

Negotiation Support Portal

ROADMAP



Overview

The Roadmap lays out the various stages of planning and preparing for a large-scale investment (stages 1 & 2), negotiating the main investment contracts (stage 3) and monitoring and managing the implementation of the investment (stage 4).

While much emphasis is placed on the actual contract negotiation process, the success and sustainability of an investment also depends on the right policies and legal and regulatory framework being in place to govern the investment and ensure it aligns with a country's national development strategies, and the careful monitoring of the implementation of the investment project.

Each stage of the Roadmap links to key tools and resources as well as to the support providers that can provide assistance in relation to that stage.

Stage I: Setting the Legal and Policy Framework

As a first step, policymakers need to assess whether they have the right types of government policies, strategies and a legal and regulatory framework in place to both attract [foreign direct investment](#) (FDI) and to ensure that any such investments are sustainable and beneficial to the country.



1.1. Government Policies and Strategies: Assess, Formulate and Reform

To attract foreign direct investment and maximize its contribution to the sustainable development objectives of a country, clear government policies are needed to guide and inform the planning, preparation, negotiation, monitoring, and implementation of an investment.

Such policies include:

- **A national development plan, policy or vision** that outlines a country's sustainable development goals and sets out in which sectors foreign direct investment is desirable to achieve those goals.
- **Investment policies** that are aimed at achieving a country's development goals and set out the strategic priorities for investment. See the United Nations Conference on International Trade and Development (UNCTAD)'s [Investment Policy Hub](#) for more guidance on investment policies.
- **Investment Incentives** to promote foreign direct investment. Such fiscal, financial, or other investment incentives must be carefully assessed in terms of long-term costs and benefits before they are implemented. The costs and benefits of incentives must be periodically reviewed to ensure they are effective in achieving their desired goals.
- **A master infrastructure plan** to help identify and prioritize investments into the construction, operation and maintenance of infrastructure. For an example of how to prepare such a Master Plan, see India's National Capital Planning Board's [Toolkits for preparation of Master Plan for Water Supply, Waste Water, Drainage and Solid Waste Management](#).

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1.2. Reform and Revise 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 investment projects.

Governments should formulate or revise their laws according to their democratic processes, as a part of which relevant stakeholders, including communities which stand to be affected, should be consulted. A government's national policies and policy objectives, as well as international and regional best practices should also be taken into account in the formulation or revision of such laws. Some governance frameworks and initiatives are available to assist with this process.

If a [public-private partnership](#) (PPP) in an investment is envisaged, the PPP legal and regulatory framework may also need to be revised or updated. There may also be scope for leveraging investments in natural resource-related infrastructure (such as power, ports, rail, water, ICT) to address national infrastructure developments goals, which should be considered. For more information, see the [Columbia Center on Sustainable Investment's work on Leveraging Mining-Related Infrastructure Investments for Development](#).

In relation to any investment, comprehensive environmental, social, and human rights protections should also be included in the legal framework. Laws and regulations setting out such protections should reflect international and regional standards and best practices. They also need to address such issues as what data should be collected for [impact assessments](#) and management plans, which government agency or department 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.

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 amended in the course of negotiations and which may not.

Finally, the implementation of [bilateral investment treaties](#) may need to be considered. Where [local content](#) legislation is or has been implemented, governments need to ensure that the provisions in the investment treaties and local content requirements do not conflict.

1.3. Sector-Wide Analyses

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 or infrastructure potential that is the object of the investment. Having such information will improve the balance of the negotiation and promote the prospects of an equitable outcome.

Depending on the type of the investment, such information could include:

- **Geological information** regarding the location, estimated quantity and quality of mineral resources;
- **Hydrological information** regarding water sources and availability, seasonal fluctuations, and current users of water; or
- Information regarding the **suitability and availability of land** for a particular use.

In relation to **extractive industry 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. Importantly, the status of land that will be made available for the investment project needs to be ascertained.

Where land rights have not been formalized, informal land uses need to be assessed and taken into account so that adequate in-kind and financial compensation can be made available to land users so as to minimize the prospects of social and community conflict. See the [Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security](#) for guidance on how to improve the governance of tenure.

At this time, the government should also assess whether it has the requisite skills and in-house expertise and experience in relation to the type of industry investment. If not, it should seek to acquire such expertise in-house or request assistance from support providers or donors to ensure it has access to the requisite skills or expertise in such areas. This will ensure that, when investment opportunities arise, the government is well placed to negotiate, monitor and implement the investment.

Key Resources

- UNCTAD: [Investment Policy Hub](#)
- [Natural Resource Charter](#)
- IGF: [Mining Policy Framework](#)
- PPIAF: [Draft PPP Policy Outline](#)
- World Bank: [Legal and Regulatory Issues Concerning Public-Private-Partnerships](#)

Stage 2: Pre-Negotiation Stage

The Pre-Negotiation Stage refers to the period during which a government identifies a particular project or investment and conducts feasibility studies and impact assessments. It is also at this stage that a host government should prepare the necessary documentation to carry out a tender or competitive bidding process, if such an application of rights process is being used.



2.1. Conduct Feasibility Studies

A government may wish to carry out [feasibility studies](#) to assess the suitability and viability of exploiting a particular resource or constructing, rehabilitating, or expanding a particular infrastructure at a given time and place. Feasibility studies are also crucial to obtain information about the resource that will help define the framework of the investment and define and quantify any risks associated with the investment to better inform the government in subsequent negotiations with the investor.

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 water resources (i.e. the annual projected rainfall and recharge capacity of any underground aquifers) in the location of a proposed investment, the current and projected demands on those water resources and the impact of the proposed investment on those water resources;
- **Microeconomic studies** to map out the effect on the local economy of such an investment and the potential for economic linkages; and
- In the case of infrastructure, **demand and risk analyses** to determine the demand for the infrastructure or associated public service that will be provided in relation to it and to identify and quantify the cost of potential risks in the construction, operation and maintenance of the infrastructure.

Equipped with such feasibility studies, a host government is better placed to make informed decisions as to the suitability of a large-scale investment from a budgetary, technical and geographical perspective.

2.2. Conduct and Review Environmental, Social and Human Rights Impact Assessments

[Environmental Impact Assessments](#), [Social Impact Assessments](#) and [Human Rights Impact Assessments](#) need to be conducted to assess the potentially adverse social, environmental, and human rights impacts of a particular 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 [investment contract](#) entered into between the government entity and the investor.

Where a local community stands to be affected by an investment, it is important that a government engages early on with such a community. The internationally-recognized principle of [free, prior, and informed consent](#) or [FPIC](#) provides that indigenous peoples have a right to consultation on matters, like investments, that affect their rights and interests. There is also increasing international consensus that non-indigenous communities have a right to be consulted with and to participate in public decisions that affect their lives. Consulting with communities and obtaining FPIC also reduces the risk of social conflict, which minimizes transactional costs and ensures greater certainty for the project.

2.3. Prepare and Manage the Tender Process

The objective of awarding a concession or license through a competitive bidding or tender process is to identify the best contracting party through a sound, competitive, inclusive, and transparent process.

Competitive bids are commonly used for the development of infrastructure projects to promote value for money.

Competitive bidding is also becoming more widespread in the extractive industries, especially where there is already geological information available on a particular mineral or petroleum reserve. The alternative to a competitive bidding process is to award mineral or petroleum rights on a [first come, first served basis](#).

The documentation governing the tender process needs to be well-drafted and comprehensive, setting out the material terms and conditions for agreement, pre-conditions and parameters for the investment and ensuring the tender process is conducted transparently.

For more information on competitive bids and unsolicited bid proposals for infrastructure projects, see [Procurement Processes and Bidding Documents](#) on the World Bank's [Infrastructure Resource Center](#), including guidelines, standardized bidding documents and checklists.

To learn more about the mineral resource tenders, see the World Bank's [Mineral Resource Tenders and Mining Infrastructure Projects: Guiding Principles](#)

Key resources

- [EPEC PPP Guide](#)
- IISD: [Investment Contracts for Farmland and Water: Ten steps](#)
- [Mining Contracts: How to Read and Understand Them](#)
- [Oil Contracts: How to Read and Understand Them](#)

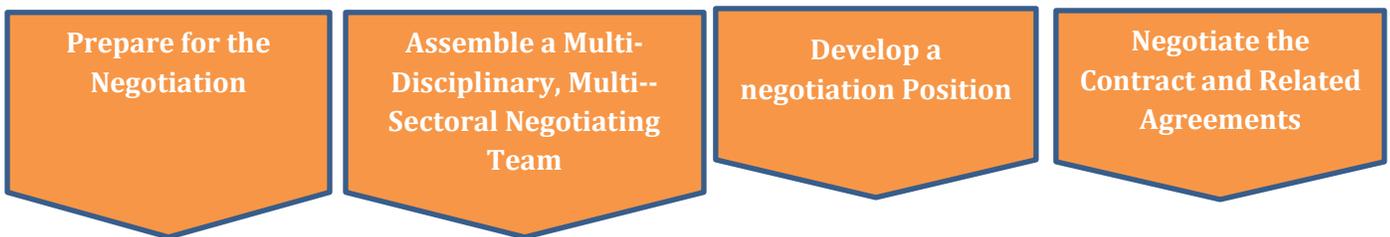
- Rights and Democracy: [Getting it Right: Human Rights Impact Assessment Guide](#)
- [Stakeholder Engagement: Feasibility Studies and Project Planning: Good Practice Pointers](#)

Stage 3: Contract Negotiation

Where an investor is engaged on a [first-come, first-served basis](#), or has made an unsolicited bid, a contract negotiation over the terms of the investment contract is usually required. It is at this stage that such important contractual terms as profit sharing, the level of taxes, and the breadth of stabilization clauses may be negotiated and the rights and obligations of each of the contracting parties agreed.

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 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.

The Australian National Audit Office offers best practice guidance on how to prepare for and conduct a contract negotiation on its [website](#).



3.1. Prepare for the Negotiation

Before the start of a contract negotiation, the host government should determine its national negotiating position, taking into account the [feasibility studies](#) and [impact assessments](#) that have been conducted as well as the positions of different government ministries and agencies.

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. For example, governments may wish to engage legal counsel well in advance of the direct contract negotiations to assist with the negotiation process.

3.3. Assemble a Multi-Disciplinary, Multi-Sectoral Negotiating Team

The decision of who will sit at the negotiation table and will represent the different parties is of vital importance to the outcome of the negotiations and the sustainability of the investment. However, there is no one one-size fits all formula as to who should represent the government at the negotiations table. The structure will depend on the governance structure of a country, the way past negotiations were structured and the political will for a particular structure.

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) as well as of some of the government/ ministerial representatives from the sectors implicated by the investment. These could include, for example, representatives from the ministries of finance, justice, labor and employment, public works, national planning, indigenous peoples, the environment and water, etc. That way, the negotiation is more likely to be equitably balanced and lead to a fair outcome, while at the same time ensuring that the investment is aligned with national and sector development goals.

3.3. Develop a Negotiation Position

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. This includes prior agreement on who should lead the negotiation and who in the room is empowered to take decisions on which aspects of the deal.

3.4. Negotiate the Contract - Draft, Negotiate and Review 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.

Key Resources

- [IISD Guide to Negotiating Investment Contracts for Farmland and Water](#)
- [Model Mining Development Agreement](#)
- [NPV model to analyze PSAs/PSCs or Concessionary Arrangements](#)
- [OpenLandContracts.org](#)
- [ResourceContracts.org](#)

Stage 4: Contract Implementation and Monitoring

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 oversee the compliance of the contracting parties with the laws of the land and the terms of the contract, as well as to monitor 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 helps 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.



4.1. Monitoring of the Investment

For the government to effectively monitor compliance, it should:

1. Map out the government and investor obligations in the contract and relevant legislation; and
2. Identify contacts in the relevant ministries and government agencies that will be responsible for ensuring the government complies with its contractual obligations and the investor carries out its operations in accordance with its contractual obligations and the standards it has agreed to meet. This should also include ensuring that the efforts of each government department involved in monitoring the investment are coordinated and inter-linked to maximize the government's ability to oversee the investment.

In relation to the extractive industries sector, the World Bank Institute's [contract monitoring roadmap](#) details the steps and actions that need to be carried out to effectively monitor the implementation and operation of extractive industry investments.

4.2. Implementation of the Investment

To facilitate the effective implementation of an investment project, a government also needs to ensure that applications for permits and licenses are promptly reviewed and accepted/ rejected on the basis of objective and transparent criteria and that all administrative decisions and regulatory actions are subject to transparent review procedures.

Given the long terms of many investment projects, flexible review mechanisms also need to be in place to address changes of circumstance that may require the terms of an investment contract to be revised or updated.

4.3. Grievance mechanisms

In addition to their potential for fostering sustainable development in host countries, large-scale investment projects can sometimes have adverse effects, including employment conflicts or even human rights violations, leading to grievances from third parties, such as workers or local community members.

Host country governments should ensure that courts or other judicial processes are accessible to those third parties for addressing investment-related grievances. Governments can also establish non-judicial grievance mechanisms to complement these processes. Such [grievance mechanisms](#) can serve as a useful forum for the expression of community and worker concerns or the resolution of disputes, which in turn can help to ensure greater stability and commercial certainty for the investment project. Non-judicial grievance mechanisms might be especially useful when a country's judicial system is already over-burdened and lacks capacity to resolve disputes in a timely manner.

As well as ensuring adequate judicial remedies and potentially developing state-run non-judicial grievance mechanisms, governments can also require or encourage investors to develop their own operational-level grievance mechanisms. Such grievance mechanisms would be operated by the investor or a designated third party, and can be designed to resolve investment-related disputes or grievances using conciliation and negotiation, or through more adjudicatory processes. In addition to state-based and operational-level grievance mechanisms, individuals and communities seeking redress may also have access to other grievance mechanisms in certain contexts, such as those established by international financial institutions financing part or all of the investment or by relevant multi-stakeholder initiatives.

Key Resources

- [Guidebook for Evaluating Mining Project EIAs](#)
- [NRGI Guide to the EITI Standard](#)
- [Towards Sustainable Decommissioning and Closure of Oil Fields and Mines: A Toolkit to Assist Government Agencies](#)
- World Bank: [Contract Monitoring Roadmap](#)