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Promotion et protection de tous les droits de l'homme, civils, politiques, économiques, sociaux et culturels, y compris le droit au développement

Rapport du Représentant spécial du Secrétaire général chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises, M. John Ruggie

Additif

Principes pour des contrats responsables: intégrer la gestion des risques pour les droits de l'homme dans les négociations contractuelles entre États et investisseurs: conseils à l'intention des négociateurs*, **

Résumé

Les opérations commerciales peuvent avoir des incidences positives et négatives sur les populations et les droits de l'homme, à savoir les droits et libertés dont chacun doit jouir pour vivre dans la dignité, comme en a convenu la communauté internationale. Dans certains cas, lorsqu'une entreprise risque d'avoir des incidences positives et négatives directes et importantes sur les droits de l'homme, la gestion des risques pour les droits de l'homme doit être un élément central à prendre en considération dès le départ. Cela est particulièrement nécessaire lorsqu'un projet présente des risques ou des perspectives considérables sur le plan social, économique ou écologique, ou pourrait entraîner l'épuisement de ressources naturelles renouvelables ou non.

Dans de tels cas, quel que soit le secteur concerné, le processus de négociation entre un État hôte et un investisseur commercial offre une occasion unique de définir, de prévenir et d'atténuer les risques pour les droits de l'homme. C'est ainsi que l'on parviendra à tirer le meilleur parti de l'ensemble des avantages découlant de l'investissement tout en évitant ou en réduisant les éventuels effets négatifs. En outre, les principes exposés ci-après

* La soumission tardive de ce rapport s'explique par le souci d'y faire figurer des renseignements aussi à jour que possible.

** Étant donné sa longueur, le rapport qui est joint en annexe au résumé est reproduit tel qu'il a été reçu.

permettront de s'assurer que les États conservent une marge de manœuvre suffisante dans le cadre du contrat d'investissement, notamment aux fins de la protection des droits de l'homme, tout en évitant les litiges devant des instances internationales d'arbitrage à caractère contraignant.

Les 10 principes qui peuvent aider à guider l'intégration de la gestion des risques pour les droits de l'homme dans les négociations contractuelles sont les suivants:

1. Préparation et planification des négociations relatives au projet: les parties doivent être bien préparées et pouvoir examiner les effets du projet sur les droits de l'homme durant les négociations.

2. Gestion des effets potentiellement néfastes sur les droits de l'homme: les responsabilités en matière de prévention et d'atténuation des risques pour les droits de l'homme associés au projet et à ses activités doivent être clairement définies et acceptées avant la signature du contrat.

3. Normes opérationnelles liées au projet: les lois, réglementations et normes qui régissent l'exécution du projet doivent faciliter la prévention, l'atténuation et la réparation des effets négatifs sur les droits de l'homme tout au long du projet.

4. Clauses de stabilisation: s'il y est fait recours, les clauses contractuelles de stabilisation doivent être rédigées soigneusement de sorte que toute protection des investisseurs contre les modifications ultérieures de la législation ne porte pas atteinte aux efforts déployés de bonne foi par l'État pour appliquer des lois, des réglementations ou des politiques de manière non discriminatoire afin d'honorer ses engagements dans le domaine des droits de l'homme.

5. «Fourniture de biens ou services supplémentaires»: si le contrat prévoit que les investisseurs fourniront des services débordant du cadre du projet, cela doit être fait d'une manière compatible avec les obligations de l'État et les responsabilités des investisseurs dans le domaine des droits de l'homme.

6. Sécurité physique autour du projet: la sécurité physique des installations ou du personnel du projet doit être assurée dans le respect des principes et normes relatifs aux droits de l'homme.

7. Participation de la population locale: le projet doit être assorti d'un plan en faveur de la participation de la population locale dès le départ et tout au long de sa mise en œuvre.

8. Suivi du projet et respect des normes: l'État doit pouvoir vérifier que le projet respecte les normes pertinentes afin de protéger les droits de l'homme, tout en donnant l'assurance voulue aux investisseurs commerciaux qu'il s'abstiendra de toute ingérence arbitraire.

9. Mécanismes de réclamation en cas de préjudice non contractuel envers un tiers: les particuliers et les communautés qui subissent les effets du projet mais qui ne sont pas parties au contrat doivent avoir accès à un mécanisme de réclamation non judiciaire efficace.

10. Transparence et divulgation des dispositions contractuelles: les dispositions du contrat doivent être rendues publiques, et la portée et la durée des exceptions à cette divulgation doivent être fondées sur des motifs impérieux.

Annexe

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators

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I. Introduction

A. About this guide

1. This guide identifies 10 key Principles to help integrate the management of human rights risks into investment project contract negotiations between host State entities and foreign business investors.
2. The guide is the product of four years of research and inclusive, multi-stakeholder dialogue carried out under the Mandate of the Special Representative of the United Nations Secretary-General for Business and Human Rights, Professor John Ruggie.
3. Early on in his mandate, the Special Representative identified investment contracts as an important instrument through which States and businesses can affect the human rights impact of business operations. In 2007 he partnered with the International Finance Corporation to carry out the first empirical study of its kind, comparing contractual clauses that are meant to help investors mitigate the risk of changes in law—called stabilization clauses--across sectors and all regions of the world and looking at their potential implications for human rights.⁵ This research then served as the basis for more than 3 years of consultations on the human rights implications of investment contracts in venues around the globe. The SRSG convened formal and informal consultations and participated in other discussions in London, Johannesburg, Marrakech, Dakar, Paris, Washington DC and other cities, with business enterprises, State representatives, private and institutional lenders, private and institutional investors, civil society, academics, and private practitioners. These consultations were unprecedented in that they brought together human rights experts and negotiators representing business enterprises, States and others directly involved in facilitating and supporting investment projects , such as private and public lending institutions and development organizations.
4. This guide is the fruit of that collective experience about how to work towards successful projects that bring benefits to people and appropriately manage any potential adverse impacts on them. It has been developed specifically for use by State and business negotiators. It should also be of interest to those who are not directly involved in the negotiation, such as oversight bodies, civil society organizations, individuals and communities where investment projects are implemented, institutional and private lenders and insurers.

B. Definitions

5. 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.¹
6. For the purposes of this guide, “State” refers to any State entity, national or local.

¹ While these Principles can hold relevance for any sector, certain aspects of service provision or supply contracts have not been covered. For example, while potentially directly relevant to human rights, this document does not cover the human rights and contracting issues of tariff structures or supply issues for the provision of utilities, such as water or electricity.

7. The term “business investor” refers to a foreign controlled business enterprise that is party to the negotiation of a state-investor contract and to the resulting contract itself. “Parties” refer to both the State and the business investor(s) who take part in the negotiation of a state-investor contract. “Lenders” is used to indicate those private, public and multilateral organizations that support investment projects with financing.

C. Why this guide?

8. Every business venture has the potential to positively and negatively impact people and human rights—those rights and freedoms that the international community has agreed people need to live with dignity.²

9. Positive impacts of private investments can include, for example, improved basic services, employment opportunities and revenue generation that can help States to provide and maintain services. Negative impacts can include, for example, the temporary or permanent displacement of people without proper consultation and compensation; environmental damage or disturbance that can adversely impact food and water supplies, livelihoods or culturally significant locations or resources.

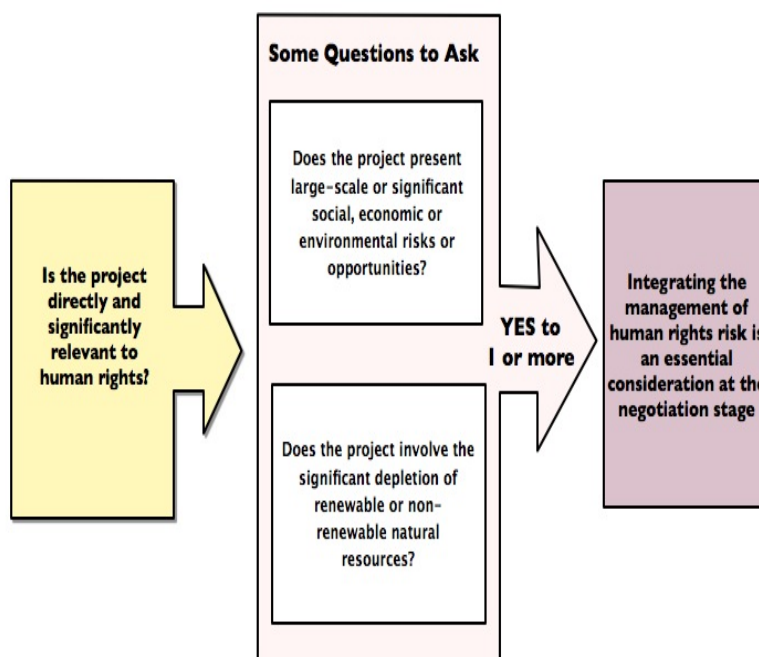
10. States and business investors alike have learned from experience that unaddressed adverse human rights impacts present significant risks for commercial projects, and reduce the potential for such ventures to be a positive benefit to society. In some cases, negative human rights impacts from projects have resulted in costly civil and criminal law suits; financial liabilities, such as delays in design, siting, permitting, construction, operation and expected revenues; problematic relations with local labor markets; higher costs for financing, insurance and security; as well as damage stemming from loss of trust, reputational deterioration and cancellation of the projects.

11. Some projects will have a higher potential for direct and significant positive and negative impacts on human rights than others. In particular, this is likely to be so in long-term projects when they present large-scale or significant social, economic or environmental risks or opportunities or where they involve the depletion of renewable or non-renewable natural resources (see Figure 1).

12. While human rights risks should always be considered in the context of business ventures, in the cases listed above, where human rights risks are particularly relevant to the project, it is important to make human rights risk management an essential consideration for the project negotiation of the contract or agreement that establishes and governs the project. This will contribute to ensuring the long-term sustainability and success of the project.

² Human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. For more on human rights and the differentiated obligations and responsibilities for States and business enterprises, see Annex 1. See also the UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (21 March 2011).

Figure 1



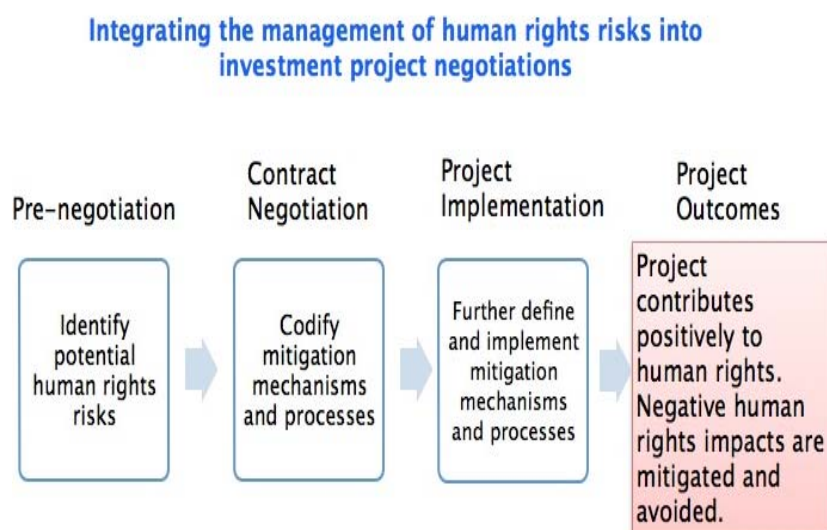
D. Why consider human rights risks in contract negotiations?

13. The experiences of both States and business investors point to the advantages of considering human rights risk early, before projects get underway and before adverse impacts occur. The negotiation is an opportune time to define the expectations and responsibilities of the parties regarding all kinds of risks, including those related to human rights. Moreover, the proper management of human rights risks will also have implications for other contractual issues, so it is best to consider them coherently along with economic and commercial issues. Lastly, considering human rights early will help ensure that States maintain adequate policy space in the investment contract, including for the protection of human rights, while avoiding claims relative to the contract in binding international arbitration.

14. As graphically illustrated in Figure 2, integrating human rights at the negotiation will:

- (1) Facilitate the early identification and early management of potential negative human rights impacts of the investment project;
- (2) Help establish clear roles and responsibilities for the prevention and mitigation of potential impacts and the remediation of impacts when they occur;
- (3) Help the parties make appropriate assessments and cost allocations for the prevention, mitigation and remedy of negative human rights impacts;
- (4) Facilitate cooperation and effective management of issues as they arise throughout the life-cycle of the project
- (5) Help increase the overall positive benefits of the project, including to human rights.

Figure 2



E. Ten key principles

15. This guide identifies 10 Principles to help States and business investors integrate management of human rights risks into investment project contract negotiations, together with their key implications as well as a recommended checklist for negotiations. The subject matter of each Principle is then explained briefly. Annex 1 offers more detailed information on the differentiated obligations and responsibilities of States and business enterprises with respect to human rights. Annex 2 summarizes the work of the UN Special Representative and the UN “Protect, Respect and Remedy” Framework.

16. While these Principles provide a starting point for better integrating concern for human rights into the contracting phase of State-investor investment projects, they do not replace the value of professional human rights expertise.

II. Ten principles for integrating the management of human rights risks into contract negotiations

A. Project negotiations preparation and planning

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

Key implications of Principle 1 for the negotiations:

- The State should enter the negotiation with a clear idea of how the project objectives, opportunities and risks relate to its existing obligations to respect, protect and fulfil human rights.
- The business investor should enter the negotiation with a clear idea of how the project objectives, opportunities and risks relate to its responsibility to respect human rights.

- The State and the business investor should enter the negotiation aiming to ensure that adverse human rights impacts are avoided, mitigated or remedied throughout the life-cycle of the project. This should be the case even where a State participates as an investor or as a beneficiary to the project's revenues or both.
- The parties' should enter the negotiation with the appropriate information and access to expertise and negotiation support to pursue these aims, and the negotiating agenda should reflect them.

Recommended checklist for Principle 1:

- The State representatives directly engaged in the negotiation are tasked to achieve a project agreement that will help secure potential positive human rights impacts from the project while contributing to the effective protection of human rights throughout the project's life-cycle.
- The representatives of the business investor directly engaged in the negotiation are tasked with pursuing a project agreement that will ensure that human rights are respected throughout the project's life-cycle.
- Both parties have access to expertise that will allow them to make informed decisions regarding how best to allocate responsibilities for the prevention, mitigation and remedy of negative human rights impacts in the context of the project. For example, both parties are equipped to understand the potential financial and legal implications of different options proposed by either party.
- The parties have ensured that their respective human rights obligations or responsibilities are reflected in the negotiating agenda.

Brief explanation: Project negotiations preparation and planning

17. States can optimize the full range of benefits to be drawn from investment projects by ensuring that they have the knowledge and capacity to address the human rights implications of projects in a coherent way along side economic considerations. This requires meaningful preparation on human rights issues and the integration of such considerations in contract negotiations.

18. For States, the ministries, agencies or other authorities that deal with human rights-related issues (such as health, education, housing, environment, justice) should be involved from the initial stages of a State's planning for, or participation in, an investment project. For each project, States can facilitate their negotiation planning by identifying the positive benefits to human rights to be gained by a project as well as the risks to human rights that the project might pose. For example, infrastructure or mining projects may spur economic development in an area, creating employment opportunities or expanding access to food, healthcare or other basic necessities. Projects may also lead to the physical or economic displacement of people, risking their further impoverishment, and impeding their access to food, livelihood and healthcare.

19. On the part of business investors, the principle of respecting human rights while pursuing investment projects should be integrated into the project from conception, and reflected in the contract negotiation and throughout the life-cycle of the project. This may require adding human rights expertise, in particular to support their negotiating teams.

20. For both parties a range of expertise, including on human rights issues, will be required throughout the negotiation. Such expertise includes legal, technical, financial and commercial investment banking expertise--for example, to provide financial models so that parties can independently weigh up cost implications. The parties should ensure that their

negotiating teams have the capacity to provide this understanding. For States, there may be support available through international or bilateral development cooperation.

B. Management of potential adverse human rights impacts

Principle 2: 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 finalized.

Key implications of Principle 2 for the negotiations:

- While more specific studies on potential adverse human rights impacts should occur throughout the life-cycle of the project, parties need to be aware of any potential adverse impacts that are foreseeable from feasibility studies, early impact assessments, due diligence assessments or other initial project preparation.
- The parties need to have adequate expertise in order to identify and manage human rights risks throughout the project and before impacts occur, either by building their internal capacity or by securing external expertise.
- Ensuring that adverse impacts can be prevented and mitigated requires that appropriate funds are available and allocated to enable the necessary measures to be taken.
- Prevention and mitigation plans should be developed by including information and insight gained through community engagement efforts with those who may be adversely impacted.

Recommended checklist for Principle 2:

- The contract clearly delineates who is responsible and accountable for mitigating the risks of adverse human rights impacts, as well as for how mitigation efforts will be financed.
- The parties either agree on a set of human rights baselines--measurements of the state of human rights enjoyment before a project begins, or agree how such baselines will be established before project work begins.
- Parties have assessed their own capacity to fulfill their responsibilities related to the management of human rights risks under the agreement.
- Parties have ensured that funding for mitigation efforts will be available when needed, setting up special financial mechanisms with independent or joint accountability structures where appropriate .
- Before the contract is finalized, the parties have agreed on an initial plan to communicate with potentially impacted individuals and communities regarding risks of adverse impacts from the project in order to involve them in the development of prevention and mitigation plans.
- If the project foresees a special financial mechanism for compensation, there is agreement on how information about both its existence and ongoing management will be shared with potential beneficiaries. (see Principle 7)

Brief explanation: Management of potential adverse human rights impacts

21. To be able to prevent and mitigate potential adverse human rights impacts, States should ensure these are assessed from the project's earliest stages through its life-cycle,

including the final stages such as decommissioning, abandonment or rehabilitation of the sites. For the business investor, it is important to complete a first assessment as early as possible in the context of a new activity, even before contract negotiation, to aid its understanding of the potential risks and benefits to people posed by the project from the outset.

22. Assessments should draw on credible internal or independent external human rights expertise and involve meaningful consultation with potentially impacted individuals and communities as well as other relevant stakeholders.

23. National laws, local laws, lending standards or other external benchmarks may establish certain requirements for assessing impacts, or human rights prevention and mitigation measures. These may be part and parcel of social and environmental impact assessments or part of other risk assessments or stand-alone requirements. But to ensure the clarity of roles and responsibilities among the parties, the contract should delineate responsibility for: (1) carrying out periodic assessments of actual and potential adverse human rights impacts³; (2) devising and carrying out a prevention and mitigation plan for potential negative impacts; and (3) ensuring funds for such activities will be guaranteed and administered as planned.

24. Parties might consider setting up special financial mechanisms with independent or joint accountability to ensure that adequate resources are available to carry out prevention and mitigation plans as required. Proper structures and oversight for the collection and use of the funds, in particular transparent financial mechanisms, are necessary to the credibility of the mechanisms, to support good governance and to minimizing risks or allegations of corruption. Making financial mechanisms transparent can also be a useful way to reassure impacted communities that appropriate plans are in place to prevent and mitigate potential harms and build trust in the project.

C. Project operating standards

Principle 3: 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.

Key implications of Principle 3 for the negotiations:

- The parties are aware of any legislative, regulatory and enforcement gaps, and are prepared to work to identify whether or how they can be overcome.
- The parties should supplement local laws, regulations and standards with external standards not currently incorporated into domestic law⁴ where these can facilitate the prevention, mitigation and remediation of negative human rights impacts throughout the life cycle of the project.

³ The assessment of human rights impacts need not be a distinct process from other types of assessments made, such as environmental and social, as long as it is appropriate to identify human rights risks.

⁴ "External standards" refers to standards not currently incorporated into domestic law, such as those created by lenders, international industry bodies or other good practice or internationally recognized guidelines or standards.

Recommended checklist for Principle 3:

- The State representatives responsible for negotiating the contract have consulted with relevant ministries or agencies who can advise on any current laws relevant for safeguarding human rights, on their adequacy for managing the risks posed by the project, and on the State's capacity for enforcement.
- The operating standards necessary for the protection of human rights throughout the life of the project have been agreed between the parties, including any external standards (financial, industrial, environmental or other) necessary to supplement applicable domestic laws or standards that relate to human rights.
- The parties have ensured that all operating standards, including any external standards necessary to supplement domestic standards, apply to successors⁵ and sub-contractors.
- The parties have agreed to methods for: (1) ensuring compliance with the relevant external standards; (2) managing conflicts between domestic law and external standards should they arise; and (3) ensuring that project governance allows for updates in standards as they evolve.

Brief explanation: Project operating standards

25. In most countries, a variety of laws and policies directly or indirectly require that businesses act with respect for human rights. These may include laws or policies on non-discrimination, labor, environment, health, property, mining and anti-bribery. Such laws and policies are an important foundation of ensuring the prevention and mitigation of negative human rights impacts in the context of projects. However domestic frameworks may lack laws and policies governing certain project activities. Or there may be more nuanced legal gaps such as a lack of clarity on entitlement to occupy or dispose of land. There also may be gaps in State capacity even where laws and regulations exist, preventing States from having the means to effectively monitor and ensure compliance of investment projects with applicable domestic laws and policies.

26. Deficiencies in domestic laws and policies and their implementation are not just problematic for States and people impacted by projects. They create a difficult situation for business investors given their need to ensure that projects can be carried out in a manner that prevents and mitigates both potential harms to people and resulting risks to the investor itself.

27. To mitigate such obstacles, parties can supplement domestic laws with relevant external standards (such as those created by lenders, international industry bodies or other good practice or internationally recognized guidelines), and include them explicitly in the contract. This can help to build shared expectations for the parties to the investment and sub-contractors, as well as provide visibility, predictability and a common benchmark of performance for external interested bodies, such as lenders and insurers. It may also help to equip the State with adequate standards for overcoming its own gaps in domestic laws, policies and capacity to monitor compliance.

28. To be effective, the parties should ensure that the supplementary external standards are appropriate to the local context. For example, good practice technical standards on safe blasting from another State may not be useful where the local construction techniques differ.

⁵ "Successor" refers to an entity that takes over and continues the role of the business investor.

29. Furthermore, as successor companies and sub-contractors may be involved in the project at different stages of its life-cycle, the parties should ensure that all the relevant standards, including any external standards, also apply to these entities.

30. The contract should indicate how monitoring and compliance with supplementary standards aimed at protecting human rights will be assured. In particular, relevant State agencies should be equipped with knowledge and training to be able to credibly monitor compliance with the full range of standards included in the contract. For example, if the contract - in line with international lending standards - requires environmental and social impact assessments before significant activities are carried out, the State must ensure that it has the capacity to effectively review, evaluate and to take appropriate and timely action on these assessments. Where the State currently lacks the capacity to carry out monitoring, the contract should provide for alternatives, at least on a temporary basis, such as self-reporting or other external credible verification.

D. Stabilization clauses⁶

Principle 4: Contractual stabilization clauses⁷, 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.

Key implications of Principle 4 for the negotiations:

- It is legitimate for business investors to seek protections against arbitrary or discriminatory changes in law. However, stabilization clauses that “freeze” laws applicable to the project or that create exemptions for investors with respect to future laws, are unlikely to satisfy the objectives of this Principle where they include areas such as labor, health, safety, the environment, or other legal measures that serve to meet the State's human rights obligations.
- Stabilization clauses, if used, should 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 recognized good practices in areas such as health, safety, labor, the environment, technical specifications or other areas that concern human rights impacts of the project.
- Where they are used, mechanisms to manage the material and economic impacts on an investor of non-discriminatory changes in law should be carefully designed to mitigate the specific risks to which the investor is exposed.⁸ Such mechanisms should not undermine the State's *bona fide* efforts to meet its human rights obligations.

⁶ This text on stabilization clauses deals solely with the human rights implications raised by such clauses and is not intended to provide guidance on any other issues related to stabilization.

⁷ “Stabilization clauses” refers to any clause that addresses the issue of changes in the law during the term of the contract, including those that seek to maintain the project's “economic equilibrium” or those that freeze the applicable law to a project. “Economic equilibrium” is used to refer to those clauses that seek indemnification or compensation in one form or another from the State for the costs of compliance with changes in law.

⁸ For example, in the case of fixed-tariff industries, measures would be designed to help manage the impacts of costs associated with implementing new laws related to the particular difficulties of the industry and fixed tariff structure.

Recommended checklist for Principle 4:

- The State and the business investor have understood the relationship between stabilization clauses and the State's human rights obligations.
- Where the parties have agreed to use a stabilization clause, the State's negotiating team is charged with ensuring that the clause is consistent with the State's human rights obligations, meaning 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.
- The business investor has ensured that the contractual protections against future changes in law affecting its investment cannot create obstacles to the State's *bona fide* efforts to discharge its obligations with respect to human rights in a non-discriminatory manner.
- The investor has anticipated in its own project plan that human rights-related laws, policies and regulations applicable to the project may evolve throughout the project's life cycle and this has been factored into its project and financial planning.

Brief explanation: Stabilization clauses

31. Contractual stabilization clauses aim to mitigate the risks to business investors from changes in law. Not all investment contracts have these provisions, but research shows that where they do exist the breadth of their application, and their provisions for mitigating the impacts of new laws on investors, vary greatly.⁹

32. Business investors view project financing predictability and consistency as a primary concern, as most large investments are long term and of an irreversible nature. This makes them vulnerable to changes in the rules governing their projects over time. For example, mining projects are tied to the location of the natural resource and much of the infrastructure for extraction is immovable, such that investors who successfully explore for minerals or oil are vulnerable to unilateral changes in local rules once the initial risk of investment has been taken. In fixed-tariff industries, investors may be limited in how they can absorb the costs of new laws and regulations, so they view mitigating this risk as particularly relevant.

33. Lenders to investment projects view stabilization clauses as a way to ensure certain benefits to the project, such as a guarantee that the State will not enact laws that make loan repayments more difficult. Particularly for projects with non-recourse financing (that is, where loans are repaid from project revenues), stabilization clauses may be considered important. Some States see stabilization clauses as a way to provide assurances aimed at encouraging inward investment.

34. However, the comparative research carried out by the Special Representative showed that, depending on the way the stabilization clause was drafted, it may have the potential to unduly constrict the policy space States need to meet their human rights obligations. The research found that those contracts negotiated with developing country governments were (1) typically much broader in their coverage than those agreed with developed country governments; and (2) they were much more likely to include exemptions for or award compensation to business investors for compliance with future laws--even in

⁹ See also *Stabilization and Human Rights*, available at: [www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf)

areas that are directly related to protecting human rights, such as health, environmental protection, labor and safety.

35. States fulfill their human rights obligations in part by passing and implementing legislative measures in a broad spectrum of areas such as health, safety, labor, environmental protection, security, and non-discrimination. Therefore, where stabilization clauses are used, it is important that States maintain the latitude for adopting and fully implementing such legislative measures.

36. A primary driver for the inclusion of stabilization clauses in state-investor contracts is often a concern on the part of business investors to have predictability in the fiscal laws and regulations applicable to the project. Fiscal constraints have been the subject of attention in recent years by academics, industry associations, civil society and others, given the perception that these have given rise to renegotiation demands by States.

37. Where fiscal terms are the driver for stabilization, it may be possible to reduce the interest in stabilization clauses by addressing the fiscal concerns of both business investors and States. For example, fiscal terms can be designed to allow some flexibility to adjust to external conditions over the life of the project, such as commercial risks and project operating costs, fluctuations in commodity prices, and changes in the business operating environment.¹⁰ This type of arrangement, when properly designed, can provide States and business investors with long-term fiscal certainty, lessening the interest in stabilization clauses and therefore their potential to interfere with the State's policy space needed to meet its human rights obligations.

38. Additionally, necessary investor protection against arbitrary and discriminatory changes in law can be fashioned to not interfere with the State's *bona fide* efforts to meet its human rights obligations. In certain circumstances, in particular for fixed-tariff projects, the parties to the contract can integrate a number of mechanisms to manage the material and economic consequences of changes in the law. These can specify procedures to facilitate the efficient and effective resolution of issues as they arise, such as formula for appropriate risk-sharing or procedures and requirements for the parties to negotiate in good faith regarding mitigating any impacts of changes in the law. Such mitigation measures or agreed procedures should be guided by the key implications and the recommended check list set out above and in particular should not undermine the State's *bona fide* efforts to meet its human rights obligations.

39. Finally, if parties include stabilization provisions in contracts, they should be drafted with a view to the broader legal context and other relevant contract provisions, which might influence the efficacy and appropriateness of the stabilization clause itself. Relevant factors include the potential applicability of international investment treaties, relevant avenues for dispute resolution, as well as the choice of law for the contract and provisions on methods of dispute resolution.

¹⁰ If the parties are considering this idea, at least three issues should be highlighted: (1) the realities of the State's current and projected ability to administer more sophisticated fiscal regimes; (2) the challenges of offering non-standardized regimes and administering purpose-built fiscal regimes for the current and future projects in the State, and (3) the impact of any fiscal regime on the speed with which a State receives revenues.

E. “Additional goods or service provision”¹¹

Principle 5: 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.

Key implications of Principle 5 for the negotiations:

- The provision of additional goods or services risks a blurring of roles, responsibilities and accountability for their quality and sustainability between the parties.
- States maintain their human rights obligations when they contract with investors for the delivery of additional goods or services. Investors’ responsibility to respect human rights applies to this additional provision of goods or services.
- Expectations regarding such goods and services and their sustainability throughout the project’s life-cycle need to be aligned among all relevant parties. Efforts to align expectations may be necessary.
- Assessments of human rights risks and the design of prevention and mitigation measures for the project should include any risks flowing from the business investor’s provision of additional goods and services.

Recommended checklist for Principle 5:

- The State is aware of the costs of requiring investor-provided additional goods or services, including any impacts on the timing and amount of expected project revenues.
- The contract clearly sets out the standards that will apply to the provision of additional goods or services.
- The parties have agreed how the sustainability of additional goods and services will be assured, if relevant, beyond the project life-cycle, and how impacted individuals and communities will be informed of the plans for the sustainability of the goods or services.
- The parties have identified who is responsible for ensuring the effectiveness of the additional goods or services, and for performing adequate oversight and monitoring of such goods or services.
- The parties’ prevention and mitigation plans regarding potential adverse human rights impacts cover any risks arising from additional goods and service provision by the business investor.
- The contract requires that the community engagement plan for the project includes community engagement regarding the provision of additional goods and the creation and ongoing management of such additional services (see Principle 7).

¹¹ “Additional goods or service provision” refers to any good the business investor provides and any service it carries out to the benefit of the State, local communities or other people in the State, where these goods and services are not related to any project activity and do not constitute measures to prevent, mitigate or remediate potential or actual adverse human rights impacts of the project.

Brief explanation: Additional goods or service provision¹²

40. In some cases, States require investors to provide 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 project impacts. In these cases, the State is effectively contracting out for such goods or services, but it does not relinquish its human rights obligations by doing so.¹³ The investors' responsibility to respect human rights also applies to the provision of goods or services even where these are additional to the project and the investor's core business activity.

41. States should therefore consider carefully whether and how to contract out for these goods or services. First, they should verify that such arrangements are an effective way of fulfilling human rights given the specific details of each case. States should consider (1) any opportunity costs of not pursuing a public tendering process to obtain such goods or services; (2) the impact, if any, that investor-provided services may have on the sustainability of such goods or services; and (3) the risks that such arrangements can create by blurring the roles and responsibilities between the State and the business investor, in particular in relation to beneficiaries of such goods or services.

42. If additional goods or services are under consideration in a state-investor contract negotiation, the collateral human rights implications should be reviewed during the negotiation. A lack of clarity from the perspective of beneficiaries as to the State's and business investor's respective roles may lead to unrealistic or misplaced expectations and create unintended animosities. Consistent with earlier principles, parties should agree on the approaches to prevent or mitigate human rights risks connected with the provision of additional goods or services at the time of contracting. The contract should reflect expectations regarding the quality and effectiveness of any goods or services to be provided; agreement on compliance with applicable laws and standards and accountability; and agreement on how the sustainability of services, where appropriate, will be managed beyond the life-cycle of the project, for example by designing a transition plan from the investor to the State or another provider as early as possible.

F. Physical security for the project

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

Key implications of Principle 6 for the negotiations:

- The provision of physical security for investment projects, irrespective of private or State provision of security services, requires clarity of roles, responsibilities and

¹² It is not uncommon for States to require wider public use of infrastructure or services, such as electricity or roads or rail lines that are established by the business enterprise to run projects. This type of leveraging of services or infrastructure can be an important contribution to enhancing the enjoyment of human rights and fostering broader economic development in the region impacted by the project. The human rights obligations and responsibilities of the parties also apply in these contexts. However, leveraging services and infrastructure built for projects does not pose the same risks as when business investors are required to provide services that are unrelated to their business venture, their project objectives and their expertise.

¹³ Guidance from international sources on human rights standards can offer useful benchmarks and parameters for performance on issues such as accessibility, affordability, adequacy and quality of services. For example, see: <http://www2.ohchr.org/english/bodies/treaty/index.htm>.

accountability and should in all cases be carried out in compliance with internationally recognized principles on human rights and humanitarian law.

- The level of physical security envisioned for projects has to be carefully considered, and where security is needed, parties should create clear written protocols to manage security provisions, aimed at avoiding and mitigating any related human rights risks and remediating any abuses that occur, including through a credible grievance mechanism.

Recommended checklist for Principle 6:

- The State and business investor have identified human rights risks, as well as potential criminal and civil liabilities involved in the provision of physical security for the project.
- The parties have agreed protocols for the management and implementation of security services throughout the project that (1) address how to involve local law enforcement or other relevant public officials; (2) address how to coordinate private and public security services; and (3) are in line with internationally recognized human rights law and humanitarian law relevant to the management and implementation of security.¹⁴
- The parties have agreed that an operational-level grievance mechanism will be available to address grievances regarding the provision of security services and activities (see Principle 9). Such grievance mechanism will not prejudice or hinder access to other state-based or non-state based grievance mechanisms such as those provided by regional bodies or UN treaty body mechanisms.
- The parties have agreed that community engagement plans will include engagement with local individuals and communities on issues related to security (see Principle 7).

Brief explanation: Physical security for the project

43. Some of the most serious human rights abuses in the context of business activity have involved security personnel charged with protecting business installations or operations. These security personnel could be local police, armed forces or private security personnel. Episodes of violence, especially when they are not followed by appropriate investigation, prosecution and remedy for those who have suffered from negative human rights impacts, pose legal, reputational and financial risks for States and business investors. State representatives, the directors of businesses and possibly the business investor itself can be accused of criminal behavior for carrying out or being complicit in human rights abuses.¹⁵ Therefore the failure to set clear responsibilities and expectations related to the physical security of investment projects during the negotiation poses serious risks to all involved.

¹⁴ See www.voluntaryprinciples.org for The Voluntary Principles on Security and Human Rights. See www2.ohchr.org/English/law/firearms.htm for the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and see www2.ohchr.org/English/law/codeofconduct.htm for the Code of Conduct for Law Enforcement Officials.

¹⁵ See UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (21 March 2011) at GP 17 and 23. See also Clarifying the Concepts of “Sphere of Influence” and “Complicity”, UN Doc A/HRC/8/16 (15 May 2008); available at: www.reports-and-materials.org/Ruggie-companion-report-15-May-2008.pdf.

44. It may not be possible to identify all security needs at the contracting stage, and security arrangements may have to be agreed with local officials, military personnel, or others who are not involved in the negotiation of the deal. However, protocols and approaches for managing physical security for the project should be agreed at the contracting stage and further developed through the life cycle of the project.

45. When identifying risks, the current security profile of the area where the investment will take place should be considered as well as potential migration flows to or from the area that may result from the project. For example, existing and/or potential ethnic or religious conflict, poverty, unresolved land claims, criminality, conflict over resources, terrorism, and political insurgency will all be relevant factors. The security implications should be fully integrated in any risk assessment and should be reflected in the contract where appropriate.

46. Based on initial security assessments, the parties can agree the level of security provision needed for the project; the rules of engagement between parties; and how the involvement of other relevant officials, institutions or organizations will be facilitated. The standards agreed upon should be compatible with human rights and humanitarian law standards. The Voluntary Principles on Security and Human Rights and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials are useful reference documents. The parties should also ensure the availability of a project-level grievance mechanism for alleged harms to local communities and individuals from security services (see Principle 9), and should agree how best to engage with local communities on the specific issue of security provision.

G. Community engagement

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

Key implications of Principle 7 for the negotiations:

- Both the State and business investor should view community engagement as fundamental aspects of creating common expectations for the project, and mitigating risks for themselves, for the project and for individuals and communities impacted by the project.
- The community engagement plan should be inclusive with clear lines of responsibility and accountability. It should be initiated as soon as practicable.
- Consultation with impacted communities and individuals should take place before the finalization of the contract.
- Disclosure of information about the project and its impacts is an integral part of meaningful community engagement.
- The history of any previous engagement efforts carried out by either of the parties with the local community regarding the investment project needs to be known by both parties in order to take this into account in planning.
- Community engagement plans should be aligned at a minimum to the requirements of domestic and international standards. For example, free prior informed consent or consultation with those potentially impacted may be required.

Recommended checklist for Principle 7:

- Potentially impacted communities and individuals have been identified to the extent practicable before the contract is finalized.
- Parties have agreed on the scope of community engagement and have agreed to their respective roles, responsibilities and accountability for these efforts.
- Parties have agreed on methods of communicating to impacted communities information that is relevant to their human rights, while adequately protecting proprietary information.
- To the extent possible at the contracting stage, the community engagement plan has been properly costed and resourced.
- The parties have shared information regarding any previous community engagement efforts concerning the project and have agreed how information gathered through future community engagement will be shared.

Brief explanation: Community engagement

47. Effective and ongoing community engagement from the initial stages of investment projects is now widely recognized as minimum good practice for successful projects. It is the best way to identify and understand potential negative human rights impacts and identify effective preventative and mitigation measures. Effective engagement helps to manage expectations and foster trust of local communities – both of which are particularly important in the context of long-term investments.

48. Effective engagement is inclusive and designed to facilitate the involvement of all relevant individuals and groups, paying attention to gender differences and to those at heightened risk of vulnerability or marginalization. For example, in places where men may speak for a family or group, it might be more difficult to learn about risks specific to women. Specialized approaches should be developed to understand such risks, and they should be explored from the earliest stages of project execution. For instance, where women are in charge of collecting water for the family, men consulted may not identify the relocation of a community well as having a serious potential impact, whereas it may be critical to the women's ability to continue to access water safely and as needed.

49. It may not be possible to include detailed plans for engagement in the contract because these will be developed in part with entities and people who may not be party to the negotiation. For example, those individuals and communities who will be impacted (see Principle 2) and perhaps local or regional authorities will contribute to the creation of detailed engagement plans. However, the State and the business investor can define their expectations and responsibilities for carrying out community engagement at the time of contracting. For example, the parties can agree (1) that a plan for engagement will be developed in an inclusive manner before project activities impacting local individuals or communities begin, (2) that specific prevention and mitigation measures will be developed, where possible, with those at risk of being impacted, and (3) to minimum criteria for effective engagement.

50. Sharing information with individuals and communities potentially impacted by the project on the prevention and mitigation of potential negative impacts should be viewed as integral to the overall community engagement plan—including information on security, access to a project-level grievance mechanism and contract terms. Disclosure of monitoring reports, reports on measures to prevent and mitigate adverse impacts and other information relevant to human rights will keep people informed about the project and how it might impact their lives (see Principle 10).

51. At the time of contract negotiation, State or local authorities may have already facilitated engagement efforts. Typically, the business investor will have engaged with individuals and communities potentially impacted by the project, at least as part of initial feasibility or due diligence studies. These activities should be communicated during negotiations. The parties should identify what efforts have been made to engage with individuals and communities potentially impacted by the project, the successes or challenges of such efforts, and what steps have already been taken that may have caused community concern or interest (such as plans to resettle people or actual resettlement ahead of contract negotiation). Sharing such information is important for the design of future community engagement processes and can help both parties to foresee potential risks down the road.

H. Project monitoring and compliance

Principle 8: 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.

Key implication of Principle 8 for the negotiations:

- The standards relevant to preventing, mitigating and remedying any adverse human rights impacts of the project need to be agreed in order for monitoring and compliance efforts to be effective (see Principle 3).
- The State is responsible for ensuring compliance with such standards, whilst the business investor is responsible for adhering to the standards.
- Where State capacity for monitoring compliance of the project with such standards is lacking, alternative agreed methods of monitoring and compliance should be substituted.
- The contract should reflect the State's right to monitor compliance with all relevant standards (such as technical, social, environmental, fiscal, financial and accounting standards), while at the same time integrating guarantees for business investors against arbitrary interference in the project.

Recommended checklist for Principle 8:

- The contract assigns responsibility for compliance with agreed project standards.
- The contract gives the State the necessary rights to ensure that the business investor is in compliance with agreed project standards, including ensuring State access to information and project sites reasonably required to ensure compliance.
- Necessary guarantees are in place for the business investor against arbitrary interferences in the project.
- The State has assessed its capacity and capabilities to monitor compliance effectively, identifying any gaps or weaknesses.
- The contract identifies how gaps in capacity and capability to monitor compliance, where they exist, will be mitigated, for example via self-reporting requirements, external assistance or other means.
- The State has properly costed its compliance monitoring role.

Brief explanation: Monitoring and compliance

52. Irrespective of contractual undertakings, States have obligations to protect human rights and to ensure respect for their laws. One way States fulfill these obligations is by ensuring compliance with project standards. When capacity to enforce compliance is lacking, States should consider obtaining outside expertise. While this can require significant resources, especially for poorer States, the investment should be money well spent because it will help ensure the full range of economic and social benefits of the project are realized. These efforts may be supported through development cooperation.

53. The State must ensure that it has appropriate rights to carry out all necessary compliance monitoring work, such as rights to access to information and project operations, either directly or through third parties. Where State capacity is lacking, parties can agree on other methods such as self-reporting, the use of external monitoring, and so forth. Likewise, the contract should reflect the business investor's obligation to cooperate with such compliance work. Necessary guarantees for the business investor against arbitrary interference by the State in the project operations should be provided.

I. Grievance mechanisms for non-contractual harms to third parties

Principle 9: 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.

Key implication of Principle 9 for the negotiations:

- The contract should ensure that individuals and communities who are impacted negatively by the project have access to an effective operational-level grievance mechanism enabling grievances to be lodged and addressed at an early stage.
- Operational-level grievance mechanisms should not prejudice or restrict access to State-based or other non-State based complaint mechanisms, including judicial mechanisms, or mechanisms provided by project lenders, regional tribunals or other.

Recommended checklist for Principle 9:

- The contract requires that individuals or communities who allege that they have suffered harm in the context of project activities will have access to an effective non-judicial grievance mechanism.
- The grievance mechanisms will comport with the effectiveness criteria for non-judicial grievance mechanisms contained in the UN Guiding Principles on Business and Human Rights.¹⁶
- The parties have ensured that the grievance mechanism will not prejudice or restrict access to State-based or other non-State based complaint mechanisms.

¹⁶ The Guiding Principles on Business and Human Rights describe both State obligations and business entity responsibilities regarding remedy. See specifically Guiding Principles 25 – 31 available at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

Brief explanation: Grievance mechanisms for non-contractual harms to third parties

54. Even with the best contractual provisions and operating standards in place, any major investment project is likely to lead to some concerns and grievances among those directly affected about its perceived adverse impacts. These grievances may raise human rights issues, or, if neglected or poorly handled, may lead to escalating tensions and confrontations that in turn generate adverse human rights impacts. It is important to have a means to identify and effectively address such grievances. This is also part of the business investor's responsibility to respect human rights, which requires that a business enterprise facilitate the remediation of human rights harms that it causes or contributes to, and that it establish or participate in an effective operational-level grievance mechanism in support of this objective. In this context, an "operational-level grievance mechanism" is a mechanism that will address grievances related specifically to the investment project or project activities.

55. Operational-level grievance mechanisms support the identification of adverse human rights impacts as a part of the business investor's on-going human rights due diligence.¹⁷ They also make it possible for grievances to be addressed and for adverse impacts to be remediated early and directly by the business investor, thereby preventing harms from compounding and grievances from escalating. (see Guiding Principle 29)¹⁸. Such mechanisms should not impede access to remedy through judicial or other non-judicial processes available to individuals and communities impacted by the project.

56. As part of their duty to protect human rights, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related adverse human rights impact occur within their territory and/or jurisdiction, those affected have access to effective remedy. In addition to providing these State-based mechanisms, States should consider ways to facilitate access to effective non-State based grievance mechanisms (see Guiding Principles 28).¹⁹ Supporting the inclusion within the state-investor contract of a provision for an effective operational-level grievance mechanism can facilitate important opportunities for early remedy – or even prevention – of negative impacts on individuals and communities, without prejudice to their ability to access State-based mechanisms.

57. Both parties can therefore advance the efficient and effective remediation of harms if they come to the negotiation: (1) having identified whether an effective operational-level mechanism already exists or whether it will have to be established specifically for the project; and (2) with the aim of ensuring an operational-level grievance mechanism is made available to individuals and communities who may be adversely impacted by the project without prejudice to their ability to access State-based mechanisms. The contract should also reflect both parties' responsibility to fully participate in good faith in the mechanism.

58. If an effective mechanism does not exist prior to negotiation, before contract closure the parties should assign responsibility for ensuring that such a mechanism is established.

¹⁷ See Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (21 March 2011) at Principles 17 – 21.

¹⁸ See Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (21 March 2011) at Principle 29.

¹⁹ See Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (21 March 2011) at Principle 28.

The UN Guiding Principle 31²⁰ sets out a number of criteria that non-judicial grievance mechanisms should meet in order to be effective, namely:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

59. The parties should view the operational-level grievance mechanism as an important complement to wider community engagement and collective bargaining processes, where relevant, but not as a substitute for any of these.

J. Transparency/Disclosure of contract terms

Principle 10: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.²¹

Key implications of Principle 10 for the negotiations:

- Contract terms, with exceptions for compelling justifications, should be disclosed in an accessible manner and seen as part of the community engagement plan for the project.

²⁰ See Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (21 March 2011) at Principle 31.

²¹ Disclosure of information related to the project throughout its life cycle allows people to have information that is pertinent to them and their human rights. Transparency of project information throughout its life cycle should be considered as part of the ongoing community engagement plan (See Principle 7). Initiatives like the Extractive Industries Transparency Initiative and some lending standards offer additional benchmarks on disclosure that can be useful reference points for parties.

- Exceptions to the disclosure of contract terms should be based on compelling justifications, such as business proprietary information or information that could directly impact the position of one of the parties in a concurrent or imminent negotiation. Exceptions to disclosure should be time-bound to fit the compelling justification.
- Where there are exceptions to disclosure, the subject matter of the excluded clause(s) should be identified, along with their expected release date.
- Applying disclosure requirements to all business investors equally can contribute to alleviating business investors' concerns regarding competitiveness.

Recommended checklist for Principle 10:

- The State has considered how it can facilitate disclosure of contract terms, for example by standardizing disclosure rules for all business investors.
- The parties have agreed to disclose the contract terms and identified the exceptions, if any. Those are made for particular clauses or subjects where there are compelling justifications. The parties have agreed to a reasonable time frame for keeping exceptions confidential.
- 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.
- If disclosure of contract terms poses costs or risks, measures to resource or mitigate these have been agreed between the parties before the finalization of the contract.
- The contract delineates responsibility for making the contract terms accessible. The contract requires publication in an accessible manner, taking into account possible barriers to access such as linguistic, technological, financial, administrative, legal or other practical constraints.

Brief explanation: Transparency/disclosure of contract terms

60. States should disclose information when the public interest is impacted—this is the case when it comes to investment projects which present either high risk or high rewards for human rights. Contract disclosure is one way the State and business investors can pursue their respective human rights obligations and responsibilities. States can facilitate disclosure by standardizing disclosure rules amongst competitors.

61. There can be a number of costs associated with not disclosing. For example, the State and the business investor may spend time and resources handling civil society complaints, stakeholder and other requests for disclosure or even campaigns calling for transparency. Furthermore, lack of disclosure can contribute to a loss of trust among interested individuals and communities in the project and even between the parties.

62. Appropriate disclosure of the contract terms allows both parties to communicate transparently with those who will be impacted by the project and to ensure that expectations correspond to what has been agreed. In this way it can reduce suspicion regarding the fairness of the contract terms and guard against unrealistic demands. Thus, disclosure of contract terms should be viewed as one part of any community engagement plan (see Principle 7). Disclosure of the contract also promotes accountability of both parties to implement the promises agreed in the contract and notifies third parties of the rights and obligations of the parties to the contract. Therefore disclosing the contractual terms can promote trust in the investment project and the parties to the investment.

63. While there are legitimate reasons to keep a level of confidentiality during the negotiations, broad confidentiality provisions relative to the finalized contractual terms will

not satisfy the objectives of this Principle. Exceptions to disclosure should be based on compelling justifications, such as business proprietary information or information that could compromise the negotiating position of either party for an imminent or concurrent negotiation. The parties should come to the negotiation with an idea of the types of information, if any, they believe fall within these parameters, along with a proposed time period for which the information should remain confidential. When the contract terms are disclosed, the subject matter of the excepted clause(s) should be identified, along with their expected release dates.

64. Finally, meaningful transparency requires information to be accessible - meaning that it can be obtained without legal and administrative barriers, financial obstacles or discriminatory denials of access. Therefore, the disclosure of contractual terms should include making them readily available to interested parties, and may require translating them into local languages and making them available free of charge. In some contexts posting the contractual clauses on the internet may work. In others this would not be appropriate without ensuring that people without access to the internet have an opportunity to obtain the information. Making contractual terms accessible may require some resources, which should be considered an integral part of costs of the project. Before contract closure the parties should agree how the contractual terms will be released in an accessible manner.

Appendix I

State's human rights obligations and business enterprise's responsibility to respect human rights

“Human rights” is a collective term for what the international community has agreed are the fundamental rights and freedoms people need to live with dignity. They are often expressed and guaranteed by law, including through international agreements and customary international law.

Human rights cover civil, political, economic, social and cultural rights such as the protection of the life, liberty and physical security of the individual, as well as rights relating to the workplace, to family life, access to housing, food, water, health care, education, and participation in cultural life.

State and companies have differentiated yet complementary roles vis-à-vis human rights:

- States have a broad set of international human rights law obligations which require that they respect, protect (with regard to any other third party) and fulfill the human rights of individuals within their territory and/or jurisdiction. Regarding human rights abuses caused by third parties, States have a duty to protect against such abuses, including those by business, through appropriate policies, regulation, and adjudication;
- Business enterprises have a responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others and to address adverse human rights impacts with which they are involved.²² They may do many things beyond respecting rights that contribute to the enjoyment of rights, such as promoting human rights or contributing to their fulfilment, for instance by supporting health or educational programs. But these actions do not offset a failure by a business to respect human rights throughout its operations and such positive behavior is not the equivalent of preventing, mitigating and remedying adverse human rights impacts. For example, the harm caused by polluting water source is not balanced or cancelled out in some way because the investment project also brought in a road or a school to a community.

²² For a survey of the scope and patterns of alleged corporate-related human rights abuse, see John Ruggie, “Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse”, UN doc. A/HRC/8/5/add.2 (23 May 2008), available at: <http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf>.

Appendix II

About the work of the Special Representative

This document has been developed by the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Professor John Ruggie. The Special Representative was appointed by then UN Secretary-General Kofi Annan in 2005 and Ban-Ki Moon continued the appointment.

In 2008, the Special Representative presented the “Protect, Respect and Remedy” Framework (known now as the UN Framework) to the UN Human Rights Council. It clarifies State and business responsibilities and provides a foundation on which thinking and action can build over time.

The “Protect, Respect and Remedy” Framework rests on three pillars:

- the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and
- greater access by victims to effective remedy, both judicial and non-judicial.

The UN Framework is intended to work dynamically, and no one pillar can carry the burden on its own. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. Yet, all are intended to be mutually reinforcing parts of a dynamic, interactive system to advance the enjoyment of human rights.

The State duty to protect

The first pillar is the **State duty to protect** against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication. It highlights that States have the primary role in preventing and addressing corporate-related human rights abuses. The Special Representative documented the duty’s legal foundations, policy rationales and scope in his 2008 and 2009 reports to the Human Rights Council, available through his website.

Although States interact with business in numerous ways, many currently lack adequate policies and regulatory arrangements for effectively managing the complex business and human rights agenda. While some States are moving in the right direction, overall State practice exhibits substantial legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and States themselves. The most common gap is failing to enforce existing laws. In addition, legal and policy incoherence can result from departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – working in isolation from their government’s own human rights obligations and agencies.

Greater policy coherence is also needed at the international level. States do not leave their human rights obligations behind when they enter multilateral institutions that deal with business-related issues. States should encourage those bodies to institute policies and

practices that promote business respect for human rights. Additionally, capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect.

The Special Representative has proposed a number of measures that States can take to promote corporate respect for human rights and prevent corporate-related human rights abuse. They relate to clarifying general State regulatory and policy functions; promoting respect for human rights through the State-Business nexus, such as when State agencies provide business with substantial support and services; supporting business-respect for human rights in conflict affected areas; and ensuring policy coherence at home and abroad. Under Guiding Principle 9, the final element includes States maintaining adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

The corporate responsibility to respect

The **corporate responsibility to respect** human rights means acting with due diligence to avoid infringing on the human rights of others and addressing adverse human rights impacts with which they are involved. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

The responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not caused those impacts.

Companies can affect virtually the entire spectrum of internationally recognized rights. Therefore, the corporate responsibility to respect applies to all such rights (although in practice, some rights will be more relevant than others in particular industries and circumstances). At a minimum, this means looking to the International Bill of Human Rights (comprising the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights), and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.

How does a company avoid infringing on human rights, and mitigate adverse impacts? What is needed is human rights due diligence. Human rights due diligence is a potential game changer for companies: from "naming and shaming" to "knowing and showing." Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.

Companies routinely conduct due diligence to satisfy themselves that a contemplated transaction has no hidden risks. Drawing on the features of well-established practices and combining them with what is unique to human rights, the Special Representative has laid out the basic parameters of a human rights due diligence process. Because this process is a means for companies to address their responsibility to respect human rights, it has to go beyond simply identifying and managing material risks to the company itself, to include the risks a company's activities and associated relationships may pose to the rights of affected individuals and communities.

Based on a statement of commitment to respect human rights and supporting policies, the core elements of human rights due diligence include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Moreover, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Access to Effective Remedy

Even where institutions operate optimally, adverse human rights impacts may still result from a company's activities and victims must be able to seek redress. Thus the third pillar of the U.N. Framework addresses the need for enhancing access to effective remedies for those whose human rights are impacted by corporate activities. The Special Representative has focused on three categories of grievance mechanisms through which individuals and communities with human rights-related complaints against companies can be addressed: judicial; state-based non-judicial; and non-state based non-judicial mechanisms.

States are encouraged to consider a coordinated system of remedy for victims of corporate-related human rights abuse, including both judicial and non-judicial options as appropriate. Currently, access to judicial mechanisms for business-related human rights claims is often most difficult where the need is greatest as a result of both legal and practical obstacles. And there is an uneven patchwork of non-judicial mechanisms at the national and international levels.

Operational-level grievance mechanisms play an important role, performing two key functions that also relate to the corporate responsibility to respect. First, they serve as early warning systems, providing companies with information about their impacts; second, these mechanisms make it possible for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating. In addition, collaborative initiatives undertaken by industry bodies, multi-stakeholder groups, international organizations and regional human rights systems can complement operational-level and State-based mechanisms.

Non-judicial mechanisms, whether State-based or independent, should conform to principles of legitimacy, accessibility, predictability, rights-compatibility, equitability, transparency and continuous learning. Company-level mechanisms should also operate through dialogue and engagement rather than the company itself acting as adjudicator.

The Guiding Principles

The Human Rights Council endorsed the Framework unanimously in 2008, and asked the Special Representative to provide additional concrete guidance on its operationalization. The Special Representative has responded with a set of Guiding Principles on Business and Human Rights, published in March 2011. The Guiding Principles seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. The UN Human Rights Council will consider formal endorsement of the text at its June 2011 session. Key elements of the Framework and Guiding Principles have already been incorporated into ISO26000 (the new social responsibility standard adopted by more than 90 percent of member bodies of the International Organization of Standards), and the OECD Guidelines for Multinational Corporations, to which more than 40 States adhere.

The Guiding Principles are the product of six years of research and extensive consultations involving governments, companies, business associations, civil society, affected individuals and groups, business investors and others around the world. They outline how States and businesses should implement the UN Framework in order to better manage business and human rights challenges.

The Guiding Principles *highlight what steps States should take* to foster business respect for human rights; *provide a blueprint for companies* to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm; and constitute a set of *benchmarks for stakeholders* to assess business respect for human rights. The principles are organized under the UN Framework's three pillars as described above.

The Special Representative's investment contracts work

Early on in his mandate, the Special Representative identified investment contracts as an important context to explore. In 2007 he partnered with the International Finance Corporation to carry out the first empirical study comparing stabilization clauses across sectors and all regions of the world and looking at their implications for human rights. This research served as the basis for two more years of consultations on investment contracts and human rights. Formal and informal consultations were held around the globe, including in London, Johannesburg, Marrakech, Dakar, Paris, and Washington DC, with a wide group of stakeholders from all regions of the world, representing governments, business entities, financial institutions, commercial practitioners and civil society.

The outcome of this extensive consultation was wide-ranging support for the Special Representative to provide further guidance on stabilization but also on other issues relating to human rights and State-investor contracts. In developing this guidance, the Special Representative has continued to consult widely with stakeholders from all relevant perspectives to ensure that they are a useful learning tool for States, business investors and other interested parties.

This guide represents one way in which the Special Representative is fulfilling the request from the UN Human Rights Council to provide views and concrete recommendations on how States can meet their duty to protect and how businesses can pursue their responsibility to respect human rights.
