

Negotiations Roadmap

Background

For many developing countries, large-scale projects carried out by foreign investors, for example, in extractive industries, or large-scale land investments in agriculture or forestry, are the most important means of facilitating economic growth, development and prosperity. While these deals are of critical importance, many developing host country governments do not have in place robust legal regulatory frameworks, or the human and financial resources necessary to plan for, negotiate and implement such projects in a sustainable and mutually beneficial way. This means they are losing the opportunity to maximize the development gains of these major projects for their country.

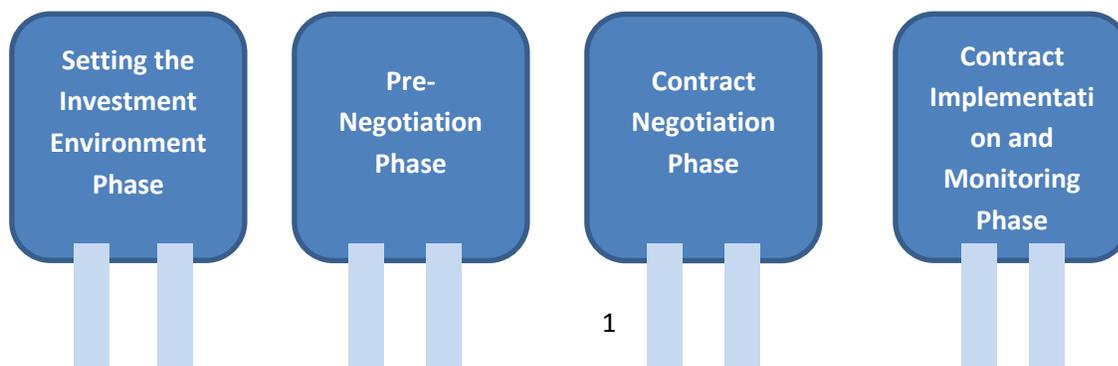
Poorly conceived and negotiated deals for such projects, which often last for decades and sometimes sit outside the country's legislative framework, not only prevent a country from enjoying the full long term benefits of its resources, but help to entrench poverty, corruption and even conflicts, particularly when governance systems are inadequate. From the company's perspective, bad deals can lead to adverse business outcomes, such as reduced security of titles or concessions, increased prospects for disrupted operations from civil protests and greater risks of revisions of tax and other conditions. Companies seek stronger negotiating partners so as to facilitate the negotiation process, legitimize their deals and ensure that contracts are more robust.

Purpose and scope of online Negotiation Roadmap

The negotiation roadmap will visually map out the stages of preparing for, negotiating and implementing and monitoring large-scale investment contracts for host governments. In addition to a brief description of each stage, it will indicate key strategic considerations and the types of expertise that might be necessary at each stage.

The negotiation roadmap will also link to the annotated lists of online tools and resources geared at host governments in relation to each negotiation phase for Extractives (oil & gas and mining) and large-scale land investments.

Finally, the matrix of major negotiation support providers, which is currently published on the VCC's website as a pdf, will be linked to the roadmap in an easy-to-search online format. This will enable host governments to readily identify the organizations that are best placed to assist them.



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1. Setting the Investment Environment

To attract sustainable investments in natural resources, governments should first assess whether they have the right government policies, strategies and legal and regulatory framework in place to both attract foreign direct investment (FDI) and ensure that any such investments are sustainable and beneficial to the country.



1.1. Formulate and reform government policies and strategies to improve the investment environment and align FDI with national development goals

Having sound and clear government policies in place in relation to FDI, fiscal terms and sector objectives can help to guide and inform potential investments. It is similarly important for governments to formulate or update national development and/ or sector strategies that define government sector objectives and identify the types of investments required and investors desired for the sector.

Having such policies and strategies in place will help to align foreign direct investments in extractives and land with national, regional and local development goals.

1.2. Reform the legislative and regulatory frameworks

A comprehensive and clearly drafted legal and regulatory framework improves the investment climate for investors, promotes transparency and government accountability, facilitates better contract negotiations and makes it easier to implement and regulate contracts.

The inclusion of comprehensive environmental protections and human rights standards in the legal frameworks governing large-scale investments in natural resources is also becoming increasingly common. Such laws and regulations need to set out what data should be collected for impact assessments and management plans, who should review and approve them, the process for revisions and corrections, and what the penalties are for non-compliance. Setting out such provisions in the laws governing contracts rather than in the contracts themselves could also limit their (re)negotiation at the contract stage, though some investors may seek to introduce stabilization clauses in the contracts that circumvent some of those standards.

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The implementation of model contracts based on best practices and public consultations could further minimize the discretion in the contract negotiating process, with guidance as to which provisions may be altered in the course of negotiations and which may not.

For the extractives industries sector, laws and regulations are also required in relation to decommissioning and closure, as well as rehabilitation of land.

1.3. Foster sector-specific research and develop technical knowledge

To minimize the asymmetry of information between the host government and the investor in complex contract negotiations, a host government needs to have a good understanding of the resource that is the object of the investment. In relation to extractive industries investments, for example, governments require geological information about the location and estimated quality and quantity of reserves as well as the technical expertise to understand and interpret such information. An understanding of the infrastructure needs of the investor is also important so that the scope for shared use or third party access to such infrastructure can be assessed.

2. Pre-Negotiation Phase

The pre-negotiation phase refers to the period during which a government identifies a particular project or investment and conducts feasibility studies and environmental and social impact assessments. It is also at this stage that a host government should prepare the necessary documentation to carry out a tender or auction.



2.1. Conduct/review feasibility and other impact assessment studies

A government may wish to carry out feasibility studies in relation to the exploitation of its natural resources to assess the suitability and viability of exploiting a particular resource at a given time and to obtain crucial information about the resource that will help define the framework of the investment.

The types of feasibility studies include, but are not limited to geological surveys to better understand the location, grade and quantity of the resource (in the case of extractive industries), hydrological studies to better understand the availability and renewability of affected water resources and microeconomic studies to map out the effect on the local economy of such an investment and the potential for economic linkages.

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Equipped with such feasibility studies, a host government is better placed to make informed decisions as to the suitability of a large-scale land investment from a technical/ physical perspective and what factors need to be considered in the tender/ auction/ grant of the right to exploit the resource as well as during the negotiation of the contracts for such an investment.

2.2. Conduct/ Review environmental and social impact assessments

Impact assessments also need to be conducted to assess the potentially adverse social, environmental and human rights impacts of a particular large-scale extractives or land investment and be better placed to manage and mitigate the risks. With an understanding of the impacts, site-specific environmental, human rights and social parameters can then be included in the tender documents and incorporated into the concession agreement, mining development agreement or other written agreements entered into between the government entity and the investor.

2.3. Prepare and Manage the Tendering Process

The objective of designing an award or tender process is to find the best entity to develop/ exploit a resource, to maximize the potential for revenues and to avoid the distortion of incentives to perform.

Whether rights to develop/ exploit a resource are tendered, auctioned, or granted on a first-come, first-serve basis, the documentation governing the process needs to be well-drafted and comprehensive, setting out the requirements, pre-conditions and parameters for the investments.

3. Contract Negotiation Phase

Once the tendering or other award process has been completed, the bids have been reviewed and the most suitable investor chosen, it is time to prepare for and begin the contract negotiation process. It is at this stage that profit sharing, the level of taxes, breadth of stabilization clauses, and extent of quality standards may be negotiated and the rights and obligations distributed among the contracting parties.

The contract essentially dictates the relationship between the host government and the foreign investor for the duration of the investment, which makes it crucial for the host government to have a negotiating team that is fully capable of engaging in the discussions on an equal footing in terms of both knowledge and expertise with the contracting party. While at previous stages industry-specific information was also necessary, it is also vitally important here to assemble a negotiating team that has the knowledge, expertise and experience to negotiate the substantive provisions of the contract.



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3.1. Prepare for the negotiation

Prior to the commencement of a contract negotiation, the host government should determine its national negotiating position, ideally taking into account the feasibility studies and impact assessments that have been conducted as well as the positions of relevant stakeholders.

Given that negotiations inevitably require some compromise to reach a final agreement, determinations also need to be made as to which provisions of the contract/ objectives are non-negotiable (the “deal breakers”), which are desirable, and which points could be conceded in a negotiation in order of areas of higher and lesser priority.

If any additional research, information or expertise is required for the negotiation to bolster the host government’s position, it should also be carried out at this stage.

The negotiating team should understand and agree what the government position is in respect of the contract negotiation and what it hopes to obtain.

3.3. Assemble a multi-sectoral negotiating team

It is in the host government’s interest to assemble a multi-disciplinary, multi-sectoral negotiation team that is composed in a professionally balanced manner of relevant experts (legal, commercial, fiscal, technical) and government/ ministerial representatives from the sectors implicated by a large-scale investment. That way, the negotiation is more likely to be equitably balanced and lead to a fair outcome, while at the same time ensuring that sector-development goals in the natural resource, infrastructure, water, energy and the environmental sectors are aligned with the goals of the investment.

For example, for the negotiation of a large-scale mining investment, it is not only the ministry responsible for mining who should be involved. Sector experts from ministries/ agencies responsible for water, the environment and finance should also be present in the negotiations. To the extent the mining company requires infrastructure, whether it be power, roads, or rail and port access, the relevant ministry responsible for such infrastructure should also be present. Similarly, where a community development agreement is negotiated, or a mining company is otherwise required to commit to the provision of certain social services, representatives from the relevant sector should also be present to ensure that such commitments align with national/ sectoral goals for the region in which the concession area is located.

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3.3. Develop a negotiation strategy

The government should establish a timeline and roadmap for the negotiations to follow during the negotiation process to ensure that all relevant issues are properly discussed, with relevant technical, legal and commercial experts present, and agreed upon.

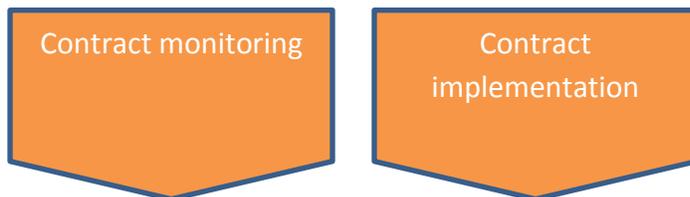
The members of the negotiation team should also understand and agree an effective negotiation strategy ahead of time to progress the government's negotiation position.

3.4. Negotiate the contract/ Drafting and reviewing contractual provisions

An effective and smooth negotiation is one where both parties are on an equal footing in terms of access to information, technical expertise and an understanding of the available options.

A contract which is well-drafted, responsive to changing circumstances and fair to both parties is most likely to be sustainable and mutually beneficial to both parties.

4. Contract Implementation and Monitoring Phase



Once the contract has been signed and ratified, the project development and operations will begin. It is crucial to the sustainability and success of the project that governments have the capacity and resources to monitor compliance of the contracting parties with the laws of the land and the contract, as well as the impact of the operations and related activities on the environment and affected communities. Contracts should also be made publicly available and easily accessible. Contract transparency will help to hold both the host government and the investor to account and to facilitate the monitoring of contract obligations by government representatives and civil society alike.

For the government to effectively monitor compliance with contract provisions, it should map out the government and investor obligations in the contract and relevant legislation and identify contacts in the relevant ministries and government agencies that will be responsible for (1) ensuring the government complies with its contractual obligations and (2) the investor carries out its operations in accordance with its contractual obligations and the standards it has agreed to meet.

There should also be a flexible and responsive mechanism in place to address changes of circumstance that may require revision of the contracts.

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The World Bank Institute's [contract monitoring website](#) details the steps and actions that need to be carried out by governments to effectively monitor the implementation and operation of projects in the extractive industries.