

HUMAN RIGHTS AND STATE-INVESTOR CONTRACTS

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

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

1.1. NEGOTIATION PREPARATION AND PLANNING

QUESTION

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

QUESTION DESCRIPTION

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.2. MANAGEMENT OF POTENTIAL ADVERSE HUMAN RIGHTS IMPACTS

QUESTION

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

QUESTION DESCRIPTION

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

[Question references: Principles for Responsible Contracts]

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.3. MONITORING AND COMPLIANCE

QUESTION

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

QUESTION DESCRIPTION

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

[Question references: Principles for Responsible Contracts]

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.4. PROJECT OPERATING STANDARDS

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

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.5. STABILISATION CLAUSES

QUESTION

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

QUESTION DESCRIPTION

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

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.6. ADDITIONAL GOODS OR SERVICE PROVISION

QUESTION

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

QUESTION DESCRIPTION

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.7. PHYSICAL SECURITY FOR THE PROJECT

QUESTION

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

QUESTION DESCRIPTION

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.8. COMMUNITY ENGAGEMENT

QUESTION

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

QUESTION DESCRIPTION

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.9. PROJECT-LEVEL GRIEVANCE RESOLUTION

QUESTION

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

QUESTION DESCRIPTION

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

1.10. TRANSPARENCY AND DISCLOSURE OF CONTRACT TERMS AND INFORMATION

QUESTION

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

QUESTION DESCRIPTION

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

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

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

BASIS OF ASSESSMENT

FOLLOW-UP

ANNEX I

SUMMARY OF THE PRINCIPLES FOR RESPONSIBLE CONTRACTS

- 1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
- 2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalised.
- 3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.
- 4. Stabilisation clauses: Contractual stabilisation clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.
- 5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.

- 6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
- 7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
- 8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
- 9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.
- 10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

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

ANNEX II

ABOUT THE HUMAN RIGHTS COMPLIANCE ASSESSMENT

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

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

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

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