



**THE DANISH
INSTITUTE FOR
HUMAN RIGHTS**

**HUMAN RIGHTS
AND STATE-
INVESTOR
CONTRACTS**

GUIDANCE AND ASSESSMENT TOOL
FOR COMPANY NEGOTIATORS

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS
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CONTENTS

INTRODUCTION	4
MINI BRIEFING NOTE	6
QUESTIONS FOR COMPANY NEGOTIATING TEAMS	10
HUMAN RIGHTS COMPLIANCE ASSESSMENT MODULE	16
ANNEX I – SUMMARY OF THE PRINCIPLES FOR RESPONSIBLE CONTRACTS	36
ANNEX II – ABOUT THE HUMAN RIGHTS COMPLIANCE ASSESSMENT	37
FURTHER RESOURCES	38

INTRODUCTION

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS

This guidance consists of three complementary components that seek to provide practical information and guidance to companies on respecting human rights in State-investor negotiations and contracts:

- A 4-page briefing note on human rights and State-investor contracts
- A 6-page checklist with human rights relevant questions for company negotiating teams
- The Human Rights Compliance Assessment Module based on the Principles for Responsible Contracts.

The guidance is based on the Principles for Responsible Contracts, and other relevant standards and frameworks, including the UN Guiding Principles for Business and Human Rights and the 2011 version of the OECD Guidelines for Multinational Enterprises. For ease of reference the three components are also available separately.

The guidance is intended for staff groups involved in the negotiations of State-investor contracts as well as staff with responsibility for human rights, including business development, legal affairs, government relations and sustainability.

WHY CONSIDER HUMAN RIGHTS AT THE CONTRACTING STAGE?

- Putting in place measures for effective management of human rights risks and impacts early facilitates more effective human rights management throughout the project lifecycle, particularly in operating contexts where domestic laws and regulations do not provide sufficient protection for human rights.
- It enables division of roles and responsibilities between State duties and company responsibilities towards human rights.
- It facilitates early identification of human rights risks and impacts, including potential legal liabilities.
- It enables appropriate allocation of costs for the management of potential human rights risks and impacts of the investment project.
- Considering human rights risks and impacts at the contracting stage provides a valuable opportunity to identify ways to maximise the project's potential positive contribution to human rights.

WHAT ARE THE PRINCIPLES FOR RESPONSIBLE CONTRACTS?

The “Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators” were developed under the mandate of the former UN Special Representative on Business and Human Rights, Professor John Ruggie. The ten key principles seek to help integrate the management of human rights risks into investment project contract negotiations between host-State entities and foreign business investors, and are the product of four years of research and inclusive multi-stakeholder dialogue. The principles cover a range of subjects, including: operating standards, stabilisation clauses, compliance and monitoring, transparency and community engagement.

For further details see Annex I.

WHAT IS THE HUMAN RIGHTS COMPLIANCE ASSESSMENT TOOL?

The Human Rights Compliance Assessment Tool (HRCA), developed by the Danish Institute for Human Rights, is a comprehensive tool designed to identify the human rights risks and impacts of company operations. The tool consists of a database of questions and indicators measuring the implementation of human rights in company policies, procedures and practice. It covers all internationally recognised human rights and their impact on all rights-holders and other stakeholders, including employees, local communities, customers and host-governments. The standards and indicators in the database are regularly updated to incorporate feedback from company users and developments in international human rights law.

For further details see Annex II.

MINI BRIEFING NOTE

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS

INTRODUCTION

This four-page briefing note provides an overview for companies on some of the key human rights considerations associated with the negotiation and content of State-investor contracts. The summary is based on “The Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators” which were developed under the mandate of the former UN Special Representative on Business and Human Rights, Professor John Ruggie.

Exercising **human rights due diligence** includes the consideration of human rights at the stage of State-company contracting for an investment project. In particular where domestic laws and standards do not provide appropriate protections for human rights, or where administrative capacity is unable to appropriately guarantee the protection of human rights in the context of a given investment project, the contract negotiation can provide a valuable platform for consideration of how human rights risks and impacts of the project will be managed throughout the project lifecycle.

MANAGEMENT OF HUMAN RIGHTS RISKS AND IMPACTS – ROLES AND RESPONSIBILITIES

For the effective and ongoing management of human rights risks and impacts throughout the project lifecycle it is important that the **roles and responsibilities of the host-State and the company** are clearly understood and articulated, and that costs for the management of human rights risks and impacts are assigned. For instance, a contractual commitment that a party will be responsible for carrying out the assessment and analysis of human rights risks and impacts can help to ensure that that party appropriately budgets for these activities.



“A **State-investor contract** is a contract made between a host State and a foreign business investor or investors. The types of contracts relevant to this guide are those in resource exploration or exploitation such as in oil, gas or mining; large agricultural projects; infrastructure projects, such as for the construction of highways, railways, ports, dams; or those for the development and operation of water and sanitation systems.” -Principles for Responsible Contracts, paragraph 5-

As a first step, this means that both the State and the company need to ensure that the **negotiating agenda** reflects human rights relevant issues and that negotiators are tasked to engage on these issues. From a company perspective, this would include ensuring that the negotiating team is supported by in-house or external **human rights expertise**. It also means that the company takes steps together with the State to develop a **shared platform of understanding** of the potential human rights risks and impacts associated with the investment project and how these will be addressed. Negotiating teams need to be aware of any potential adverse human rights impacts that are reasonably foreseeable from feasibility studies, early impact assessments, due diligence assessments and other project preparation. The company can assist in the development of such a shared platform of understanding by sharing relevant information with the State, and asking the State negotiating team to do likewise.

Consideration of roles and responsibilities also extends to project **monitoring and compliance**,

reflecting the State's duty to monitor compliance with all relevant standards (such as technical, social, environmental, fiscal, financial and accounting standards etc.), whilst providing necessary assurances for the company against arbitrary interference in the project.

OPERATING STANDARDS

It is important to ensure that the **operating standards**, including the laws, regulations and standards governing the execution of the project, facilitate the prevention, mitigation and remediation of any adverse human rights impacts throughout the lifecycle of the project. For example, standards governing construction should be compatible with best practice HSE standards thereby reducing the likelihood of workplace accidents, which may impact on the right to life; waste management standards need to be in line with sound environmental standards thereby reducing the likelihood of pollution, which may impact on the right to health. It also means that the company needs to be aware of any gaps between host-State laws and regulations (and implementation of these) and international human rights

standards, and consider how any gaps identified might be mitigated. Ensuring that the operating standards governing the project facilitate the prevention, mitigation and remediation of any adverse human rights impacts can be facilitated through contractual provisions that identify and commit to upholding the most protective relevant standards (domestic, international, those created by lenders or international industry bodies etc.) and ensuring that the contract provides for compliance with updates in domestic laws, regulations and standards as they evolve.

PHYSICAL SECURITY, COMMUNITY ENGAGEMENT AND GRIEVANCE RESOLUTION

The parties' reaching agreement about roles, responsibilities and processes for **physical security, community engagement and grievance resolution**, can facilitate ongoing company human rights due diligence for the project. For example, effective and inclusive engagement with impacted rights-holders and host-communities - essential for understanding

potential human rights risks and impacts and to ensure sustainability of the project - needs to occur as early as possible and throughout the project lifecycle, and is therefore well considered already at the contracting stage. Whilst it might not be possible to provide precise details of community engagement plans or project-level grievance mechanisms at the contracting stage, including provisions for the development, implementation and costing of these human rights due diligence measures at this point is a useful way to ensure that these aspects are appropriately implemented and managed throughout the project lifecycle.

ADDITIONAL GOODS OR SERVICE PROVISION

Additional goods or services refers to goods the company provides or services it carries out to the benefit of the State or host-communities (e.g. schools, healthcare services, roads or other), where these goods or services are not related to any project activity and do not constitute measures to prevent, mitigate or remediate direct adverse human rights impacts of the project. The corporate responsibility to respect applies to the provision of additional goods or services. Therefore, if the company is to provide additional goods or services, appropriate standards for such services, monitoring and planning for long-term sustainability beyond the life of the project need to be thoroughly considered during contracting. Furthermore, the contract should ensure clarity of roles of the State and company and be structured in a way to support the State in exercising its human rights duties.



STABILISATION CLAUSES

Stabilisation clauses refer to those clauses in an agreement that address changes in the law in the host-State during the term of the contract. From a company perspective, stabilisation clauses can constitute a risk-mitigation tool to protect foreign investments from sovereign risks such as changes in the fiscal regime which will impact on the economic viability of the investment. Host-States may view stabilisation clauses as a way to foster a favourable investment climate. It is important to note that there are different types of stabilisation clauses, and that full-freezing clauses and clauses that freeze any laws on labour, environment, HSE and any other areas that can be directly related to protecting human rights, must be avoided. ‘Full-freezing’ clauses are clauses that can be interpreted to insulate an investment from any and all laws of the host-State with respect to the investment project over the life of the project; ‘economic equilibrium’ clauses require that the investor complies with new laws but also make it possible for the investor to gain some type of compensation to mitigate costs of compliance, in some circumstances; and ‘hybrid’ clauses require the State to restore the investor to the same position it had prior to changes in law, including via exemptions. If stabilisation clauses are used, the potential human rights implications need to be carefully evaluated and addressed. In particular, it is important that such clauses are consistent with the State’s human rights duties and do not create obstacles to a State’s bona fide efforts to introduce and fully implement laws, regulations or policies in a

non-discriminatory manner to meet the State’s human rights obligations.

TRANSPARENCY AND DISCLOSURE

Transparency and disclosure of contract terms is critical from a human rights perspective. Appropriate disclosure allows both parties to communicate transparently with those who will be impacted. This means negotiations should include seeking agreement on a strategy for the disclosure of the contract terms in a timely manner, including consideration of information accessibility for impacted rights-holders and other stakeholders (e.g. language, literacy, physical accessibility etc.). Any exceptions to the disclosure of contract terms should be based on compelling justifications and time-bound to fit the justifications. Contract negotiation also needs to include the development of strategies for the timely and accurate disclosure of specific human rights due diligence information associated with project implementation (e.g. impact assessments, stakeholder engagement plans, information about the community grievance mechanism etc.), again also considering accessibility.

Key Resource: “Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, United Nations General Assembly, Human Rights Council (A/HRC/17/31/Add.3, 25 May 2011).

QUESTIONS FOR COMPANY NEGOTIATING TEAMS

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS

TOPIC	QUESTION	YES	NO	
Negotiation preparation and planning	1. Have you considered how company commitments to human rights relate to the proposed contract and project (e.g. human rights policy, HSE standards, the Voluntary Principles on Security and Human Rights, labour standards etc.)?			
	2. Is your negotiating team supported by in-house or external human rights expertise?			
	3. Have you considered how the project may impact positively and negatively on the human rights of host-communities (e.g. through resettlement, security arrangements, environmental impacts, growth of local economies etc.)?			
Human rights impact management	4. Do negotiations recognise and require the undertaking of human rights due diligence for the project and do they appropriately assign costs and timing of specific due diligence activities (i.e. human rights baseline, assessment of human rights impacts, community engagement etc.)?			
	5. Do negotiations consider and delineate State duties and company responsibilities with respect to specific activities for identifying, mitigating and remedying human rights impacts throughout the project lifecycle?			
Monitoring and compliance	6. Do negotiations reflect the State's duty to monitor project compliance with relevant standards (i.e. technical, social, environmental, fiscal, financial and accounting standards)?			

This checklist contains 15 questions for company negotiating teams to assess if human rights are considered in State-investor contract negotiations. The accompanying

mini briefing note provides background information on why and how human rights are relevant to State-investor contract negotiations.

SUGGESTED ACTIONS	OBJECTIVES
<ul style="list-style-type: none"> • Seek input from in-house or external human rights expertise. • Consult colleagues from relevant business functions, e.g. legal, security, community relations, human resources etc. • Seek input from both corporate and subsidiary levels to clarify company human rights commitments and local host-community context. • Consider findings from early feasibility studies, baseline studies, community engagement etc. to understand potential human rights risks and impacts and inform the negotiating agenda. 	<p>The negotiating team is supported by human rights expertise and potential human rights risks and impacts are considered in the negotiating agenda.</p>
<ul style="list-style-type: none"> • Consult with relevant business functions on implementation and costing of human rights due diligence measures. • Ensure the negotiating agenda includes consideration of State duties and company responsibilities with regard to human rights. 	<p>The negotiation considers the implementation of effective ongoing human rights due diligence and negotiating parties show awareness of their respective duties and responsibilities with regard to human rights.</p>
<ul style="list-style-type: none"> • Ensure the negotiation contemplates that during the term of the contract the State will have access to information and project sites reasonably 	<p>The deal negotiated enables the State to monitor the project's compliance with relevant standards whilst providing necessary</p>

TOPIC	QUESTION	YES	NO	
	7. Have you considered the State’s capacity to monitor project compliance with relevant standards and the potential need for temporary measures to address any gaps in capacity?			
Project operating standards	8. Have you checked that the proposed operating standards for the implementation of the project facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the project lifecycle?			
Stabilisation clauses	9. Do you refrain from seeking or accepting full-freezing stabilisation clauses and clauses that freeze any laws on labour, environment, HSE and any other areas that can be directly related to protecting human rights?			
	10. Do you seek to ensure that any stabilisation clauses, if used, do not contemplate economic or other penalties for the State in the event that the State introduces laws, regulations or policies which: (a) are implemented on a non-discriminatory basis; and (b) reflect international standards, benchmarks or recognised good practices in areas such as health, safety, labor, the environment, technical specifications or other areas that concern human rights impacts of the project?			
Additional goods or service provision	11. Do negotiations consider the human rights implications of additional goods or services, and if included seek to ensure human rights compliant standards for any additional goods or service provision (including assignment of responsibility for ensuring quality, effectiveness, oversight and monitoring)?			

SUGGESTED ACTIONS	OBJECTIVES
<p>required to ensure compliance of the project with relevant standards.</p> <ul style="list-style-type: none"> In case of weak State monitoring capacity include temporary alternative measures, e.g. self-reporting requirements, monitoring by external stakeholders or a multi-lateral body. 	<p>assurances for the company against arbitrary interference in the project.</p>
<ul style="list-style-type: none"> Draw on early country entry, political risk and legal framework analyses to identify any gaps between host-State standards (and their implementation) and international and best practice standards, including human rights standards. Seek to bridge any gaps in host-State laws, regulations and standards by supplementing them with more protective standards where necessary, including human rights standards. 	<p>The laws, regulations and standards governing the implementation of the project are clearly identified, clear enough to be adjudicated, and facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the project lifecycle; they apply to contractors, subcontractors and successors.</p>
<ul style="list-style-type: none"> Obtain legal and human rights input on any stabilisation clause proposed by the host-State or the company to ensure that it does not create obstacles to the State's bona fide efforts to introduce and implement laws, regulations or policies in a non-discriminatory manner to meet the State's human rights obligations. 	<p>Stabilisation clauses, if used, do not create obstacles to the State's bona fide efforts to introduce and implement laws, regulations or policies in a non-discriminatory manner to meet the State's human rights obligations.</p>
<ul style="list-style-type: none"> Consult with relevant business functions and government agencies to determine applicable standards and consider quality, transparency/disclosure and long-term sustainability of additional goods or services. 	<p>Any additional goods or services provision is structured in a way that supports the State duty to provide such services and considers quality, monitoring, transparency/disclosure and long-term sustainability.</p>

TOPIC	QUESTION	YES	NO	
Project physical security	12. Do negotiations consider potential human rights risks and impacts associated with physical security of the project (including both public and private security provision), including potential legal liabilities?			
Community engagement	13. Do negotiations consider how to ensure ongoing and effective engagement with impacted communities and individuals (e.g. commitment for the development, implementation and funding of a community engagement plan)?			
Grievance resolution	14. Do negotiations consider provision for the development and implementation of an effective project-level grievance mechanism for impacted communities and individuals?			
Transparency and disclosure	15. Do negotiations include seeking agreement about how to ensure the timely and accurate disclosure of the contract, including consideration of information accessibility for impacted rights-holders and other stakeholders?			
	16. Do negotiations include consideration of how to ensure the timely and accurate disclosure of specific due diligence information related to project implementation, including information accessibility for impacted rights-holders and other stakeholders?			

SUGGESTED ACTIONS	OBJECTIVES
<ul style="list-style-type: none"> • Ensure commitment that security will be carried out in line with international human rights standards and international humanitarian law, and make provision for the further development of detailed security management protocols as part of project implementation. 	<p>Human rights risks associated with physical security for the project are identified and provision is made for any security management by public and/or private security forces to follow international human rights standards and international humanitarian law.</p>
<ul style="list-style-type: none"> • Consult with relevant business unit functions, e.g. community relations and legal, to identify the likely scope of community engagement and applicable effective engagement principles, e.g. Free Prior Informed Consent where applicable. 	<p>Effective community engagement strategies are developed and implemented ensuring impacted communities and individuals are regularly and appropriately engaged throughout the project lifecycle.</p>
<ul style="list-style-type: none"> • Consult with relevant business functions to identify whether a suitable project-level grievance mechanism is in place or will need to be developed. 	<p>Impacted communities and individuals have access to an effective project-level grievance mechanism.</p>
<ul style="list-style-type: none"> • Seek agreement within the negotiation on a strategy for the suitable disclosure of the contract in a timely manner. • Negotiate with a presumption towards transparency and disclosure, ensuring that the scope and duration of any exceptions are based on compelling justifications and appropriately time-bound. • Seek agreement within the negotiation on strategies for the timely and accurate disclosure of specific human rights due diligence information associated with project implementation (e.g. impact assessments, stakeholder engagement plans, information about the community grievance mechanism etc.), including consideration of accessibility of information for rights-holders and other stakeholders. 	<p>Impacted communities and other stakeholders have public access to the terms and conditions of the contract, as well as public access to specific human rights due diligence information associated with project implementation, in a manner that is accessible to them.</p>

HUMAN RIGHTS COMPLIANCE ASSESSMENT MODULE

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS

This State-Investor Contracts Human Rights Compliance Assessment Module is designed to assess the compliance of State-investor negotiations and contracts with human rights, including the Principles for Responsible Contracts developed by the former UN Special Representative on Business and Human Rights. (see Annex I).

The Module is a new addition to the Human Rights Compliance Assessment developed by the Danish Institute for Human Rights (see Annex II for further information about the Human Rights Compliance Assessment and how it can be used).

1.1. NEGOTIATION PREPARATION AND PLANNING

QUESTION

Are negotiating teams supported by human rights expertise, ensuring capacity and mandate to implement the responsibility to respect human rights in negotiations?

QUESTION DESCRIPTION

Negotiating parties need to be adequately prepared and have the capacity to address human rights implications of the project during negotiation. This includes making sure that negotiating teams are appropriately supported by in-house or external human rights expertise, reflecting human rights in the mandates of negotiators and ensuring negotiators understand the respective human rights duties of the State and human rights responsibilities of the company.

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	Company due diligence processes and protocols governing negotiations include human rights considerations (e.g. investment risk-assessments, negotiation guidelines etc.).			
2	The negotiating team is supported by in-house or external human rights expertise.			
3	The negotiating team is aware of potential adverse human rights impacts reasonably foreseeable from feasibility studies, early impact assessments, community engagement or other initial project preparation. Context specific potential human rights impacts identified through these studies inform the negotiations.			
4	The company takes steps to ensure that State negotiating teams have access to any necessary expertise and information during negotiations (e.g. human rights, legal, technical, financial, etc.).			

BASIS OF ASSESSMENT

FOLLOW-UP

1.2. MANAGEMENT OF POTENTIAL ADVERSE HUMAN RIGHTS IMPACTS

QUESTION

Does the company take steps to clarify State duties and company responsibilities for the prevention, mitigation and remediation of actual and potential adverse human rights risks and impacts associated with the project?

QUESTION DESCRIPTION

State duties and company responsibilities for the prevention, mitigation and remediation of actual and potential human rights risks and impacts associated with the project and its activities should be clarified and agreed to the extent possible before the contract is finalised. As the contract forms a basis for the future management of human rights risks and impacts it is an important tool in the allocation of tasks for protecting and respecting human rights, including allocation of financial resources and timing for ongoing management of human rights risks and impacts throughout the project lifecycle. Considerations at contracting include: clarifying how a human rights baseline will be established; providing for assignment of adequate funding for human rights management and mitigation (including capturing project lifecycle considerations, i.e. anticipating the need for human rights due diligence funding at project start-up and closure, as well as during operations); recognising the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy; and to the extent possible assigning roles and responsibilities for ongoing human rights due diligence, including through commitments to further defining specific protocols and steps during project implementation (e.g. including an initial contractual commitment for the development and implementation of a more detailed security management protocol and community engagement plan).

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	The contract contains provision for undertaking human rights due diligence (i.e. human rights baseline, periodic assessment of human rights impacts, stakeholder engagement, grievance mechanism etc.).			
2	The contract clearly delineates State duties and company responsibilities with regard to actual and potential human rights impacts of the project.			
3	The contract provides for assignment of adequate funding for human rights impact management, including through setting up special financial mechanisms with independent or joint accountability structures where appropriate.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.3. MONITORING AND COMPLIANCE

QUESTION

Do negotiations and contracts consider how project compliance with human rights will be monitored?

QUESTION DESCRIPTION

The State has the primary duty to monitor project compliance with relevant standards to protect human rights whilst also providing necessary assurances for the company against arbitrary interference in the project. To ensure effective monitoring and project compliance with relevant standards the company needs to consider the State's capacity to monitor the project's compliance with applicable standards, and identify how it may contribute to closing any gaps identified in the State's capacity to monitor (e.g. through temporary alternative agreed methods of monitoring and ensuring project compliance with applicable standards).

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	Company negotiators consider potential conflicts of interest and gaps in State capacity to monitor project compliance with project operating standards and human rights and if there are gaps identified the contract stipulates how these will be mitigated, (e.g. via self-reporting requirements, external assistance or other means).			
2	The contract reflects the State's duty to monitor compliance with all relevant standards (such as technical, social, environmental, fiscal, financial and accounting standards), including providing for State access to information and project sites reasonably required to ensure such compliance.			
3	The company cooperates in State monitoring and compliance work.			
4	The company seeks to ensure adequate costing of monitoring and compliance activities.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.4. PROJECT OPERATING STANDARDS

QUESTION

Does the company ensure that the contract stipulates human rights compatible operating standards for the project?

QUESTION DESCRIPTION

The laws, regulations and standards governing the project should facilitate the prevention, mitigation and remediation of any adverse human rights impacts throughout the project lifecycle. This includes seeking clarity of operating standards; identifying any inconsistencies between host-State laws and regulations and relevant international standards, including human rights standards; and including a commitment that the most protective standards will apply. The contract should also include acknowledgment that standards are dynamic over time and a commitment that project governance allows for updates in laws, regulations and standards as they evolve.

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	The company has identified gaps between host-State laws and regulations (and their implementation) and international standards, including human rights standards (e.g. through early baseline or risk assessment).			
2	The contract applies operating standards that facilitate the prevention, mitigation and remediation of any adverse human rights impacts throughout the project lifecycle, including a commitment that in case of inconsistencies between national standards and international and other best practice standards the more protective standard will apply.			
3	The contract stipulates that all operating standards apply to successors and contractors and sub-contractors.			
4	The contract acknowledges that applicable standards are dynamic over time and provides for adherence to operating standards updated as bona fide efforts of the State to introduce and implement laws, regulations and policies to meet the State's international human rights obligations.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.5. STABILISATION CLAUSES

QUESTION

Has the company ensured that stabilisation clauses, if used, are carefully drafted so that any protections for the company against future changes in law do not interfere with the host-State's bona fide efforts to introduce and implement laws, regulations or policies, in a non-discriminatory manner, to meet the State's human rights obligations?

QUESTION DESCRIPTION

Stabilisation clauses refer to those clauses in an agreement that address changes in the law during the term of the contract. From a company perspective, stabilisation clauses can constitute a risk-mitigation tool to protect an investment from changes in the fiscal regime during the life of the project. Host-States may view stabilisation clauses as a way to foster a favourable investment climate. It is important to distinguish between different types of stabilisation clauses, and clauses that freeze any laws on labour, environment, HSE and any other areas that can be directly related to protecting human rights must be avoided. 'Full-freezing' clauses are clauses that can be interpreted to insulate an investment from any and all laws of the host-State with respect to the investment project over the life of the project; 'economic equilibrium' clauses require that the investor complies with new laws but also makes it possible for the investor to gain some type of compensation to mitigate costs of compliance, in at least some circumstances; and 'hybrid' clauses require the State to restore the investor to the same position it had prior to changes in law, including via exemptions. If used, it is essential that potential human rights implications of any stabilisation clauses are carefully considered. For example, if such clauses are used it is important that they are consistent with the State's human rights obligations and do not create obstacles to the State's bona fide efforts to introduce and implement laws, regulations or policies, in a non-discriminatory manner, in order to meet the State's human rights obligations.

[Question references: Principles for Responsible Contracts; OECD Guidelines for Multinational Enterprises]

INDICATORS		YES	NO	NO INFO
1	The company does not negotiate full-freezing stabilisation clauses or clauses that freeze any laws on labour, environment, HSE and any other areas that can be directly related to protecting human rights and avoids entering any contract that contains any such stabilisation clauses.			
2	Stabilisation clauses, if used, do not contemplate economic or other penalties for the State in the event that the State introduces laws, regulations or policies which: a) are implemented on a non-discriminatory basis; and b) reflect international standards, benchmarks or recognised good practices in areas such as health, safety, labour, the environment, technical specifications or other areas that concern human rights impacts of the project.			
3	Where they are used, mechanisms to manage the material and economic impacts on a company of non-discriminatory changes in law should be carefully designed to mitigate the specific risks to which the company is exposed.			
4	If a stabilisation clause in an existing agreement freezes law related to health, safety, labour, environment or other standards related to human rights protection, the company nonetheless applies the relevant higher standards and improvements in laws and regulations.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.6. ADDITIONAL GOODS OR SERVICE PROVISION

QUESTION

Does the company ensure human rights impacts associated with additional goods or service provision are considered?

QUESTION DESCRIPTION

Where the contract envisages that the company provides additional goods or services (non-commercial services or infrastructure, such as schools, healthcare services, roads or other, that are not essential to either carrying out the project or mitigating the project impacts), this should be carried out in a manner that is compatible with the State's human rights duties and the company's human rights responsibilities. This includes consideration of whether additional goods or service provision would in any way hinder the State's implementation of its human rights duties. The company's responsibility to respect human rights applies to the provision of goods or services even where these are additional to the project and the company's core business activity.

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	The contract clearly sets out human rights compliant standards that apply to additional goods or service provision.			
2	Responsibility for ensuring the effectiveness, oversight and monitoring of additional goods or services is assigned and adequately resourced.			
3	Any company provision of additional goods or services is designed in a manner that considers and supports the State duty to provide such services, including long-term sustainability of services (i.e. beyond the life of the project).			
4	Company human rights due diligence activities include additional goods or service provision (e.g. impact assessments, monitoring etc.).			

BASIS OF ASSESSMENT

FOLLOW-UP

1.7. PHYSICAL SECURITY FOR THE PROJECT

QUESTION

Does the company seek to ensure a contractual commitment that any physical security for the project is carried out in a manner that is consistent with international human rights standards and international humanitarian law?

QUESTION DESCRIPTION

Physical security for the project's facilities, installations or personnel should be provided in a manner that is consistent with human rights standards and principles. Therefore, to the extent possible human rights risks and impacts associated with public and/or private security provision for the project need to be identified in negotiation preparations and planning, and approaches to security management agreed before the contract is finalised (to be further operationalised throughout the project lifecycle).

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	In negotiations and contracts the company identifies and considers human rights risks and impacts associated with physical security of the project, including potential legal liabilities.			
2	The company negotiates for a commitment that security will be carried out in line with international human rights standards (e.g. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Code of Conduct for Law Enforcement Officials, International Humanitarian Law, Voluntary Principles on Security and Human Rights etc.), and ensures that there is provision for the development of detailed security management protocols.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.8. COMMUNITY ENGAGEMENT

QUESTION

Does the company ensure that the contract contains provision for effective community engagement throughout the project lifecycle?

QUESTION DESCRIPTION

Effective community engagement is an integral aspect of human rights due diligence and may be facilitated through a contractual provision allocating resources and responsibilities for community engagement activities. Whilst the contract may not be able to stipulate all necessary detail, it should at minimum provide reference to the development, costing and resourcing of community engagement plans and activities.

[Question references: Principles for Responsible Contracts]

INDICATORS		YES	NO	NO INFO
1	Potentially impacted communities and individuals have been identified and consulted to the extent possible before the contract is finalised.			
2	To the extent possible at contracting stage, the community engagement plan has been properly costed, resourced, roles and responsibilities for implementation considered and the timing for implementation agreed.			
3	Parties have shared information regarding any previous community engagement activities, and have agreed on how information gathered going forward will be shared.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.9. PROJECT-LEVEL GRIEVANCE RESOLUTION

QUESTION

Does the company ensure that the contract includes a commitment for the development and implementation of an effective project-level grievance mechanism?

QUESTION DESCRIPTION

An effective project-level grievance mechanism is an integral component of human rights due diligence, facilitating both remediation as well as serving as an early warning system to capture community grievances. Therefore, the contract should at minimum provide reference to the development, implementation, costing and resourcing of a project-level grievance mechanism that meets the UN Guiding Principles' effectiveness criteria: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, based on engagement and dialogue. [Question references: Principles for Responsible Contracts, UN Guiding Principles on Business and Human Rights no. 31]

INDICATORS		YES	NO	NO INFO
1	The contract provides for the development and implementation of a project-level grievance mechanism that: is accessible to impacted individuals and communities; meets the UN Guiding Principles' effectiveness criteria; and does not prejudice recourse to judicial mechanisms.			
2	To the extent possible at contracting stage, the community grievance mechanism has been properly costed, resourced and roles and responsibilities for implementation considered.			

BASIS OF ASSESSMENT

FOLLOW-UP

1.10. TRANSPARENCY AND DISCLOSURE OF CONTRACT TERMS AND INFORMATION

QUESTION

Does the company take active steps to ensure the terms of the contract as well as specific human rights due diligence information related to the project are disclosed in a timely and accurate manner and are accessible to impacted rights-holders and other interested stakeholders?

QUESTION DESCRIPTION

Rights-holders and other stakeholders who may be impacted by the investment project need to have access to timely and accurate information regarding the terms of the contract. Appropriate disclosure of the contract terms also allows negotiating parties to communicate transparently with those who may be impacted by the project. Negotiations should include reaching an agreement on a strategy for the disclosure of the contract terms and conditions, including consideration of information accessibility (e.g. languages, literacy, physical accessibility etc.). The company should negotiate with a presumption towards transparency and disclosure, ensuring that the scope and duration of any exceptions are appropriately time-bound and based on compelling justifications. It is also important that negotiations and contracts include steps for the timely and accurate disclosure of specific human rights due diligence information associated with project implementation (e.g. impact assessments, stakeholder engagement plans, information about the community grievance mechanism etc.). Transparency and disclosure of such information also needs to consider information accessibility for rights-holders and other stakeholders.

[Question references: Principles for Responsible Contracts; OECD Guidelines for Multinational Enterprises]

INDICATORS		YES	NO	NO INFO
1	The company agrees to, and works towards, the proactive and timely disclosure of the contract terms.			
2	The company ensures that disclosure of contract terms is in formats accessible to impacted rights-holders and other stakeholders, considering factors such as language, literacy, physical accessibility etc.			
3	Any exceptions to disclosure are based on compelling justifications and time-bound to fit the compelling justifications.			
4	The contract requires that where clauses are kept confidential, the subject matter of the excepted clause(s) is disclosed, along with the expected release date.			
5	The contract delineates responsibility for making the contract terms accessible.			
6	The company ensures that contract negotiations and contract terms make provision for the timely and accurate disclosure of specific human rights due diligence information associated with project implementation (e.g. impact assessment plans, stakeholder engagement plans, information about the community grievance mechanism etc.).			

BASIS OF ASSESSMENT

FOLLOW-UP

SUMMARY OF THE PRINCIPLES FOR RESPONSIBLE CONTRACTS

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.

2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalised.

3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.

4. Stabilisation clauses: Contractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.

5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.

6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.

7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.

8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.

9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

United Nations (2011), **Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators**, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31/Add.3).

ANNEX II

ABOUT THE HUMAN RIGHTS COMPLIANCE ASSESSMENT

The Human Rights Compliance Assessment (HRCA) is a comprehensive tool designed to identify human rights risks and impacts of company operations. It covers all internationally recognised human rights and their impact on rights-holders and other stakeholders, including employees, local communities, customers, end-users and others.

The tool incorporates an online database of questions and indicators, measuring the implementation of human rights in company policies, procedures and performance. The database incorporates the Universal Declaration of Human Rights and more than 80 human rights instruments and International Labour Organisation conventions and recommendations. The standards and indicators in the database are regularly updated to incorporate developments in international human rights and feedback from HRCA users.

The structure of the HRCA allows users to systematically evaluate company human rights risks and impacts in a number of business-unit areas, including: human resources, environment and communities, security, government relations and contracting and procurement. Each business-unit section

contains a set of questions and indicators for evaluation. A question description is provided for each question that explains the rationale of the question and indicators, in terms of human rights standards. Space is provided for noting down the basis for assessment undertaken, with reference to the question and its indicators, as well as any follow-up points to be implemented. The basis for assessment should be completed using data from a variety of sources that is sufficient to allow an adequate and impartial analysis of the question and indicators. Such sources might include: company policies and procedures; interviews with a range of stakeholders, such as company staff, company management representatives, local communities and individuals, including vulnerable individuals and groups, government stakeholders, such as representatives from relevant ministries or local government authorities, national and international human rights sources and experts. Follow-up points should be specific, allocate necessary responsibilities and resources and indicate a clear timeframe for implementation. You can access more information about the HRCA on the Danish Institute for Human Rights website at: <https://hrca2.humanrightsbusiness.org>



FURTHER RESOURCES

Cotula, Lorenzo (2014), **Foreign investment, law and sustainable development – A handbook on agriculture and extractive industries**, Institute for Environment and Development, International Institute for Environment and Development.

Harrison, James (2010), **Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments**.

International Bar Association (2011), **Model Mine Development Agreement – A Template for Negotiation and Drafting, 1.0**.

Mann, Howard (2008), **International Investment Agreements, Business and Human Rights: Key Issues and Opportunities**, International Institute for Sustainable Development.

Mann, H., K. von Moltke, et al. (2006), **Model International Agreement on Investment for Sustainable Development Negotiators' Handbook**, 2nd edition, International Institute for Sustainable Development.

OECD (2011), **OECD Guidelines for Multinational Enterprises**.

UN Office of the High Commissioner for Human Rights training modules on the Principles for Responsible contracts:

<http://www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx>

Shemberg, Andrea (2008), **Stabilization Clauses and Human Rights – A research project conducted for IFC and the United Nations Representative to the Secretary General on Business and Human Rights**.

United Nations (2011), **Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework**, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31).

United Nations (2011), **Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators**, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31/Add.3).

United Nations (2011), **Guiding principles on human rights impact assessments of trade and investment agreements**, Report of the Special Rapporteur on the right to food, Olivier De Schutter (A/HRC/19/59/Add.5).