

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).