

Preface

This resource document (“Resource”) is intended to help government drafters and reviewers of foreign investment projects and related contracts. It specifically focuses on fairness and balance in investment relationships with respect to environmental, social, and economic development matters in order to maximise the sustainable development benefits and minimise the costs to government and citizens. Setting up an investment project for success for the duration of a contract is a complex undertaking that takes time, energy and proper resources. Of the myriad issues that investment contracts must address, a failure to adequately provide for the environmental, social and economic development consequences of an investment will, inevitably, lead to a contract that is suboptimal for the government. All too often, it ends in financial loss, which is ultimately shouldered by the people in the host state. The role of lawyers in this process will, for the reasons discussed, be of ever-increasing importance.

Negotiating good contracts requires an understanding of how to establish and implement good negotiating practices. The need for sound preparations that engage the government departments responsible for the key issues being raised cannot be stressed enough. The important role of the lawyer in this process will be underscored throughout this Resource. Governments that lack capacity and experience should seek support, and use the opportunity to ensure government officials learn from outside specialists. Negotiating a contract is a business process, not a policy-making process: a contract will not be reopened whenever there is a change in government, at least not without a high risk of triggering disputes. Understanding the provisions being negotiated and consequences thereof is absolutely essential.

The issues addressed in this Resource are one basket of issues in a contract setting. Numerous additional issues must be considered, including properly defining the project scope and location, the financial terms, the timelines and deliverables at different stages of the project, certain fiscal elements, and the warranties of each party. Historically, too much emphasis has been placed on the beginning of the relationship (signing a

contract) and how to maintain that status quo, but not enough on how to manage the evolution of the relationship over its full, often decades-long, lifespan. Changes in the relationship, such as amendments, assignments, stepping-in and winding-down, all of which seem impossibly far in the future, are likely to occur. Properly structured dispute management and dispute settlement processes are also critical.

While recognising the importance of all of these issues, this Resource focuses exclusively on the environmental, social and economic development dimensions of investment, which time and again have proved to be a blind spot in so many failed investment projects. To help lawyers anticipate and address this blind spot, this Resource sets out practical, principle-based guidance on the procedural and substantive rights and obligations involved in environmental, social, and economic development matters (Chapter 4), followed by guidance related to general, legal or procedural provisions that apply to the entire contract (Chapter 5). Many of these general provisions are understood as legal ‘boilerplate’ and yet they can have a surprising impact on the sustainable development of the host country, its people and the environment. A summary of all guidance appears in the Annex.

We hope that governments and drafters and reviewers of investment contracts can use this Resource to maximize the sustainable development impacts of investment projects, not least those implemented to help governments recover and build back better following the ravages of the coronavirus pandemic.