achievable?	

Are additional elements, such as government shares or production sharing, being offered? • If so, what are the terms? Are they comparable to other projects of similar nature? How will these be monetised? • Will the government have sufficient votes on a board to monetise its shareholdings? If not, what guarantees of dividends are offered?	

example? If so, does this mean the project is simply not viable? Many countries prohibit mining and oil and gas projects in national parks or next to them, be it marine parks or land-based parks. Is the project area near a large population or waterways that are critical to local communities? Is biodiversity at risk? Is the proposed project likely to contribute to greenhouse gas (GHG) emissions? Will it be resilient to climate change events?

How will eventual project closure be managed? These are all critical questions that require some explanation, even at the earliest stages of project development.

An environmental impact assessment (EIA) is usually mandatory for large projects. This will then be accompanied by an environmental management plan (EMP). In both cases, it is very important for government officials to ensure the independence and integrity of these processes is maintained in the early review and negotiation process. A growing number of international arbitrations are arising from this very issue.

Planning the transition from exploration to exploitation is also a key issue for investors, governments and communities alike, as discussed separately below. Investors may seek absolute guarantees for this transition. However, governments cannot approve an EIA until the precise results are known from the exploration phase; the scale, location and technology for a potential project also needs to be known before EIA approval.

Checklist 2.7: Environmental checklist, project overview

Does an EIA report exist? • If so, has it been independently verified or approved by government in accordance with applicable law? • If not in existence or not approved, what is the plan for doing this?	
Is there an existing environmental management plan? • If so, has it been approved by government in accordance with the law? • If not in existence or not approved, what is the plan for doing this?	
How is the technology being applied in the EIA? • How is waste being managed? For example, tailings from mining?	
Is the project design climate resilient? • Has the proponent set out a climate change management plan for emissions? • Are the construction and engineering climate resilient in cases of extreme weather events?	
Are there nearby waterways that must be protected?	
Are there national parks or nature reserve areas that need protection or will limit the project?	
How are downstream communities being protected?	
Has the environment ministry undertaken a thorough review of the project? If not, when will it do so?	
How will applicable law (on the environment) interact with the investor's proposed processes? Has the investor been consistent with the law in its proposal or does it seek changes in the law for this project?	

A related question is whether all the legal requisites, including environmental and social impact assessment (EISA) reports and assessments, have been met? Alternatively, depending on the timing, there may be specific undertakings on how the legal requisites will be fulfilled, while ensuring that the government maintains all its legal rights of approval. This is an indication of the ability of the investor to keep reports and requisites current in accordance with local and domestic ordinances and laws, and of the investor's intention to comply with the law or to seek certain 'workarounds'. It should be noted here that the EISA report is one of the most significant reports that can be carried out, because it covers all the aspects of the environmental and social impact of the project. Whether it is comprehensive or just a 'boiler plate' report will highlight he commitment of the investor to both social and environmental issues. Multinational

Checklist 2.8: Social and economic development checklist

Has the project proponent engaged in consultations with local communities? • If yes, what were the results? • In not, why not? What is the plan for initial consultations?	
What communities are impacted by the project, negatively and/or positively? • What is the scope of private land, communal land and public land impacted?	
Are communities of Indigenous Peoples impacted in any way? • Is the project on or will it impact Indigenous Peoples' lands? • Are there historic or cultural areas potentially impacted? • Are plans for economic benefits being designed to include Indigenous Peoples? • What plans are there for consultations with Indigenous Peoples?	
What are the negative impacts? • What is the community reaction to them? • Are they manageable and remediable?	
What are the positive impacts foreseen? • Are they realistic?	
How does the project proponent propose to address gender issues?	
What potential economic linkages are proposed? • What are the employment dimensions? • Will other local employment be displaced? • What are the local purchasing dimensions? • Are there downstream economic benefits?	
What are the potential impacts on other local economic activity, like agriculture and artisanal and small-scale mining (ASM)?	

companies with established programmes will commission very detailed reports.

Social and community development impact plan

Local communities can stop projects in their tracks. Factoring in the needs and goals of local communities is, therefore, a critical part of the early assessment process. This can be difficult when communities are not homogenous, but the need to engage remains despite potential divisions.

Community issues range from preventing social and environmental harm, to leveraging the proposed project to maximise its social and economic development benefits. In some instances, the risk of harm may simply outweigh any potential benefits. In other cases, careful balancing may be needed and special conditions applied to the project. The initial overview should flag the potential for critical issues, and whether there are ways to address them in the negotiations and in the necessary consultations with local communities.

Infrastructure

A key challenge for any natural resource project, and many other large-scale projects, is evaluating the infrastructure needs. This includes energy, transportation, water and sewage, and waste management needs, along with communications and other requirements. It is critical to understand the infrastructure needs of the project and what impacts these might have, as well as what opportunities new infrastructure might lead to. For example, if the project will support green energy sources or develop high-speed internet access, can these be shared with the local community?

Checklist 2.9: Infrastructure checklist

Does the project require new infrastructure? • If not, will existing infrastructure be able to manage all the project needs? • If so, who will provide it, the government or the proponent? **How will it be financed?** • Will others have access to this infrastructure?	
What are the environmental and social risks associated with the new infrastructure? • Will it be climate resilient? • Will it be GHG emitting? • How will it impact local economic activity?	

2.5 The special case of exploration proposals

Exploration proposals create a unique set of issues. Most critical among these is managing the transition from exploration to exploitation. This transition has become the central issue in multiple international arbitrations, primarily when governments have had to stop projects proceeding after the exploration phase because the exploitation would create environmental and/or social consequences or risks that are unacceptable. At the same time, many investors seeking exploration rights may demand an automatic transition to exploitation in the event the exploration process is successful. The key issue here is to establish clear conditions in the relevant statute for the transition to exploitation. This then means both the government and the investor can have legitimate expectations that the project will transition to exploitation where those conditions are met.

In some instances, such as offshore oil exploration, it is possible for governments to pre-clear potential exploitation as the location and general approach to exploitation is well known, provided that this pre-clearing follows established conditions for the transition to exploitation. Governments can open certain areas for exploration and exploitation by conducting necessary environmental and social assessments in advance with a fair degree of certainty as to the results of any exploitation process. But in other cases, this cannot be done (in most instances of mining, for example) as the actual locations, risks and benefits are not knowable until the end of a successful exploration programme. This lack of knowability in advance requires that governments understand the transition point carefully, and the full scope and application of the domestic law that applies. This includes, at a minimum, the ESIA laws, fiscal laws and investment laws that are often tied to the size and nature of a foreign investment.

The above concerns apply both where governments are soliciting exploration opportunities and in cases of unsolicited proposals. In both cases, where the scope of a project, the technology, the exact location, and the potential impacts on the environment and communities is not knowable in advance, the government must ensure a breakpoint in the transition from exploration to exploitation. It is incredibly important from a legal perspective that the potential investor is **not** given any guarantees about proceeding to the exploitation phase, that it be clear in any

Checklist 2.10: Exploration to exploitation

Is the proposal for a combined exploration–exploitation agreement/ license?	
• If yes, has the government carefully reviewed the applicable laws, especially for ESIA and management planning, closure planning, and the applicable fiscal and investment regimes? • Has the government established what steps must be taken to ensure these laws are fully complied with, prior to any agreement on exploitation becoming operative? • Is there a plan for ensuring the investor complies with all legal obligations prior to any construction for exploitation commencing? • Is it clear that the government is making no promises or guarantees that the transition to exploitation will be allowed in advance of these obligations being complied with and government approvals being issued in accordance with the applicable laws? • Is there clear agreement in writing from the investor on the above requirements?	

agreement that the ESIA laws must be fully complied with and government approvals of assessments and management plans obtained prior to the transition to exploitation. No construction of any type, post-exploration, is to begin until these approvals are in place. In addition, if there are Indigenous Peoples in the potentially impacted area, as well as other communities, the investor must fulfil its obligations in relation to them prior to any construction beginning.

To be clear, recent awards of more than US$1–2 billion have been awarded by arbitration tribunals that have concluded that governments made commitments or created 'legitimate expectations' that projects would proceed seamlessly from exploration to exploitation, despite the unknown risks or impacts of the exploitation process.[10] In other cases, governments have been forced to cover the full exploration costs of the potential investor as part of an award against the government. These cases highlight the risks of governments not taking this issue seriously.

2.6 Know your Investor

A key part of the preparation phase is knowing the investor. Investors are the key development partner in long-term contracts; therefore, they must be carefully vetted. Adequate

10 See Guindo (2024), and 'Glencore Finance (Bermuda) Ltd vs the Plurinational State Of Bolivia', Permanent Court of Arbitration Case No. 2016-39, 8 September 2023.

vetting of a potential investor enhances the acceptance of a commercially viable project, with socio-economic benefits and minimised negative impacts. More importantly, it demonstrates and validates the investor's ability to perform over the full term of the project.

While many potential investors are genuine, some will promise more that they are able to deliver. Others still, may be less than genuine. In addition, their objectives may or may not align with the national development strategy, thereby causing more disruption and harm than good if goals are not consistent. Therefore, a thorough and seemingly exhaustive review of the potential investor, particularly if the Investor is new to the industry, is required. The task of evaluating a potential investor is not perfect or easy. And, unfortunately, in the international arena there are no checklists of reference sources that can be accessed.[11]

In the case of countries where resources are scarce, in-depth interviews with the investor with a list of direct questions can sometimes reveal their limitations. Asking your neighbouring counterparts can also lead to revealing answers. For companies that claim to be multinational, in most cases they are listed on at least one stock exchange where information should be relatively easy to obtain. Internet-based research is available today, and searches of many large MNEs will result in extensive lists of stories and information, some of which may be false. Internet research is important, but also requires some careful assessment of the veracity of the information. UNCTAD and the World Bank Group (2018) offer a useful tool to help governments evaluate potential investors on large FDI projects. While the tool was created to be used when screening potential investors interested in long-term agricultural projects, it is quite extensive and guides screeners on how to evaluate investors from the inception of a project.

A good starting point can be a requirement for any potential investor to disclose its own track record of investments, at a minimum in related sectors. Governments can legitimately expect both the good and the bad in such a requirement and can

11 If the company is American or UK based, then the most generally used tool is Dun & Bradstreet on the financial side. See https://www.dnb.co.uk/perspectives/corporate-compliance/are-you-read-for-perpetual-kyc-checklist.html.

engage with potential investors about projects they have undertaken that may raise concerns.

The separation of the extractives sector into exploration and exploitation permits and contracts may also raise issues of concern. These issues are often exacerbated by permitting schemes for exploration, especially in mining, that grant exploration permits on a 'first come, first served' basis, with essentially no vetting of the exploration company. This is unfortunate, as it does not allow a review of the technical and financial capacity of the company to perform what is often increasingly more complex and technology-driven exploration. This risk can then be magnified when the exploration contract or permit is tied to an exploitation commitment. In this context, it is important for similar vetting of potential investors for exploration agreements, and of course for combined exploration/exploitation agreements. Companies that may have the skill to explore mining properties may have no expertise or

Box 2.6: Key Elements of Beneficial Ownership Transparency (EITI Guidelines)

1. Benefits for citizens

- Once published, citizens can use beneficial ownership information to work with law enforcers, civil society and others to take action to hold those who misuse anonymous companies responsible.
- Increased transparency around real owners can increase trust and accountability for citizens and their government.

2. Benefits for companies

- Hidden ownership poses problems for honest companies because they don't know who they are doing business with. Publishing the real owners supports a 'level playing field' for all companies and allows them to know who they are doing business with.
- Transparency about real owners can reduce reputational and financial risks.

3. Benefits for governments

- Beneficial ownership transparency prevents conflicts of interest and can help ensure compliance with anti-corruption provisions.
- Beneficial ownership transparency helps prevent tax evasion and ensures that governments are getting the revenue they are owed.
- It supports governments getting the highest value for their extractive contracts and enhances revenue collection.

Source: EITI (2023)

capacity to exploit the resources if found, making provisions for exploitation extremely uncertain and problematic.

For the purposes of this handbook, we are aware that in the natural resource sector a more cursory assessment of the investors' capabilities may be done when an exploration license is granted. If so, when the project becomes more advanced, a more detailed screen of the investor should take place.

One example helps illustrate some of the issues involved in making sure the government has full knowledge of the potential investor. Knowing and understanding beneficial ownership of a future project is crucial in long-term contracts. The issue has become so important that the *Extractive Industry Transparency Initiative Guide* issues guidance on the disclosure of beneficial owners under its legal framework for licenses and contracts (EITI, 2023: section 2.5). In its guidance, EITI declares beneficial owners as the natural persons or real owners of the project that is the subject of the contract. As noted previously, by knowing the beneficial owner(s), any fiscal benefits accruing to various parties as a result of the ownership structure can be understood (meaning the government will have an idea of who is ultimately deriving the benefits). Corrupt practices can also be detected when they occur.

The application of international tax treaties and international investment treaties to a project may well depend on the identity of the actual beneficial owner, thus impacting fiscal issues and other aspects of the investor–state relationship. These can be significant impacts, as not all international tax and investment agreements are the same and differences can have important financial and legal impacts.

On the corruption and money laundering side, knowledge of the beneficial owners of an investor company is important. For example, let us say Mr X is on a sanctioned list for corruption. At the same time, he is the beneficial owner of Company A that in turn owns Company C, which has just executed an agreement with Country Y. By knowing Mr X is the beneficial owner of Company A, the Government of Country Y should be better able to determine who is actually benefitting from the proposed investment, how much of its benefits are being received by Mr X, whether Mr X's ownership raises conflict of interest or corruption concerns, and what other legal risks the government

Checklist 2.11: Know your investor

Who is the investor? • Who are the beneficial owners? • Is the investor on paper the same as the beneficial owners? • Is the investor a shell company in a tax haven jurisdiction of an established MNE operating though its headquarters or a properly established operating subsidiary?	
Form of company – multinational, privately held, special purpose vehicle (SPV), etc. • What is the legal form being proposed by the investor? • Will it be public or private? • Will it be a special purpose vehicle for this project only, as is often the case? • If so, what will be the obligations and liabilities of the parent investor? • Will local citizens be able to buy into the project?	
Where is the company headquartered? • Does it have physical offices? • Can a visit be made to view its operations? If not, is this a red flag?	
What is the history of the investor? • How long has the company been in existence? • How many affiliates does it have, if any? • Is it a major player in the industry? • Or a minor player or a consortium? • Are there domestic actors involved? • Is it being formed specifically to invest in this project?	
What is the performance history of the company? • What is the performance history of the parent company/investor? • What is the history of its affiliates? • For more vertically integrated MNEs, where does this project fit in with their supply and value chains? • What is the track record globally of the investor, based on research on the internet? Are there easily identified projects that the investor can use as a reference to demonstrate performance?	
What is the tax record of the company? • Will there be tax transfer issues? • Is the company part of EITI? • If so, has it lived up to its EITI obligations? • Does the company have a track record of long tax disputes with governments?	
Management and board • Does the proposed management team have a track record that is easily verified? • Has it operated in regions and countries like yours?	

Real investors and fake investors (yes, there are fake investors!) ('Fake investors' include those who operate as speculators or who may be a newcomer in the industry who wants to 'flip the asset'. These investors usually begin the exploration phase and share exploration data to flip the asset to a larger entity with the resources to develop the mine. Some of the notable signs to watch out for are the following. • The investor seems in a hurry to get things done. • The investor assumes (depending on the level of corrupt culture) that bribes/payments/gifts to influential members of the government is the way forward. While this statement might seem offensive, the intent of the handbook is simply to state the reality that may or may not exist in some public sector arenas. • The investor has become quite 'friendly' with lower-level members of the team or departments who may be influential in the analysis of the project. • The investor has direct political and/or family connections with the government. • Rather than providing detailed and authentic documents showing a realistic and well thought out plan, the investor supplies documents that are sketchy and superficial. • The investor may deviate significantly from established processes.	
What are the investor's objectives? • The investor's objectives can be found in the fine lines of the feasibility study and business plan. A review of the company's strategy documents (including its sustainability strategy documents), annual reports and other disclosures can also provide insights into the investor's objectives. • The ESIA report(s) is one of the more significant investments made by an investor, because it covers all environmental and social aspects of the project and therefore can disclose the investor's objectives regarding the project • The investor's corporate strategy document and business development plan are vital elements for the government to understand the investor's business 'purpose' and how it does business. • Community development plans are essential elements for the government. While these are influenced by national legislation and contractual agreements with the government, the plans themselves, which are prepared by the investor, can provide vital information into the mindset of the investor.	
Is the proposed project for exploration only or a combined exploration/ exploitation contract? • Does the investor have a track record on exploration or exploration/ exploitation combined? • Does it have the requisite capacities and financing for each task? (Or, for example, does it have a record of 'flipping' exploration licenses to other companies for exploitation?) • Does the investor have the skills to transition from exploration to exploitation, including technical skills, skills in community relations, financial capacity, etc.?	

Is the investor prepared to engage with community interests, including the social and economic development needs of communities?

- What is the investor's track record on engaging with communities? And its record on employment practices?
- Does it consult with local communities?
- Does it develop an economic and social development plan with the community that goes beyond generic language?

faces if the beneficial owner is indeed on corruption or money laundering watch lists.

The checklist for this section identifies a minimum number of key issues that are crucial to the success of the proposed investment. How easy or difficult is it to obtain information about the company on these issues may be telling in itself. A general 'rule of thumb' is that the more difficult it is to get basic information about a potential investor, the more likely it is that the investor is not genuine or of substance. In today's operating environment, with the digitisation of information and social media accounts, company information should be readily available and verifiable.

Box 2.7: Political/clans influences

Local political concerns are not new to major projects around the world. However, in some cases they can be particularly distorting. This is only a quick checklist of notable political concerns.

1. Is this a pet project of a specific lawmaker/politician?

Notes: If so, who, why? Give specific issues and reasons for this conclusion.

2. Does the district/clan/local political leadership agree?
3. Is it a feasible, sustainable and viable project, despite the political influence?

Note: Provide reasons, with pros and cons.

Note: Are there any competing interests and possible political and other conflicts?

2.7 Understanding and developing the government's project and development plan

If the first two steps above, verifying the initial proposal and verifying the investor, lead to positive views on the potential of the project, the government must then turn to preparing its own objectives for the design and implementation of the project. This

Checklist 2.12: Government objectives

What is the reason for the development of this specific resource at this specific time, in broad terms? • Infrastructure and development? • Market forces, including global market demand and market prices, make the project attractive? • To attract FDI, jobs and generate tax and ancillary revenue? • But this is not specific or clear, so let's drill down!	
Fiscal revenues • Will the resource generate corporate income tax? • Will it generate royalty payments over the life of the mine? • Will it generate dividends from ownership of shares? • The government should ensure that the fiscal regime and contract design do not lead to tax leakage through incentives or by the investor company engaging in base erosion and profit shifting (BEPS) activities. • Is the timing of revenues and risks understood? • Are there gaps in the fiscal regime that need to be addressed in the negotiations?	
Legal framework • What standards will be required of the investor? • Is the investor seeking any departure from applicable laws and regulations? • Are there gaps in the laws and regulations that need filling? • The government should ensure the contract is subject to national law and consistent with it. • Which agencies will lead on regulation of the investor and be responsible for implementing the contract and monitoring compliance by the investor?	
Environment • The government must secure state of the art environmental performance. • Are the environmental laws strong enough and robust enough to fully cover the project? • If not, what needs to be added? Are there international standards that can be pulled in for this purpose? • Are climate change issues fully covered in the laws? If not, what is needed for them to do so? • Are any potential GHG emissions factored into the country's Nationally Determined Contributions (NDCs)? • Are there robust protections for biodiversity and local waterways? • Is there a robust monitoring system being put in place to ensure effective and transparent monitoring?	

Decommissioning/closure planning As part of the environmental and social programme, has the proponent included a fully developed decommissioning/closure plan? • If not, what must be set out and where? • How is decommissioning/closure to be paid for? How will it be treated for taxation purposes? • Is the residual liability for decommissioning clearly addressed?	
Defining and incorporating social and economic goals • The project should generate local employment. The government must develop a robust model for the number of jobs it wishes to see developed at different skill and wage levels. • Gender: how are gender issues to be reflected in employment; and in social protection and development approaches? • Creating local economic linkages: • What are the expectations for local purchasing during the construction and operation stages? • What are the expectations for downstream linkages? • What type of non-mine business development can be pursued, including for women? • What are the steps needed to achieve these objectives in terms of: • clarity, measurability; • training measures; • business development steps and practices? • Will the project deliver social benefits through infrastructure including schools, hospitals, clinics, service and feeder roads, etc.	
Local community needs • Has the community been consulted? Have community groups and leaders been identified for this purpose? • What are their views on the project? • What are their objectives? Can they be accomplished? If so, how? If not, are there alternatives?	
Are there Indigenous Peoples involved in the project area? • If so, have their rights been addressed during project development? • If not, what steps need to be taken to ensure these rights are protected? And that the project will not be stopped because of this?	
Beyond the community level, is there political support for or opposition to the project? • What support is present for the project? • Where is the opposition to the project and why? • What can be done to mitigate/overcome the opposition?	
Are there any issues that could possibly affect the timing of the negotiation process? • Are there elections on the horizon that could impact the negotiations? • Are there trade-offs that are required for political reasons that can impact the process? • Are there internal politics that can prevent the government arriving at a total government approach?	

presents the opportunity to begin integrating the project into the country's own national development goals.

The objective at this stage is to define the parameters of a negotiation with the company: What does the government seek in this process? What are the relevant community expectations? How can they best be met? And how can these be achieved while leaving space for the company to achieve its objectives?

The development of a comprehensive set of government objectives requires a broadly based inter-departmental process, as noted in the sections relating to the building of the negotiating team. The scope and depth of these objectives will depend on the nature, location, scale and other factors in the proposed project. But generally, all the issues raised below are going to factor into the process in one way or another.

The need for a comprehensive understanding of the whole of government objectives is critical. Without a comprehensive and agreed plan, there are real risks that unrepresented departments will work to undermine confidence in the negotiations or the project (or will have surrogates do so) and that differences will come out at the negotiating table. The latter can be especially damaging to governments in a negotiation, as skilled negotiators for investors will work to exploit any inconsistencies and minimise the contributions of the project to enhancing national welfare. The pre-negotiation process should ensure the government speaks with one voice in a negotiation, toward common ends. The equation is quite straightforward: the negotiators represent the government and country as a whole, not one department in the government. Hence the importance of an inter-governmental negotiation team. To have the respect and support of their colleagues across government, and to ensure a positive response to a negotiated contract, negotiators must know and seek to achieve all government objectives, not just those of one department.

2.8 Official approval of the negotiating position

2.8.1 Documentation

The government technical committee must be able to review and assess the above issues, at a minimum, in order to establish an initial, comprehensive, government-wide position. After

doing so, these goals must then be accepted by the negotiating team. In turn, they are then presented to the most senior level of decision-making: the cabinet, the President's Office, the Prime Minister's Office, the line minister, as the case may be.

The technical committee should compile the documents used to complete the reviews described above and the recommendations that accompany them. Once assembled, the documents should be reviewed and finalised by the technical committee for presentation to the negotiation team.

At the end of the review by the technical committee, a memorandum should be drafted with a list of recommendations to the negotiating team, along with – at a minimum – the following:

- a legal description and map of the proposed project area; if possible, there should be an aerial map with topography and survey of the metes and bounds;
- a general description of the project with an indication of the project's alignment with the government development plan;
- the total cost of the project;
- the total value of the project with proposed benefits and risks;
- an outline of the fiscal regime that is expected to apply and its consistency with domestic law;
- an outline/summary of the ESIA or plans for an ESIA;
- a note of whether all the terms and conditions requested by the investor are in line with applicable domestic laws;
- a note of whether there are any international laws and standards not in domestic law that should be noted or included by reference;
- a note of whether any affected communities have been consulted on the project and who is/are the agreed upon representative(s);
- a detailed report on the screening of the investor;
- a note of any suspicious activities or mentions that should come to the attention of the negotiating team;
- a note of any conflicts of interests or recusals;

Checklist 2.13: Documentation checklist

The following documents, at a minimum, should be collected, collated and preserved	
• Maps of the proposed project area, including the resource site, project site, impacted area, local communities, local waterways.	
• A summary description of the project and its relation to development goals.	
• Fiscal/financial: - the fiscal regime and expected sharing of the rents of the project; - total costs expected for the project; and - a summary of the fiscal regime and any deviations requested by the potential investor.	
• Environmental and social documentation: - ESIA or plans for performing this, and accompanying management plans; - closure plan or plan for developing this; - human rights due diligence; - analysis of impacts on Indigenous Peoples, where relevant; - climate change analysis of the project for climate event resilience and emissions; - expected employment and local purchasing benefits; and expected downstream economic benefits.	
• Legal: - a summary of applicable laws; - analysis of any requests for deviations from applicable laws; - a summary of any applicable international treaties or other international laws or standards; - a copy of the draft contract proposed by investor, if there is one; - a copy of the model contract of the government, if there is one; and - a copy of the government proposed draft contract, if there is one.	
• Community analysis: - What are the community responses? - What are the responses of national stakeholders?	
• Investor screening: - Who is the beneficial owner? - What is the track record of the investor in similar investments? - Is the investor on – or connected to any company or individual on – international watch lists for illicit financial flows?	
• Recommendations: - summary of recommendations to minister, cabinet, etc.	
• Miscellaneous: - Are there any other notable issues? - Is there any issue of conflict of interest? - Other?	

- any draft contract expected to be presented to the investor or that the investor has presented; and
- any other notables that should come to the attention of the negotiating team.

For future reference, all documents should be copied and placed in a binder for each member of the negotiating team and in a central record keeping office located in the office of the government's appointed legal representative or its central archive. This is in addition to maintaining electronic files. As the negotiations proceed from this point, all notes, memoranda and documents will be updated for each member. We recommend designating a member of the Attorney General's Office as the registrar and keeper of the documents. If there are non-electronic documents, for example, a copy of the EISA report or a printed copy of the licenses that were provided to the teams, said document(s) should be scanned and incorporated to be made a permanent part of the project documents.

2.8.2 The recommendations

The recommendations from the technical committee to the negotiating team and through them to final decision-makers should be clear in terms of the top line: to proceed, not to proceed, or to proceed subject to some specific conditions. The range of options is:

- not to continue the project and to notify the proponent it is not acceptable to the government, with at least a reasonable explanation as to why this decision is being made;
- to initiate negotiations, but with strict conditions to be established on the investor, as set out in the recommendations;
- to indicate general support for the project, subject to specific issues to be addressed in the negotiations;
- to approve a draft contract to send to the proponent; or
- to indicate the redlines and areas that are 'no go' for the government for official approval of these as well.

2.8.3 Establish a negotiation timeline and budget

If the recommendations are to proceed to negotiate, then the technical committee and negotiating team should provide a draft timeline and budget for the process, including the cost, if any, of external advisers. The technical committee should have assessed the needs for any external support, and established the costs of what it believes is needed. Costs should include per hour rates, telephone costs, flights, costs for printing and so on, and any other ancillary associated costs.

The technical committee and negotiating team should estimate the expected timeline of the negotiation. Depending on complexity and availability of the negotiating team, this could be anywhere from 6 to 24 months. There is no rational purpose in artificially condensing the timeline. Given expected asymmetries in time and resources favouring the investor, doing so will often have negative impacts that are disproportionately felt by the government teams. A serious long-term investor will not balk because the project will take some time to negotiate. Indeed, as noted above, an investor that seeks an unreasonable timeline is one that should be seen as raising red flags about its intentions.

After the recommendations are presented to decision-makers, the negotiating team should feel secure in knowing the positions it has to pursue. It should then prepare how best to proceed.

Checklist 2.14: Negotiating timeline and budget

What is the proposed timeline of the negotiation? • To finalise preparations to negotiate? • To engage in initial negotiations on objectives of the parties (see below)? • To set a fuller timetable with negotiating partners, broken down by issues? • To finalise and reach agreement?	
What are the expected costs of the negotiation? • In terms of time of government officials? • For travel costs, meeting hosting costs, etc.?	
What external resources are needed for support and how much will these cost?	

2.9 Preparing the scope and content of negotiations

After the presentation of the technical committee and the formal adoption of the negotiating positions, it now becomes the role of the negotiating team, led by the designated chair or co-chair, to fully outline and develop the scope of the project for negotiation. This is the last task, building the bridge between preparing to negotiate and starting to negotiate.

2.9.1 Statement of goals and objectives

The starting point for any negotiating process is setting out the government's negotiating objectives and interests. The objectives and interests are not drafted as legal text but rather as clear, plain language descriptions of what the government wants to achieve on all key issues. They are, in effect, the negotiating mandate for the negotiators and should reflect the government's development goals in relation to the project.

Checklist 2.15: Objectives

Are the objectives clearly agreed by cabinet or the final decision-makers? • Are the objectives clearly set out in plain language? • Are they consistent with the applicable law and development policies? • Are they consistent with community and Indigenous Peoples' consultations? • Do the objectives cover the social and economic development goals, including local content and employment goals? • Do they cover the environmental goals?	
Do the objectives provide a sufficiently clear benchmark for directing the negotiations on specific issues?	
Do the objectives provide a sufficiently clear benchmark for assessing in subsequent years whether the contract and its implementation are meeting the objectives?	
How do the government's objectives compare to the investor's objectives as set out in their operational plan, business plan or feasibility study?	
Are there specific infrastructure facilities that will be constructed, for example, airports, ports or railways? • If so, they must be clearly incorporated into the agreement objectives, with timelines.	
If Indigenous Peoples, in the accordance with the UN definition, live in the area, a specific section must address all aspects, interests, preservations and cultural aspects of the agreement as it relates to the Indigenous Peoples.	

When the draft contract is prepared, these goals will provide the core material for the preamble, setting out the broad goals of the parties. These are then integrated into the objectives section to help guide its interpretation and implementation. The objectives and interests will also, as discussed in Section 3, be the first item for the negotiations, before the legal text becomes the focus.

The objectives also provide a critical benchmark for both parties and for all groups involved to measure the success of the contract and whether, as part of later joint reviews, adjustments need to be made in the contract to achieve the objectives more fairly or efficiently. Thus, the objectives help guide the full lifespan of the project. This is not the same issue as compliance with the obligations in a contract. Rather, it focuses on the question of whether the goals of the parties are being met, even if both parties are in full compliance with their obligations.

The development of an effective natural resources agreement results when the parties recognise and are in full alignment on the objectives and interests of all stakeholders: the country, the investors and any affected communities. The long-term stability and success of the project depends upon the negotiated understanding that all parties will benefit from the agreement through the success of the project, increased government revenues and sustainable development for the affected communities.

2.9.2 All issues to be in the law or in the contract

In preparing a draft contract for negotiation, or even the outline of one, it is important to recognise that all the issues that must be addressed by the government must appear in either the applicable law or the contract. In this regard, we highly recommend starting with the applicable law, and not duplicating or negotiating what appears there. This ensures that the final result will be consistent with, and a complement to, the applicable national laws. (And by extension, we recommend making sure that the applicable law clause in the contract is clear that the law of the host state is the applicable law for the contract.)

It is not sufficient to leave matters that involve obligations of the investor unwritten based on verbal guarantees of the company. The contract, when combined with the applicable law, should

provide a complete record of all the rights and obligations of the government and the company, and to the extent necessary, of the community or Indigenous Peoples.

The initial review of the applicable law should have already prepared the negotiating team to undertake the final analysis of this issue and determine what elements are:

- fully covered in the applicable law and hence should not be addressed in the contract;
- not addressed at all in the applicable law and thus need to be fully set out in the contract; and
- partly set out in the law but need to be developed in the contract in order to create concrete and enforceable obligations that are project specific.

In addition, for those elements that will be addressed in the contract, the team must be clear it has the legal ability to negotiate such issues. For example, if the national investment law allows different types of tax incentives for different sizes of projects, a fairly common occurrence, the negotiators cannot, unless otherwise expressly authorised to do so, give higher levels of incentives than those allowed. While it is the responsibility of the negotiating team to ensure it is staying within its legal mandate in any negotiation, it is also the responsibility of the investor to do so, and to ensure that all elements of the contract are consistent with the domestic law.

Checklist 2.16: Scope of contract

Has an analysis been completed as to what should be in the contract and what should be in the law?	
As for the elements to be in the contract, does the negotiating team have the mandate to negotiate those issues?	
Is the scope of any issue outside the domestic law or negotiating mandate such that it either cannot be negotiated or a new law must be passed to empower the team to negotiate it?	
Regarding the legal status of the investor and the investment, has it/have they been registered or incorporated in the host country? Are they in good standing?	

2.9.3 Role of a model contract and the International Bar Association's MMDA as support

Within many governments over the past few years, there has been a discussion over whether to develop a model contract that is then used as the basis for any negotiations in that sector; for

example, a model mining contract, oil contract or infrastructure contract. The development of a model contract can facilitate the negotiation with private investors, and certainly clarifies many of the expectations of the government in a negotiation. It also helps ensure greater consistency between projects, which increases enforceability and reduces transaction times. A model contract can also enhance comprehensiveness in terms of encompassing all the issues that will not be regulated by the applicable law directly, as there is time to ensure this without being under the pressure of a specific negotiation. In addition, a model contract can ensure the proper relationship between the applicable law and contract is carefully set out and screened, so helping to ensure the desired consistency and hierarchy between these two sources of law.

However, preparing a model contract is not the best course of action for every country. First, it takes significant time and team effort to draft a comprehensive model contract, and there is much less value in one that is not comprehensive. Therefore, if there is not likely to be more than one or two negotiations, there may not be a lot of value in drawing up a model contract. The issue of demand is thus critical. Is this going to be a one-off situation or are several more negotiations expected in the sector? The more likely it is that there will be several negotiations, the more value a model contract will have.

It is also important to assess whether the expertise is available to develop a model contract, both within government and outside government. Where external expertise is needed, it is important that this be sourced, as with an actual negotiation, as the end product of the model contract process will be binding contract language. At the same time, the scheduling of time to develop a model contract can assist with the recruitment of external supports. It also provides increased opportunity for external advisers to carry out critical training, which sometimes cannot be maximised during a negotiation per se.

Box 2.8: Ecuador

In 2010–2011, the Government of Ecuador undertook a process to develop a model contract. To do so, it engaged experts who had been participating in the International Bar Association's Model Mine Development Agreement (MMDA) (see mmdaproject.org). While Ecuador subsequently signed only two comprehensive mining contracts, both were closely based on the model agreement and MMDA approach.

So, there are pros and cons, and timing and expense issues. But overall if there is an expectation of the government negotiating several contracts, the development of a model contract will give greater leverage and consistency to the government's efforts.

In 2011, the International Bar Association adopted its Model Mine Development Agreement (MMDA), which is freely available to the public at mmdaproject.org. This was developed specifically as a broad-based instrument to assist governments in developing mining contracts with large foreign investors. While the MMDA sets out model legal text for all the provisions, its first use can be in relation to scope of coverage. The Table of Contents for the MMDA was developed over a six-month period. It starts from the proposition that no domestic law is available and hence all issues relating to mining and sustainable development should be addressed. The table of contents is, therefore, comprehensive in scope and in itself provides a checklist for the issues that need to be addressed in the law or in the contract.

For governments, the MMDA remains a valuable tool in this respect. Many issues are what might be called 'boilerplate' contract issues and will not figure in the identification of issues for cabinet approval. Others will be fully reflected in the applicable law and hence the team can identify these easily and make sure they do not duplicate them in the contract. And so on. Thus, while the MMDA cannot simply be taken off the shelf and used as a model contract due to differences in domestic laws, legal systems and so on, it provides a useful tool. It can ensure the negotiating team has a comprehensive overview of what has to be addressed and that these issues are addressed.

2.9.4 Redlines

Parties to an agreement rarely agree on all points immediately since they all have different priorities, objectives, thresholds and issues that are not open to negotiation. It is crucial those lines are clearly understood on both the government as well as the investor sides. The government's technical committee and negotiating team should be very clear and purposeful in indicating to decision-makers what issues are negotiable, to what extent, and what issues are not negotiable at all or in significant part. What are the possible areas of flexibility and what are the issues where it is necessary to draw the line in the

proverbial sand? In some instances, these 'redlines' will indicate that no negotiation should take place, that the parties are too divided on key issues. In others, areas where the negotiators will have to pay special attention will come to the fore and the negotiating team will have a proper opportunity to develop its strategy around them.

- Defining redlines
  - What elements are negotiable and what are not negotiable? Prior to any meeting with the investor, it is important to note which issues are non-negotiable and why. This may be done on an issue basis, or based on draft clauses in a model contract or on a draft contract proposed by the company or the government, depending on how the negotiation process is initiated. What is critical is understanding the issues, independent of the format.
  - What are the 'must haves'? Are there any must haves for the government that must be in the contract? For example, the government may want an upfront payment. It is important for the government to determine to what extent must have issues will be negotiable.
  - Testing political limits: It is almost always the case that someone either within the government or on the side of the investor will try to insert a provision of a political nature or for a political purpose. For example, it is common for members of the ruling party to push for benefits for its supporters. These types of highly political provisions need to be politely declined by the negotiating team.
  - Consistency with domestic law: As we have discussed, all aspects of the agreement must be in conformity with existing domestic law, at least unless there are specific enabling provisions in the law that allow the government to negotiate terms that are inconsistent with or outside the applicable law. In such cases, it is important to be very clear what is negotiable and to what extent the enabling provisions allow for variations from the applicable law.

- How to manage these limits and redlines
  - Redlines, limits, must haves and special provisions are all best managed when they are identified early by the technical team, agreed by the negotiating team and confirmed by political decision-makers. This, in turn, is best done when the reasons for the redline or special provision are made clear. They must also be clearly articulated in order for all parties to understand and make a decision to accept or reject the conditions of the redlines. In some instances, slight modifications may lead to acceptable compromises.

Checklist 2.17: Redlines

What are the specific redlines in this negotiation? • Issues or clauses that are unacceptable? • Issues that are 'must haves'?	
What are the reasons for these redlines? • The reasons for each issue should be clear and understandable.	
Are there alternative approaches for these issues, bearing in mind the interests of each party? • Can the issues be reframed or revised to allow scope for negotiation if needed?	

2.9.5 The role and applicability of international standards

Many contracts will reference international standards as either guidance for the parties or as part of legally binding commitments. In general, this should only be done when such inclusions will be of significant impact in the domestic space. They should add to the performance expectations of the parties, not lower the expectations from compliance with the domestic law. For example, a reference to ILO core labour standards should not be open to a reading that an applicable domestic law with higher labour standards is not applicable to the investor. International standards should, therefore, be referenced when they raise the bar rather than lower it. Even the inclusion of standards that may exist in other regions may not be necessary or applicable in your specific domestic setting.

In order to compete and operate in the international arena, governments in all parts of the world are members of numerous

international mining organisations, including the Intergovernmental Forum on Mining (IGF), and companies are often involved with industry groups, such as the International Council on Mining and Metals (ICMM). Additionally, they ascribe to numerous standards including the International Organization for Standardization (ISO) standards set by the Canadian Institute of Mining, Metallurgy and Petroleum/ Global Mining Standards and Guidelines (CIM.GMSGS) and the Global Mining Guidelines Group, to name a few. However, while the seniors in the industry will subscribe to and maintain these standards, junior miners may not have the capacity to implement them as effectively at the time of the agreement. Even if the standards these organisations have developed relating to environmental stewardship, social responsibility, economic development, health and safety stewardship, and commitment to innovation and use of modern technology, are not incorporated into a contract, it is worth investigating whether the investor subscribes to such standards and its track record in applying them. This is another element in knowing the investor.

It is also important for the negotiators to know the various international treaties and conventions to which the state has ascribed. These are not standards in a traditional sense, but they do set out international obligations on states that may directly impact the expectations of the parties to a contract. For example, a country that has signed the Paris Agreement on climate change will expect investors into the state to plan their investment in a way that contributes to meeting the national targets. Some international agreements, such as the previously mentioned ILO Conventions on minimum labour standards, are also routinely referenced in international standards on corporate social responsibility. Good negotiators on both sides will know the scope of the government's international obligations and will seek to support them in practice. Especially relevant will be them knowing the applicable international tax and investment treaties.

Chapter 3

The Negotiations

Chapter 3
The Negotiations

3.1 Negotiation process: inside the negotiating team

The actual process of a 'sit down' negotiation begins after the preparations and meetings of the government teams have occurred, as set out above. Over this time, there will also be ongoing conversations with the investor, either requesting additional information or in many cases simply providing an update on the process. Depending upon the size, scope and nature of the project, these preparations could take weeks or even months. It is only once the process is complete, and negotiations ready, that a face-to-face meeting with the investor is called.

3.1.1 Negotiating team discipline

A key feature of any successful negotiation is team discipline. We have alluded to this above, but it is important to expand upon this theme here, as part of the discussion of the negotiation process.

'Discipline' is used here in a broad sense to include specific issues, like not speaking out of turn, and general issues of being professionally prepared and focused. Rather than define the term, however, some examples can be used to more fully illustrate what team discipline can mean in practice.

One voice

The negotiating team must speak with one voice. In negotiations, that is the lead negotiator. No one else speaks unless specifically asked to by the lead negotiator. The rule is, and should be, that simple and clear. The reason for this is simple as well: the investor will seek to identify and exploit any and every gap within the negotiating team it can detect. This is true of both the substance of the negotiation and the personalities of the negotiators. If an investor detects a weakness in the team, it will seek to exploit that weakness. The fastest

way to expose a weakness (and every team will have some) is to speak over the lead negotiator, contradict him or her, suggest he or she does not have full command of the issues, and so on. Power struggles within a negotiating team that are apparent to the investor pose real risks to the government chances of success.

Where a member of the negotiating team believes a serious error is being made, that member should carefully and quietly seek a break in the meeting so that he or she can speak privately to the lead negotiator. Mistakes and errors are very much minimised by proper preparation and with an experienced lead negotiator, but they can still happen. If a negotiating team member believes they are seeing such an instance, it is incumbent on them to both bring this to the attention of the lead negotiator and to do so with great discretion. This must be done professionally and discretely, so as not to disrupt the meeting unduly and put the lead negotiator into a difficult position. In most cases, legitimate errors can be fixed, while not every error will be fatal. The lead negotiator in turn must have confidence his or her team will 'have their back', a confidence that should be enhanced by the professional way possible concerns are raised.

Further, all members of the negotiating team who may be called on to speak by the lead must speak from the government's agreed position. When the negotiations are in progress, there is no minister of finance position or minister of environment position. There is only one government position, which has been agreed during the preparatory process and approved by cabinet. Any deviation can only be made by the negotiating team as a whole, under the lead negotiator, and with appropriate prior discussions with the minster(s) in charge of the file. The lead negotiator should feel confident when calling on other members of the team to speak. But to do so, she or he will have to have confidence in those members.

Playing the hero

We are all tempted, at some time, to 'play the hero' in a negotiation. It is human nature to want to be the one who is responsible for success. This may be motivated by a sense of jealousy for not being named lead negotiator, by some exaggerated sense of self-worth combined with a high level of ambition, or even a moment of perceived opportunity to 'solve' the issue. Often this manifests in speaking quietly to someone

from the other side, a quiet word to the effect of 'I can get my team to do X if you will do Y'. These types of side-negotiation efforts can be very harmful. In one instance the authors are aware of, exactly this scenario resulted in the immediate expulsion and return home of a delegation member at a major multilateral negotiation. Trust was broken and the negotiating team member was told by his head of delegation to leave immediately. The reason that person decided to go behind the lead negotiator's back and approach the other side was not clear, but most of the others on the delegation identified the desire to play the hero as being a key part of it. His career never recovered.

Confidentiality

A corollary to not playing the hero is to respect the confidentiality of the negotiations. Few governments like to negotiate in public; this is even less the case when information is being leaked by a delegation member. Such leaks can be high risk and are grounds for the source being immediately terminated if found. But they happen and one reason is, again, human nature. There is a tendency to want to demonstrate we are 'in the know', succeeding in our work lives and have a certain amount of prestige and sway. A negotiation is, however, not the time for this. All communication, proceedings and meetings held are confidential and enquiries or concerns emanating from them should be directed at the chair or the communications lead. Delegation members should not speak to the press, politicians, activists or others who are not part of the delegation or who they are not authorised to speak to. The leaking of confidential materials related to the negotiations can undermine the process, create internal distrust, and slow or impede the negotiating tactics.

Distractions and 'keeping your eye on the ball'

In any sport where a ball is involved, especially one that can be propelled at high speed, no success is possible where the players fail to keep their eye on the ball. The same applies in a negotiation. Negotiation processes can create multiple avenues for distractions. There can be inter-personal issues among the government team, from rivalries that are purely personality based to inter-departmental issues played out at a more personal level. There can be friendships or even more

personal relationships among the team that create tensions. And all these situations can become quickly replicated among delegations, especially as people spend more and more time together working on the negotiations. Social situations may arise for interactions and 'corridor chat' can be used to create wedges between team members. So, it is always important to be careful what you say, to whom and when. And in no circumstances should internal debates ever be divulged. Of course, being social with members of the other delegation is normal. But being social can never become more important than the team's goals.

It is critical for the team members to stay focused throughout the process on the issues being negotiated, not the personal or personality dynamics that may arise. Let's consider one simplistic but extreme example. A cocktail reception may be organised one or two nights into a negotiation process for people to get to know each other. This is normal. And during the reception, photos may be taken. Again, this is normal and in many cases an official photographer could be engaged. But then imagine you wake up one morning during the next negotiating session and find a copy of a photo of you with a person of the opposite sex, each holding drinks and laughing. A note is attached: 'We expect some co-operation from you or your partner at home will get this photo'. Your home address is somehow included just to make the point real. What do you do?

The first part of answering this question is recognising that you are not the target of this act. Rather, your government is the target. And therein lies the fuller answer to the question: you must inform your lead negotiator as the lead government official in the process of this attempt to break down team discipline and to seek information from you. It is the government they seek to compromise, and the response must be set out by the senior government official. This is not an issue of having done something wrong or not personally, it is an issue of protecting your integrity and the integrity of the negotiating team.

Professionalism

We spoke earlier of the need for professionalism, and will just briefly reiterate some key points in this regard here.

- Be prepared, first and foremost: Not being prepared and across your brief is inherently unprofessional.

- No excuses: Do not build in excuses for failing, either for yourself or as a delegation. Excuses become self-fulfilling prophecies and reasons for failing before even trying.

- Be on time: All meetings are expected to start and end within an allotted time frame, with a full level of respect and cordiality towards the negotiations. Play your part in this: be on time and ready to work.

- Be responsive when needed: When questions are raised and you are tasked with responding, be prompt and professional. Respond within the mandate you have.

- Be polite and cordial: Always be respectful of the negotiators on the other side. You do not have to be their friends, but you cannot become their enemies and succeed. This is even more true of those on your own team!!

Politics and power plays

While all government decisions, to some extent, are political in nature, members of the team should remember not to fight against or promote power plays within the negotiations on behalf of political figures. You are on the team for the skills and knowledge you bring. Leave the politics to the politicians.

A different type of political power play can happen when the investor seeks to use all the political leverage it can muster. Technical negotiations over language can mean tens of millions of dollars to the investor, and it is likely to seek as much leverage as it can in the process. Indeed, it is virtually guaranteed that at some point in the process the company head will seek to go around the negotiating team directly to the lead minister or president, with an argument akin to saying: 'Your negotiators are going to ruin this for you. Trust me, what we are proposing is right and best. Your lawyers will kill this project if you don't stop their behaviour now.' (Blaming the lawyers is always easy!) It would even be a surprise if this was not done at some point. To ensure against the success of this type of manoeuvre, it is critical for the decision-makers and negotiators to be in constant

communication and have frequent debriefings. The decision-makers must have trust in the negotiating team. The professionalism of the team is directly implicated here to avoid these types of power plays being successful.

Checklist 3.1: Negotiating team

Has the lead negotiator been appointed and is she or he now well acquainted with the negotiating team?	
Are all the members of the team well acquainted with each other and familiar with each other's roles and expertise?	
Have the members discussed team roles and team rules and discipline together? • Has team discipline been discussed? • Has confidentiality been discussed? • Has a process been established to address concerns about possible errors? • Has a process been established for team members to raise concerns with the lead negotiator for any reason? • Has the team reviewed and agreed to a professional standard of negotiating? - Has everyone on the team understood these expectations and agreed?	
Have non-government members of the team been similarly introduced and briefed?	

3.2 Starting the negotiation process

When the government is ready with its positions, it may convene the first negotiation session.

All communication about meetings should be sent at least 15 working days prior to the proposed dates of the meeting and may be via email with read receipts indicated. This will allow for early notification to the investor to accept or ask for changes. This time frame also assumes that the principals of the company are located outside of the state and will need the time to make the necessary flight arrangements and other accommodations for the negotiations. Appropriate negotiating facilities, with a large enough main room and at least two rooms for each delegation, should be booked for the negotiations as well.

In the letter or notice to the participants, the date, time and place of the negotiations should be clearly stated, along with a proposed agenda for the meeting. If the government team has prepared a draft contract or the government has a defined model contract, these can accompany the initial material.

Sending a copy of the draft or model agreement prepared by the government will give the investor an opportunity to read and be prepared for the process. It is then from the draft shared with the investor that the negotiations should proceed, as opposed to the investor using its own draft agreement to the exclusion of the government's.

Normally negotiation discussions range between two to three days at a time, if the parties are generally in agreement, but negotiating rounds can also be scheduled as a full week, especially when extended travel is involved. Negotiations should always take place in the country where the project is to be located. Negotiators should avoid invitations for personal visits to other sites or cities and the real risks or misperceptions that such visits can create. Negotiations should not be scheduled in the home city of the investor: this simply creates too much risk of conflicts or personal benefits for negotiating team members.

Negotiating at home may create some risks of protests for projects that are potentially controversial. If there are in fact protests or disruptions from outsiders or other interested groups at a negotiation session, it is the role and responsibility of the lead negotiator to receive, hear and share the concerns of the protesters and possibly resolve the issues. In the event the negotiations need to be suspended or postponed, this shall be done in a professional manner, with appropriate discussions with the negotiating partner.

The COVID pandemic has also heightened the numbers of remote meetings for all purposes, and some negotiating sessions may take place by remote means. While face-to-face negotiations are desirable, financial, health and safety concerns will dictate how much this is possible. Remote sessions may also be used for smaller working group or drafting meetings, where not all participants may be needed, or for specific discussions between the in-person negotiating sessions.

The number of sessions needed to finish a negotiation is impossible to predict. But as noted above, time should not be the principal factor: both parties (investor and government) should understand that the process takes time. Much more important than finishing 'on schedule' is finishing the negotiation well. A government facing an election, for instance, may wish to have a 'successful' conclusion to a negotiation sooner rather than later. Yet this risks making it obvious to the

investor that it has a real advantage in the negotiation. Here, the government risks not being able to achieve all its goals. Consequently, while a negotiating schedule should be agreed by the parties, this is for convenience and to provide structure to the process; it should not be seen as being set in stone. As with all negotiations, 'Murphy's Law' (anything that can go wrong will go wrong) invariably applies. It is in the best interests of both parties to remain flexible and work towards a speedy resolution to challenges, especially if the larger issues in the agreement have been agreed to.

Checklist 3.2: Initiating the negotiation

Is the government prepared to begin negotiations?	
Has the government finished its review of the initial proposal?	
Has the government carried out its due diligence on the investor?	
Has the negotiating team been fully appointed and is it fully prepared?	
Is the government position agreed on and approved by the right decision-makers?	
Has the government prepared a draft contract or model contract for the negotiations?	
Has a location suitable for the negotiations been reserved?	

3.3 The Negotiating Agenda

3.3.1 The Interests of the parties

The first element of the negotiation agenda should be presentations by the members of the government and investor negotiating teams. These should be led by each lead negotiator and allow each member to introduce themselves.

The beginning of the negotiation, as discussed above, should be the discussion of the interests of the parties, not a negotiating document. This is a key phase of the process, not just a pro-forma exercise. The more detailed the understanding of the interests and goals of each side, the better the negotiating process that follows. Again, the focus is on the interests in, and from, the project, not on drafting language. The government team should not be shy in expressing its interests. Not doing so can only lead to possible accusations of springing surprises on the investor later on and will not be constructive in the end.

As noted above, the government's interests will include fiscal benefits, infrastructure improvements, economic development through jobs and linkages, social development, environmental management, closure planning, and potentially other issues that are site or community specific. Quality investors are not scared away by such a scope. The more clearly the goals and interests are presented, the better the process that will unfold.

Checklist 3.3: Interests

Have the parties prepared a summary of their interests in writing?	
What are the investor's key interests? - What is the government reaction to these interests?	
What are the government's key interests? - What are the investor's reactions?	
What are the key common interests and what are the differences in interest? - These should be detailed, issue by issue.	

3.3.2 Negotiating schedule

Once the parties have discussed and understood the interests at stake in the negotiation, the negotiation process can be defined. If a draft contract or model contract is presented, it can be used to define the negotiating schedule. If not, the parties can identify and prioritise issues, working through the interests identified by each party in the initial exercise.

Either way, the goal is to set out a realistic and manageable schedule to address all the issues in the depth needed, allow time for inter-sessional discussion and drafting, and ensure a sustainable and bankable project results from the process. If the government has prepared a draft timetable, that would be helpful, as it will ensure that nothing is left out and that the timetable is manageable within government capacities.

A specific goal of a negotiating timetable is to ensure the government will have its key people at each negotiating session. Even if the negotiations take place in state capitals, as they should, government officials responsible for each specific issue must be able to plan their attendance to the exclusion of their other business. The only way government officials can contribute fully is to be fully present. Whether it is environmental questions, social issues, infrastructure development or any other issue, the government must be able to

'put its best foot forward'. This means full-time participation for the days the relevant issues are scheduled.

Checklist 3.4: Scheduling

Have the parties identified all issues to be negotiated?	
Has the government prepared a draft negotiating schedule to ensure it is fully realistic for them?	
In negotiating the schedule with the investor, has the government been careful to ensure the availability of members of the government team at the right times?	

3.3.3 Information asymmetry

A key issue in many negotiations is the inability of the government to fully manage information asymmetries. This is especially important when scheduling negotiating sessions to ensure that the right people are in the room. For each session, it is essential that governments establish the information needed for that negotiation session. It must then have both the information and people who understand the relevance of the information, available for that session. This is a key reason for setting out an effective schedule.

In this regard, we return to a previous subject of ensuring the right external expertise is also present when needed. External support in this context becomes a major strength of the negotiating team, not a weakness, as well as presenting an opportunity to train officials for the future negotiations.

A major concern in the context of information asymmetry is financial modelling capacity. While an increasing number of resources exists for governments to obtain such resources, many still fail to do so.[12] If full financial modelling capacity is not available within government as a full-time component of the negotiating team, it should be brought in from outside. There is simply no substitute for having this capacity.

As noted previously, one reason this capacity is so important is that investors have recognised that, in some instances, governments simply accept financial model numbers and do not carry out their own investigation. This has led to abuses and potential investors developing two sets of numbers: one for the government and one for the banks and internal decisions.

12 For example, Natural Resource Governance Institute, Open Oil and the IGF all have access to resources to support financial modelling in a negotiating context.

It is therefore the duty of governments to ensure they have this capacity and to ensure they use it.

As an **extra** safeguard, it is also valuable for governments to require that all the financial information provided by the investor is accurate, singular (no second set of books) and based on best available information. But this type of provision only has its full value in the context of a dispute that goes to court or arbitration. This is several stages too late for the government to be able to maximise its fiscal benefits if it has not already done so at the negotiating stage.

It is worth noting that if the government negotiators suspect they may not have equal levels or quality of information as compared to the investor, it is their duty to suspend the negotiation on that issue and develop the information base needed to negotiate properly. It is not a crime to say, 'We need to suspend until we have more information'. Nor is it a sign of weakness. It is rather, a sign of the team's commitment to acting responsibly and will garner the respect of the other party. Suspending the negotiations on this issue allows the type of information needed to be identified, the investor to supply the information it has, and the government to develop its own sources. This supports a more level playing field in the negotiating process.[13]

Staying within the confines of the government's agreed positions will reduce risks of information asymmetry having an impact. But this is not always possible. In some instances, new information being made available to the government may indicate that even with the agreed position, more reliable information is needed.

Finally, it is important to develop not just information but skills in the negotiating process. Junior colleagues may participate as observers in order to build capacity for the longer term, as well

13 An investor could resist the suspension due to the lack of data, because in the mining and hydrocarbon codes, when there is a combined exploration/exploitation negotiation or just one on exploration, the exploration process is supposed to provide much of the technical and financial data needed to fully assess a project. A common requirement is that exploration data should be presented to the government on a quarterly or periodic basis, which would allow the government to provide a more informed transition to exploitation. But this reflects another danger of automatic transition from exploration to exploitation, if governments make decisions on exploitation regimes in the absence of final technical, geological, fiscal, etc. information.

as building knowledge and negotiating skills. To train younger or newer members of the various departments who may be involved with future negotiations, it is necessary to train and introduce them through the existing processes.

3.4 Managing community expectations

Managing community expectations is an important part of the preparatory and negotiating processes. As already noted, this includes engagement and transparency with the community, based on an understanding that modern natural resource projects are essentially trilateral in nature: government, investor and community. This does not mean the community must be on the negotiating team or present at the negotiations in all cases, but it does mean that the engagement must be real, effective and open.

Who to engage with is always a difficult question in this context. There may be many people interested in communicating with the government, many of whom can legitimately claim to be representatives of at least part of the community. What is critical is for the government and the investor to both 'do their homework' in identifying the communities that will be most impacted. They must then engage those communities to select their own representatives as far as possible. The government should avoid imposing its preferred choice of representative, or choosing such persons based on political affiliations as opposed to community support, as such approaches are capable of triggering conflicts within communities. At the same time, with natural resource projects having a long lead time until any negotiations take place, there is more than enough time to identify people the community will see as being legitimate representatives. In effect, the same time taken to explore for geological and engineering purposes is also available to 'explore' for social and economic development purposes. That time should be used effectively for this. Many communities may have pre-existing institutional structures for selecting their representatives. Where such structures exist, the government should respect them and work with the communities to identify their representatives. Where these structures do not exist, the government should engage with the communities in a transparent manner to identify suitable representatives. It is

important that the government explain to the community what the role of the representative will be and provide the community with all relevant information about the project.

Community engagement also requires commitment by the community representatives to participate in good faith and under the same rules as other negotiating team members or observers. While all community representatives may not have the same goals or expectations, they must participate in good faith, preserve the integrity and confidentiality of the process, and not speak out of turn or in a manner that is intended to undermine the government's agreed positions. If there are opposing views that the community representative feels need to be voiced, they should be presented internally for discussion and not while negotiations are being held with the investor present.

That said, it may still be the case that some community groups will oppose a project right through the negotiations process. This can be anticipated in some cases and addressed with the investor. It is simply not necessary for all community groups to fully support a project, but it is necessary for the government to fully understand the reasons for any opposition and seek to address those issues to preserve the best possible opportunities for the project to succeed. And in some instances, the community objections may also be well founded. Recognising this opens the door either to take appropriate mitigation measures or to reach a decision that the project is unsuitable for that time, space and technological approach and should, therefore, be rejected.

A key goal of a community representative is to listen and provide feedback between the community and the negotiating team regarding items that may affect the execution of the agreement. The community representative should have:

- ensured that the goals of the local/impacted community(s) are clearly articulated and have formed a part of the proposed agreement;
- established ongoing relations with the local communities for two-way engagement; and
- established ongoing relations with impacted Indigenous Peoples, where relevant.

A key part of managing community expectations is not inflating them in the first place. While major investments can bring significant wealth and development, no single project is likely to meet the expectations of radically transforming a community, much less a whole country. Governments and community leaders must be realistic as to what can be achieved by way of local economic development, while at the same time being committed to maximising the potential benefits of the project with deliverable outcomes. These can include social development contributions like health and education facilities, as well as economic development benefits. The community representative is charged with helping to make this happen.

3.5 Indigenous Peoples

As noted before, care must be taken not to use the terms 'community' and 'Indigenous Peoples' interchangeably. Throughout the Commonwealth, there are regions of Indigenous Peoples whose cultural heritage, sites and traditions need to be respected during negotiations. Therefore, as negotiations and contracts are worked on, investigations into the manner, form and impact on the lands and lives of Indigenous Peoples must be continuously evaluated. Where there might be such impacts, independent consultations – and in some countries, direct negotiations – with Indigenous Peoples will be required.

Governments should not be lulled into a state of contentment by any promises by investors to connect and work with Indigenous Peoples in the impacted area. Where there are impacted Indigenous Peoples, it is the obligation of the government to ensure that their rights, whether under national or international law, are respected. The government cannot hand over this responsibility to the private investor.

3.6 Memorialising the negotiation (and preparing for disputes)

3.6.1 Maintaining records

Memorialising the negotiation is critical. This includes, of course, the drafting of the contract, but it is not limited to this. At a practical level, the memorialisation of the negotiation is a process that sets out the history of the negotiation, including presentations by all parties, drafting changes over the course of the process, understandings submitted by each party or agreed by both parties, agreed notes, and so on. But it should also include the unilateral statements, interviews, meeting records, and other documentation of both sides. The process essentially anticipates there will be disputes and ensures all the paperwork is available to fully understand the intent of the parties in drafting the contract and its implementation.

This is also exactly what the lawyers for the investor will be doing. They will be collecting all government statements, official and unofficial, before, during and after the negotiations. They will be collating the drafting record, and all changes made to any proposed text, collecting all related statements, archiving presentations and speeches and so on. This is all designed to ensure that, in the event of a dispute later, the investor will have the best opportunity to put its case forward. This is prudent action by the lawyers.

On a more cynical level – and thinking again of the idea of 'fake investors' – we do have reason to believe that some 'investors' are more intent on using their investments as a basis for lawsuits and international arbitrations than they are on ensuring the success of the investment. As many arbitrations have given awards of billions of dollars for investments that never operated based on notions of long-term lost profits, suing governments has become a bigger and bigger business (see Brewin & Bonnitcha, 2020). The best possible defence for countries against such thinking is to be prepared for this type of scenario and to ensure they have a full record of the process.

Maintaining the record of the negotiations includes:

- the record of information and decisions by the technical and negotiating teams;

- the cabinet approval process;
- the development of any initial draft agreement by the government;
- any internal and external presentations by the government or the investor before, during and after the negotiations;
- newspaper clippings and internet-based articles;
- community-level presentations and minutes of meetings; and, of course,
- the contract negotiations themselves.

The contract negotiating record is, therefore, but one element of the full record. In many ways, the other material will set out the full context for understanding what the parties were seeking to address in the contract and help a judge or arbitral tribunal interpret and apply the contract in the event of a dispute.

As already discussed, one department of government must be tasked with maintaining the full negotiating record. It is not unreasonable for this to be the Attorney-General's (AG's) department, the ministry responsible for leading the negotiations, or the office of the lead negotiator if this is a presidential appointment. There is one advantage at a practical level in tasking the AG with this role, and that is consistency of archiving between different contract negotiations under

Checklist 3.5: Memorialising the negotiations

Who has been designated to be the lead agency for keeping all the records?	
Is there an email or similar looping in of all participants to ensure all records are collected? • Is everyone informed of the need to send the records to this depository?	
Are all the records being maintained, including those from outside the actual negotiations? For instance: • Government statements, presentations, comments etc. on the project? • Investor statements, presentations, comments etc. on the project?	
Is the storage process informed by good archiving practice?	
Are the records easily accessible to the negotiating team during the process?	
Keep a full set of records in an alternative location as a backup!	

different lead ministries. While maintaining the records may seem a simple clerical task, it requires important archiving skills, ease of access during the negotiating process for the team members and long-term management. These capacities and needs should be factored into selecting how the record will be maintained.

3.6.2 Drafting the contract: holding the pen

Drafting the contract is obviously a critical part of the process. Who holds the pen remains important today, despite advances in technology that make revising documents much easier. The main issue is no longer the making of unauthorised changes, but of setting the agenda and direction of the negotiations. It is to ensure the importance of the government role in this that the best recommendation is for the government to have either a model agreement it has modified to be project specific or a project-specific draft contract as the basis for the negotiation. This will ensure all the issues the government has on its agenda will be addressed. It will also make clear to the investor what the scope of these issues must be.

In many instances, the investor will come with its own draft contract and will insist it is a better document to work from, is what they have used elsewhere, is professionally drafted by highly skilled lawyers, and so on. That is all fine, but does not obviate the desirability of working from a government draft first and foremost. It would, however, be perfectly appropriate, if possible and if the parties wish, to combine the two documents into bracketed text so that both documents are present in a consolidated document. This will preserve all the government positions in the main negotiating text, which is the key point of this part of the process.

The parties should agree on who will hold the pen and how drafts will be managed. With modern technologies, it is essential to agree on a single drafting platform, generally Microsoft Word. PDFs can be used – but tend to be more complicated when it comes to making changes or notes. The use of 'track changes' technology should be agreed for all changes until they are mutually agreed. Even with this, someone on the negotiating team must be tasked with ensuring no other changes have been made, while reviews of the text must be taken seriously and be done carefully. Every iteration must be reviewed to ensure that

all the changes are seen. Version control is also essential, and the parties should agree on a system to identify different drafts and which draft is current.

It is recommended that the government's legal representative be charged with being the pen-holder, to be responsible for making changes in the formal draft and communicating those changes to the teams of both parties. This would include ensuring drafting done in specific working groups or by others on the team is incorporated into the text properly. All members of the team are, however, responsible for reviewing and ensuring the drafting is done correctly.

When drafting the legal text, it will generally be the role of lawyers of both parties to suggest, agree upon and review acceptable changes. But as already noted, it may not be just the lawyers who are engaged in drafting, especially on issues that are quite technical or specific in nature. For example, development specialists might address economic linkages and employment requirements and draft these sections, or environmental experts might draft the environmental management components. But these texts must then be reviewed by the lawyers, just as the lawyer-drafted text must be reviewed by non-lawyers to ensure clarity and accuracy of the drafting. The goal that governs the drafting process should not be 'turf' but a collaborative effort to ensure the rights and obligations of both parties are clear and understood.

Checklist 3.6: Holding the pen

Has the government designated its lead drafter?	
Is the lead drafter aware of all the issues and objectives?	
Have other negotiating team members been clear on their role in the drafting process, reviewing and confirming text, or drafting specific elements?	
Are review processes in place to ensure the accuracy and completeness of the text?	
Has the drafting software been agreed with the other side, and is it efficient at ensuring version control and that all changes are tracked?	
Is there a process for managing issues that have been parked or redlined?	

3.6.3 The ongoing drafting: internal process

Once the negotiations have started and drafting has begun, it is important for the team to stay informed, disciplined and focused. A first step is daily briefings during the negotiation. Depending on timing of the sessions, these daily meetings should either follow each day or begin the next day. Not all negotiating team members will be doing the same thing each day. So, there must be an effective daily process to ensure everyone is up to date and that strategy can be adjusted if needed.

A critical part of the process is regular major debriefing after each full negotiating session. These debriefings, with all the negotiating team present, should occur within seven days of the end of each session. Progress notes or meetings should also be held with the highest office of the state to provide them with an update on the negotiations and ensure that there are no surprises at the political level, or from the political level, at the end of the process. The minutes and notes from these briefings should form part of the record.

A critical part of the regular meetings is reviewing the negotiating objectives. What has changed since the beginning of the negotiations? Is more information now available? Do either of these change the view on the negotiating positions? If so, how? Do such changes need further approval or are they within the original mandate? This must be a conscious part of the discussion to ensure that the goals and objectives remain valid and that there is a viable strategy to achieve them.

As the negotiations progress, this ongoing review of the objectives becomes more critical as the likelihood of success or needing to compromise becomes clearer. This is normal. The

Checklist 3.7: The ongoing process, internal briefings checklist

Have regular daily briefings been scheduled, preferably at the same time and location each day?	
Are all negotiating team members aware of this time and place and the priority of attending?	
Are post-negotiating sessions debrief meetings scheduled?	
Have briefings been scheduled with political decision-makers following each session – or daily if needed?	
Are records being kept of the daily briefings?	

negotiating process will normally progress from issues that are easier to resolve to those that are harder. This means reviewing the tougher issues will become a more salient part of the internal process. This returns us to the discussion of redlines, above, and assessing which of the outstanding issues fall into this category and which do not. Knowing where there is scope to compromise and where there is no such scope is critical.

3.6.4 Final draft and accepted agreement – or not

As the negotiations progress towards a conclusion, the negotiators should have a good sense as to whether the outstanding issues are dealbreakers or resolvable. Do they fit in the areas that are redlines or are compromises possible? At this point, it is up to the lead negotiator to determine how to assess the situation, game out different options with the team to assess negotiating options, and to inform the responsible minister of the prospects of concluding the negotiation, with or without an agreement.

We have been careful not to use the word 'successfully' in the last sentence. This is because success is not simply measured at this point by whether there is an agreement at the end of the process. A bad agreement, concluded just to say the negotiation was 'successful' in producing a contract, is not a successful conclusion. This is because it puts the future of the project at risk and lowers the benefits that could be achieved if the agreement was a good one. It is important to recall one of our key starting points: concluding a contract is not an end point, but the beginning of a long-term relationship. If the foundation of that relationship is not built correctly, the relationship will fail. In such cases, the negotiators have succeeded if they have identified the potential agreement as being poor and not one the government should not agree to. The government can build on this experience to review the soundness of the project, determine if another investor might provide a better result for the government, understand if market conditions might improve making a delay in the project helpful, and so on.

If a contract is agreed, then there are some final steps to follow. The first is to fully and carefully proofread the text prior to initialling it. This means the designated team members reading the whole text over, from beginning to end, even sections not touched in any final negotiating session. If necessary, a

meeting between the representative of the AG's Office, chair of the technical committee and the investor's legal representative should be arranged for a final review of the proposed agreement after the final negotiation meeting.

When the team is satisfied the text is correct and says what it is meant to say, the legal advisers take over for 'a legal scrub'. This is often done on a collaborative basis by the lawyers on both sides. This is not a time to rewrite the result on issues, but solely to ensure the legal language is consistent, cross references are correct and that the text is consistent with the applicable law. It is a technical legal exercise, not a policy review of the text. It is possible some lawyers will try to sneak in some substantive changes, but this should be pushed back on by the other side.

Once the final document has been agreed upon, it is to be prepared for signing. Usually, the negotiators will conclude this stage by initialling each page, signalling the text on that page has been signed off as the final text. In a remote context, this may be more difficult or might require sequential processes between the parties, who should agree between them how this will be done and to memorialise this agreement for the records.

Once initialled, the text is readied for formal signature by the authorised officials of the government and the investor. There should be enough copies for every person signing to have a copy and for both records to have copies. Depending on the circumstances, there may be a formal signing ceremony with local media and the company leaders present. This is usually seen as a positive opportunity for a press conference and a photo opportunity.

The contract should be negotiated and prepared in the official language of the host country. In some cases, this may not be possible or there may be other official or common languages that the agreement needs to be translated into. These translations should be reviewed by both parties for proper language structure and proper translation of the legal text. There should also be a provision in the text stating clearly which language version is the primary version in the event of any discrepancy in the texts.

Checklist 3.8 Finalising an agreement

Have the negotiators reached an agreement on all items?	
Has the government negotiating team reviewed the full version of the text, beginning to end, before the lead negotiator has signed off?	
Has a 'legal scrub' been performed?	
Has the text been signed off at the political level?	
Has the lead negotiator initialled each page?	
Has the text been prepared for formal signature?	
Have the appropriate counterparties to execute the agreement been identified?	
Are there sufficient copies for the parties and for the record?	
Will the agreement be executed in counterpart or in same document?	
Has an official press package been created for the signing?	
Is there any need for a translation of the agreement?	
Who takes possession of the government copy after execution?	

3.7 Debriefing and lessons learned for other process.

When a negotiation is concluded and there is time to breathe normally again, a full debrief is a helpful part of the negotiation process. This should be a team-wide process that assesses what worked well in the process and what worked less well. The goal is not to blame anyone for the results on any given issues, but to learn how the government can improve its negotiating process, its expertise and its skills. It is about the process and being able to improve upon it for the next time. The agenda for the debriefing would be very simple.

- What went well?
- What did not go well?
- Successes?
- Failures?
- How to improve the next negotiations?

Chapter 4

Post-negotiations

Chapter 4
Post-negotiations

As discussed in the introduction, one of the biggest mistakes a government negotiating team can make is believing that successfully concluding a contract negotiation is an end point. Rather, it is the beginning of a long-term relationship between the government (including subsequent ministers, prime ministers and other officials) and the company. In many cases, any community near the project will also have an active role to play as a third partner in the project, even if it is not a party to the contract. For a contract to be an effective starting point of a long-term relationship, it must include the mechanisms to support that relationship over the duration of the contract. This is the subject matter of this section.

Making this point is not to say that the relationship will be problematic or disorderly, nor does it imply bad faith among the negotiators. It is simply a reflection of reality that long-term relationships will go through periods where tensions may rise and where disputes may occur. How these periods are managed is important, and the contract negotiation process allows the parties to determine in advance what these management processes will be.

4.1 Approval and ratification processes

In many cases, the first step after formal signature of a contract is the approval and ratification process. In some states, this requires formal adoption by the parliament. Where a contract contradicts generally applicable law in any respects, this adoption will often be needed to ensure the provisions of the contract have legal force. In other words, if a contract operates in any way outside the applicable law, contradicts the law, or has elements outside the legal mandate given to the government negotiators in a statute, adoption by parliament will be necessary to have the contract become a *sui generis* law that is fully applicable to the project. Such formal adoption used to be common practice in many countries, but this is now being replaced by more restrictions on negotiators to ensure consistency with the applicable law.

In other cases, signature by the appropriate minister or minsters will suffice to give effect to the contract in a formal sense. The applicable law should set out which ministers must sign the contract for this purpose. We highly recommend more than one minister be named for this purpose, as this promotes transparency within government and greater accountability of the negotiators. It also reduces opportunities for corruption when investors are aware that multiple ministers, and thus ministries, will be engaged in the finalisation of the contract.

Even when a contract does not require formal adoption by parliament, there may be legal or political requirements for ministers to present the contract to a committee of parliament or to the plenary body. Such steps promote transparency and accountability and can help the public and other stakeholders fully understand what has been agreed and why.

4.2 Contract transparency

Whether the contract should be made public or not is often a contentious issue for governments. Many government officials still believe that investor–state contracts should remain confidential, though this view is usually based on a rationale that says 'because they always have been'. In some instances, there is concern that it will be difficult to get a better deal with other investors if every prior contract is public.

The opposing view is that published contracts help governments avoid undue political pressures and corruption, as the results will be available for all to see. There is also a sense of giving investors the security of knowing that all contracts are fundamentally the same, with little 'cherry picking' among the investors.

From the non-governmental perspective, published contracts satisfy the right of citizens to know, the need for transparency with all groups involved, and support anti-corruption and full disclosure later by the investor of its payments to government. Currently, transparency with natural resource contracts in particular has become much more the norm than the exception, as an increasing number of countries join organisations such as the Extractive Industries Transparency Initiative and the Intergovernmental Forum on Mining, to name a few. Most companies and stakeholders now accept that this will occur

and behave accordingly. As transparency in the extractive industry continues to improve through access to information, if an investor insists a contract remain secret, this may even be warning sign about the intentions or legitimacy of that investor.

Among institutions active in this field, the World Bank agencies, International Bar Association MMDA project, OECD, Commonwealth Secretariat, Extractive Industries Transparency Initiative, Intergovernmental Forum on Mining and others have adopted this view. Some governments and companies still resist this, but they are becoming fewer in number.

4.3 Implementation and compliance mechanisms[14]

Disputes will arise. How they are managed is key and what resolution methods are embedded in the contract are even more pertinent. Dispute settlement processes, however, have remained largely international, pitting numerous developing host countries against multinational companies that have resulted in significant awards against the countries. Notable cases are the 2019 Vale $2 billion award against the Republic of Guinea involving mining rights in the Simadou iron ore project and a US$4 billion award against Pakistan for a failed mining project there. Another recent dispute against Nigeria resulted in an award of more than US$4 billion as well in the oil sector. Overall, UNCTAD statistics reveal that about 25 per cent of international arbitrations under investment treaties are in the natural resource sectors. There appear to be no statistics available to assess the number of contract-based arbitrations as they remain largely secret, but the general sense is that they are growing in number.

The importance of the above is understanding that disputes are high risk and potentially very costly. A sound post-contract implementation process should, therefore, seek to reduce the risks of formalised judicial or arbitration disputes, and seek to resolve issues as simply and close to the project as possible. The Nigerian case noted in Textbox 4.1 shows that the dispute settlement options contained in international investment agreements can be challenged, but the grounds, which include public policy, need to be clear.

14 Expanded versions of Sections 4.3 and 4.4 of this handbook are found in Aizawa and Mann (2021), Sections 5.3 and 5.6.

Implementation of a contract is, in real terms, an ongoing process for both parties, the government and the investor. In addition, the government has the responsibility to monitor the company operations for compliance with the applicable domestic laws. This gives the government a dual role in relation to the project, one that can often lead to tensions and difficulties, with the government being both a partner and the enforcer of compliance.

For this reason, it is recommended that enforcement of the applicable law be left to the agencies that generally perform that task: environmental issues should be enforced by the environment department, labour issues by the labour department and so on. This reduces the potential conflicts directly with the ministry of mines, petroleum, infrastructure or whoever else has lead responsibility for the contract. Tax collection, investment ministers and others may also have a role in enforcing the obligations of the investor. At the same time, the ministry responsible for the contract will have duties to monitor compliance with the elements of the contract that are specific to that contract.

Traditional models of enforcement by government have not kept pace with needs. The idea of enforcement agents going from capitals to monitor the conduct of the company and being able to do so effectively and in a timely way is no longer functional or realistic. Years of government cutbacks and the expansion in many cases of economic activity make this approach largely obsolete. But there are other options.

In particular, there is a growing need for the government and company to engage in ongoing compliance review processes and to do so in a transparent way with the local community. This allows 'the eyes and ears' of those closest to the project – employees, community residents, civil society organisations in the community and so on – to be part of the compliance monitoring process. In the complementary Commonwealth publication (Aizawa & Mann 2021) on sustainability provisions in contracts, chapter 5 sets out a number of substantive steps in detail for making this approach effective. These include annual reporting by the company on its principal obligations, public meetings annually with the community and grievance mechanisms that allow individual complaints by citizens.

A corollary of this type of process is developing an understanding that not every breach of the letter of a contract or other legal obligation should lead to risks of termination of the contract or related licence. If governments wish investors to engage with the community and themselves on an ongoing basis to demonstrate their compliance, the project cannot be jeopardised every time they do so. Rather, the focus for enforcement purposes must turn to persistent and material breaches of the contract or other applicable law to ensure transparency, honesty and integrity in the process.

An example illustrates this point. At a mine in the far north of Canada, the investor had an obligation to hire X number of local Inuit persons at the mine. While this was achieved initially, over a few years it was found that the company could not keep the employees, who would generally not stay more than six months to a year, leaving the company unable to continually meet its obligation. But instead of this being a fatal breach of the licence agreement, the company worked with the local community to figure out why the employees were leaving so rapidly. It turned out what the local community wanted was a sense of careers and belonging, not simply a low-paying job. When the company created a career planning process and brought in skills training, the situation reversed itself and company compliance was straightforward.

In other words, the compliance reporting mechanism brought to light a problem that the company could not resolve on its own. Working with the government and community groups, compliance was achieved. More importantly, that local community developed a steady stream of jobs with increasing skills and knowledge, which was the objective of the local employment provisions in the first place. By ensuring that a process to review and resolve compliance issues was used instead of heavy-handed enforcement approaches, the issues were fully resolved and objectives were achieved.

This process begins with more transparency on compliance issues, instead of secret processes. It extends through stakeholder engagement that allows observing issues and resolving problems so that the interests and objectives behind the obligations can be achieved. And it then requires repeating this process on an annual basis or more frequently if deemed

necessary. The more routine the process is seen to be, the more its chance of ongoing success.

In addition to ongoing compliance processes, local communities often demand and expect a company grievance mechanism be available to resolve specific issues that individuals have with the company. These can be minor issues for some people, but critically important for others, especially those in the community who are directly impacted by the project operations. Again, grievance mechanisms are explored in detail in the complementary publication.

Finally, the company and government should include annual or at least periodic review processes that allow them to assess not simply compliance, but whether the agreed goals and interests are being achieved by the project as regulated by the contract or whether changes might be needed to better achieve these goals. Recall here the concept raised early on in this handbook that the parties to a negotiation should begin the negotiations by identifying their goals and interests, what they want to achieve, rather than jump into negotiating legal text. In the context of periodic reviews, this is where the focus on interests comes full circle and the parties have an opportunity to update the project documents if needed.

Doing so also requires that mechanisms be built into the contract for its review and, where warranted, its revision by amendment or addition, or sometimes by simply an agreed

Box 4.1: Corruption in arbitrations

International arbitrations are not devoid of corrupt practices. A recent notable example is the arbitration between Nigeria and Process and Industrial Development (P&ID) Ltd, which stemmed from a gas supply and processing agreement between the two parties. Following alleged non-compliance with the terms of the agreement by Nigeria, P&ID initiated arbitral proceedings as provided for in the agreement. The arbitral tribunal found in favour of P&ID and awarded the company an enormous sum, US$6.6 billion. However, Nigeria successfully challenged the award in the English High Court on the grounds of bribery, corruption, perjury and public policy, both in respect of the agreement itself and in respect of the arbitral proceedings. Notably, the court found that P&ID had improperly retained Nigeria's internal legal documents, which it had received during the arbitration – presumably to help it monitor whether Nigeria had become aware of the fraud it was committing with respect to both the tribunal and Nigeria. The court determined that had the act of bribery been disclosed to the arbitral tribunal, the proceedings would have evolved in a profoundly different manner, potentially leading to a different outcome.

interpretation of the contract. These provisions help ensure the ongoing life to the project – that it is not stagnant, but can be updated to reflect successes and failures better, as well as changed circumstances that impact the project.

4.4 Dispute prevention and dispute settlement

Finally, there may be disputes that materialise and move beyond the capacity of the parties to resolve them on their own. In some cases, governments may wish to include mediation provisions for this purpose, or other forms of outside assistance. An investment ombudsperson may be engaged by the government to assist. Or outside technical experts or mediators and conciliators may be called upon. It is important for governments to be open to such processes. These are not an afront to sovereignty, or to the role of government, but simply aides in resolving disputes before they blow up into full scale litigation or international arbitration. Positive attitudes are, therefore, essential to make such processes work.

It is also important to revisit some of the other issues raised in the negotiation phase: good drafting records, consistent file and document management, ongoing records management and other factors are essential to ensure the government is well prepared and able to defend itself in the event a dispute does turn into litigation or arbitration. Governments must understand that the company and its lawyers are doing just this on an ongoing basis: preparing for the worst while working for the best. Governments must be equally prepared in this way, managing their internal processes to ensure all documents and materials will be available if a problem grows into a full dispute.

Where all this fails, and formal disputes are inevitable, we refer readers to Chapter 5 of the complementary Commonwealth publication (Aizawa & Mann 2021) for extensive descriptions of the issues that are relevant to formulating dispute settlement provisions.

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Annex A: Sample Documents and Reports

4.5 Sample documents to be included in the technical committee report

Sample project description log

Project	Sector	Investor	Description	Location/ counties	Acreage/ hectares	Exploration license	Issued date	End date	Proposed start date	Business plan/ feasibility study	Date

Note: Information to be included on the form is to enable the team to compile a quick list of the project or projects to be negotiated or renegotiated.

Sample list of existing agreements

CATEGORY I: Mining

No.	Company	Description	Classification	Location	Ownership/ representative	GOW participation	Length of agreement	Renewal clauses	Review period
Sample comments for XXX coal power plant									
1	Michale Vale	Iron ore	Class A Mining License	Winko Tango District	Michael Vale Holding AG and M Vale, Wakonda Holding Limited	30% with a minimum of 15%	25 years Effective date of agreement (16 May 2007, amended)	Six (6) months prior to expiration	Every five (5) years; next revision: 2018
2	Clappity Walk 3 properties	Iron ore	Class A Mining License	Zinka Region	Veandente AG Holding	N/L	25 years Effective date of agreement (22 August 2011)	After the expiration for additional years not exceeding 25 years	Shall meet once every five years; next revision: 2016
3	Walkie Talkie	Gold	Class A Mining License	Tarbigi Region	Wakkie Mining Corporation Ltd.	10% free carry	25 years Effective date of agreement (3 April 2009)	Can be extended after expiration	Review after every five (5) years; next revision: 2015
4	RUBBU Iron ore mining	Uranium	Class A Mining License	Olinka Region	RUBBU Uranium Ore Mining and Mino River Iron Ore Ltd.	N/L	25 years Effective date of agreement (7 September 2010)	Can be extended after expiration	Review after every five (5) years; next revision: 2015

Sample report from the review of the feasibility study (for illustrative purposes)

1. Notes from feasibility study

Observations

1. Based on the feasibility report, which was presented dated June 2013.
2. XXX already has a coal mine in Mozambique (transfer prices/ competitive prices)

3. Location and access to site

Proposed site is situated at 25km from the capital city of Inderia, Wakanda. Site is situated closer to the Wakanda main highway, accessible from Inderia by Wakanda main highway.

There is no established rail route near to the proposed site. But unused railway route (without rails) exists closer to the site. The nearest major seaport Inderia is at around 25km from site.

Land is government owned but with adjacent kingdoms that will have to grant easement access. This is one of the more problematic chiefdoms.

Power demand and capacity addition

Based on the information available from websites & the data provided by World Bank, the total estimated demand for Wakanda on High Growth Scenario, is expected to be 240MW in the year 2015 and going up to 545MW in the year 2020. Further Average Annual Power demand is growing at a rate of 40 to 50MW for the period from 2020 to 2040 for High Growth Scenario.

The present installed capacity of Wakanda on Grid is 23MW and the following are the capacity additions which are under execution:

- 100MW HFO Based Power Plant installed under Non-Inderia Industrial Off Grid
- 130MW Reconstruction of the Hydro Station 1 and 2

Taking into consideration of the current installed capacity and the new capacity additions, the proposed Thermal Power Plant capacity is expected to be in the range of 300MW.

The Unit Size of the Thermal Power Plant can be decided after a study on the load flow and short circuit analysis (including with interconnection with WAPP) is carried out by WAKANDA.

Conclusion

Based on the above findings, the capacity addition of 300MW by year 2020 is established XXX shall take in-principle commitment from WAKANDA and other off-grid consumers for the power off-take including the WAPP 225KV substation to be established at hydro dam site. The transmission arrangement connecting grid with off-grid consumers shall also be firmed up by WAKANDA.

4. Transportation and moorage of coal

Considering coal unloading from Inderia port, following options are possible for coal transportation from the bulk carrier to site.

(a) Roadways in trucks

(b) Railway wagons with rail line constructed from port to the site and

(c) Conveyors from port to the plant site.

Technical specifications of the plant were missing. No plant size had been determined.

Project execution missing – to be later.

Project estimates were missing from the feasibility study.

Sample report form a review of the financial model

Observations from the Financial Analysis:

1. Research (coal.com, NYEX) showed that the average cost of coal for the last 24 months has been US$55. Financial Model presented uses a rate of US$81.25.
2. Financial Model shows a hard coded amount of US$373 million as the cost of the plant. Research shows that on average, the cost of 1mg. of power for a coal plant is approximately US$1 million. In some instances, the cost drops to approximately US$700,000.
3. D/E ratio is 60/40 versus max of 66/33.
4. Interest cost in model is 11%.
5. Model assumes no taxes.
6. Model assumes 25-year agreement with fixed tariff on an accelerating basis – steady pricing of US$.015 per MW for the duration.
7. Model assumes that there is a declining cost structure from approximately US$.09 to US$.07.
8. Model assumes debt repayment over 9 years vis-à-vis a 25-year agreement
9. Model assumes a 25-year life for depreciation purposes.
10. Model assumes no corporate taxes, withholding taxes, duties or other taxes.
11. Model assumes US$2.05 billion in 25 years.
12. Model assumes a total cost of coal of US$106 with a US$3 supplier margin, a cost of coal at 81.25 with US$22 for transportation.
13. Corporate entity has a long history of constructing viable and sustaining coal power plants.
14. Funding will more than likely come from bank loans as well as internal generated funds from the parent company.
15. Investor is seeking a 100% government guarantee on payment streams once the plant is constructed.

a. Impact will immediately increase our debt stock relative to World Bank requirements

Addendum 1. The UN 2030 Agenda for Sustainable Development: the 17 Sustainable Development Goals

Goal 1: End poverty in all its forms everywhere.

Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable agriculture.

Goal 3: Ensure healthy lives and promote well-being for all at all ages.

Goal 4: Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.

Goal 5: Achieve gender equality and empower all women and girls.

Goal 6: Ensure availability and sustainable management of water and sanitation for all.

Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all.

Goal 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

Goal 9: Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.

Goal 10: Reduce inequality within and among countries.

Goal 11: Make cities and human settlements inclusive, safe, resilient and sustainable.

Goal 12: Ensure sustainable consumption and production patterns.

Goal 13: Take urgent action to combat climate change and its impacts.

Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development.

Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice

for all and build effective, accountable and inclusive institutions at all levels.

Goal 17: Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

Addendum 2. Extractive Industries Transparency Initiative Principles

1. We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.
2. We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.
3. We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.
4. We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
5. We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
6. We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws.
7. We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring.
8. We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
9. We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.

10. We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.
11. We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.
12. In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations.

Source: Reproduced from EITI (2023: 7)

Addendum 3. Sample list of organisations that provide legal and other support

	Organisation	Support type	Eligible countries
IGF	Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development	Legal, consultancy	Member countries
ASLF	African Legal Support Foundation	Legal, consultancy	Through the African Development Bank
ISLP	International Senior Lawyers Program	Legal, contract	Open
UNCTAD	United Nations Conference on Trade and Development	Various	Open, global
OECD	Organisation for Economic Co-operation and Development	Guidance, policy reviews, etc.	Open, global

The Commonwealth

As resource-rich developing countries are under pressure to develop their natural resources in a sustainable manner to address a myriad of socio-economic and environmental problems, their capacity to negotiate complex, long-term investment agreements, especially with foreign investors, is crucial.

This *Handbook on Extractive Sector Investment Negotiations* aims to provide practical guidance to government negotiating teams to navigate complex investment negotiations by ensuring that processes are designed and followed to achieve sustainable deals. The handbook demystifies the negotiating process and offers a holistic approach to it – one which includes a multidisciplinary approach through the involvement of all relevant stakeholders.

Ultimately, the handbook will empower developing countries with the requisite tools, processes and commitment to professionalism necessary to bring a relative balance of power in the negotiations, through enhanced knowledge and expertise about the project, the resources at issue and the negotiating process itself.

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