



# PRINCIPLES FOR RESPONSIBLE CONTRACTS

## INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO STATE—INVESTOR CONTRACT NEGOTIATIONS



**Guidance  
for Negotiators**



**UNITED NATIONS  
HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER

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CONTRACT NEGOTIATIONS  
GUIDANCE FOR NEGOTIATORS**



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## PREFACE

The links between human rights and international investments have, over the past decade, evolved from being a niche subject of the human rights community to dominating international investment negotiations and making headline news. Civil society and other stakeholders worldwide have expressed concern about the risks to labour rights and other human rights where investment treaties are alleged to restrict the ability of States to fulfil their human rights obligations. Particular attention has focused on investor–State dispute settlement mechanisms, which are regular features of international investment agreements. These mechanisms are alleged to interfere with the ability of States to regulate in the public interest.

Other human rights concerns have been raised, including concerning the lack of transparency of investor–State dispute settlements, the alleged absence of accountability on the part of investors in international investment agreements, the alleged failure of arbitration to account for human rights impact, and the possibility that significant amounts of public money could be wrongly diverted from public goods and services to pay for arbitration costs and awards.

International, regional and national efforts are ongoing to find ways to ensure that investor protection recognizes and reinforces both the State’s duty to protect human rights and the corporate responsibility to respect human rights.

However, international investment agreements are only one of the tools that make up the regulatory regime for international investment. Another important tool is State–investor contracts, which are used extensively, particularly in countries with emerging economies. In 2007, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, identified State–investor contracts as important instruments through which States and businesses can manage human rights risks arising from an investment. During four years of multi-stakeholder consultations, he developed the *principles for responsible contracts*<sup>1</sup> with a view to enabling those parties negotiating State–investor

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<sup>1</sup> “Principles for responsible contracts: Integrating the management of human rights risks into State–investor contract negotiations – Guidance for negotiators” (A/HRC/17/31/Add.3).

contracts to integrate the management of human rights risks into contract negotiations more effectively.

The *principles for responsible contracts* were submitted by the Special Representative to the United Nations Human Rights Council as an addendum to the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.<sup>2</sup> The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

The *principles for responsible contracts* should be read in conjunction with those Guiding Principles and implemented with due regard to the obligations of States set out in international human rights law.

Since 2011, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has been promoting the *principles for responsible contracts* as a concrete tool to address some of the human rights concerns relating to State–investor contracts. OHCHR has developed training materials to further facilitate the uptake and understanding of the *principles*. This booklet is intended to complement these efforts by presenting a reader-friendly version of the *principles* in a more accessible format. It is the latest in the series of OHCHR publications on business and human rights.<sup>3</sup>

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<sup>2</sup> United Nations publication, Sales No. 13.XIV.5.

<sup>3</sup> The series so far comprises *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*; *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (United Nations publication, Sales No. 13.XIV.4); and *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (United Nations publication, Sales No. 14.XIV.6).

# INTRODUCTION

## *About this guidance*

This publication identifies 10 key principles to help integrate the management of human rights risks into contract negotiations on investment projects between host State entities and foreign business investors. It is the product of four years (2007–2011) of research and multi-stakeholder consultations under the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie.

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 compare contractual clauses that are meant to help investors mitigate the risk of changes in law—so-called stabilization clauses—across different sectors and regions and to look at their potential implications for human rights.<sup>4</sup> It was the first empirical study of its kind. This research then served as the basis for more than three years of worldwide consultations on the human rights implications of investment contracts. The Special Representative convened formal and informal consultations and participated in other discussions in London, Johannesburg, South Africa, Marrakech, Morocco, Dakar, Paris, Washington, D.C. and other cities with business enterprises, State representatives, development organizations, private and institutional lenders and investors, civil society, academics and legal practitioners. These consultations were unprecedented in that they brought together human rights experts, negotiators and others directly involved in facilitating and supporting investment projects.

This publication has been developed specifically for use by State and business negotiators with a view to ensuring that projects bring benefits to people and that their potential adverse impact is managed appropriately. It should also be of interest to those who are not directly involved in the negotiations, such as oversight bodies, civil society organizations, individuals and communities that may be affected by investment projects, institutional and private lenders, and insurers.

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<sup>4</sup> “Stabilization clauses and human rights” (2009), available at [www.ifc.org](http://www.ifc.org).



## Definitions

A “State–investor contract” is a contract between a host State and one or more foreign business investors. The types of contracts relevant to this publication are those for resource exploration or exploitation such as in oil, gas or mining; for large agricultural projects; for infrastructure projects, such as the construction of highways, railways, ports or dams; or those for the development and operation of water and sanitation systems.<sup>5</sup>

For the purposes of this publication, “State” refers to any State entity, national or local. The term “business investor” refers to a foreign-controlled business enterprise that is party to both the negotiation of a State–investor contract and the resulting contract itself. “Parties” refers to both the State and the business investor(s) that take part in the negotiation of a State–investor contract. “Lenders” is used to refer to those private, public or multilateral organizations that provide financing for investment projects.

## Why this publication?

Every business venture has the potential to have a positive and negative impact on people and human rights—those rights and freedoms that the international community has agreed people need to live with dignity.<sup>6</sup>

Examples of positive impact are: improved basic services, employment opportunities and revenue generation that can help States to provide and maintain services. Examples of negative impact are: the temporary or permanent displacement of people without proper consultation and compensation, and environmental damage or disturbance that can harm food and water supplies, livelihoods or culturally significant locations or resources.

States and business investors alike have learned from experience that not addressing adverse human rights impact presents significant risks for commercial projects and reduces their potential to benefit society. In some cases, their negative human rights impact has resulted in costly civil and criminal law suits;

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<sup>5</sup> While these principles can be relevant to any sector, certain aspects of service provision or supply contracts have not been covered. For example, this publication 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.

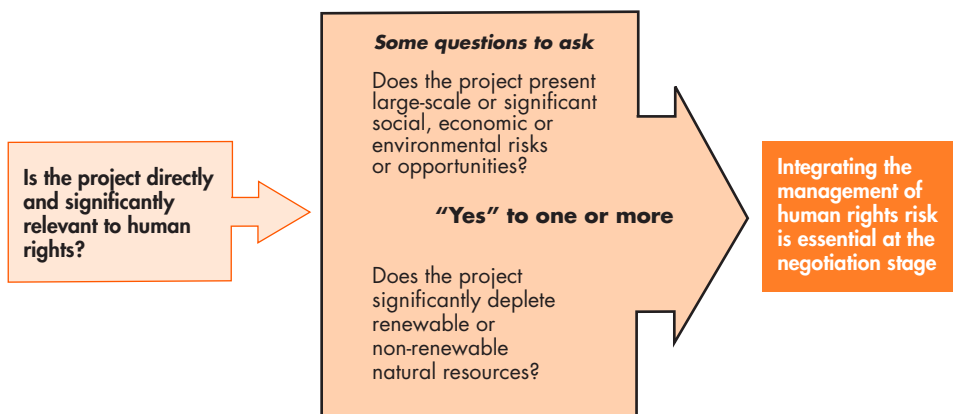
<sup>6</sup> See, for instance, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*.

financial liabilities, such as delays in design, siting, permitting, construction, operation and expected revenues; problematic relations with local labour markets; higher financing, insurance and security costs; as well as damage stemming from loss of trust, reputational deterioration and cancellation of projects.

Some projects will have a higher potential for direct and significant positive and/or negative impact on human rights than others. In particular, this is likely to be so in long-term projects that present large-scale or significant social, economic or environmental risks or opportunities or that deplete renewable or non-renewable natural resources (see fig. 1).

While human rights risks should always be considered in the context of business ventures, in the cases listed above human rights risk management is essential in the negotiation of the contract or agreement that establishes and governs the project. This will contribute to ensuring the project's sustainability and success.

**Figure 1**



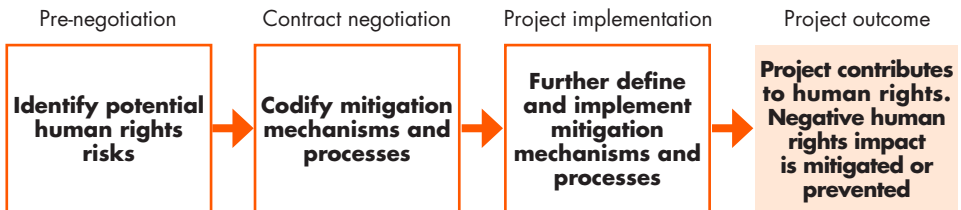
### ***Why consider human rights risks in contract negotiations?***

The experiences of both States and business investors point to the advantages of considering human rights risks early, before projects get under way and before adverse impact occurs. The negotiation is an opportune time to set out 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 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.

As illustrated in figure II, integrating human rights in the negotiations will:

- (a) Facilitate the early identification and early management of the investment project's potential negative human rights impact;
- (b) Help establish clear roles and responsibilities for the prevention and mitigation of any potential impact and the remedy of any impact when it does occur;
- (c) Help the parties make appropriate assessments and cost allocations for the prevention, mitigation and remedy of any negative human rights impact;
- (d) Facilitate cooperation and the effective management of issues as they arise throughout the project's life cycle;
- (e) Boost the project's overall benefits, including to human rights.

**Figure II: Integrating the management of human rights risks into investment project negotiations**



### **Ten key principles**

This publication identifies 10 principles to help States and business investors integrate the management of human rights risks into investment project contract negotiations, together with their key implications as well as a recommended checklist for such negotiations.

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

# TEN PRINCIPLES FOR INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO CONTRACT NEGOTIATIONS

## 1. 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:***

- The State should enter the negotiation with a clear idea of how the project's objectives, opportunities and risks relate to its own obligations to respect, protect and fulfil human rights.
- The business investors should enter the negotiation with a clear idea of how the project's objectives, opportunities and risks relate to their responsibility to respect human rights.
- The parties should enter the negotiation aiming to ensure that any adverse human rights impact is prevented, mitigated or remedied throughout the project's life cycle. This should be the case even if the State is itself an investor or benefits from the project's revenues or both.
- The parties should enter the negotiation with the appropriate information and access to expertise and support to pursue these aims, and the negotiating agenda should reflect them.

***Recommended checklist:***

- ✓ The State's negotiating team is tasked with achieving a project agreement that will (a) help secure potential positive human rights impact and (b) contribute to the effective protection of human rights throughout the project's life cycle.
- ✓ The business investor's negotiating team is 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 impact in the context of the project. For example, both parties understand the potential financial and legal implications of the 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:**

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 coherently alongside the economic considerations. This requires adequate preparation and the integration of human rights considerations in contract negotiations.

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 benefits to human rights to be gained from it as well as the risks to human rights that it might pose. For example, infrastructure or mining projects may spur economic development in an area, creating employment opportunities or expanding access to food, health care or other basic necessities. Projects may also lead to the displacement of people, risking their further impoverishment, and impeding their access to food, livelihoods and health care.

Business investors should integrate the principle of respecting human rights into the project from conception, and this should be reflected in the contract negotiation and throughout the project's life cycle. This may require adding human rights expertise, in particular to support their negotiating teams.

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 the cost implications. The parties should ensure that their negotiating teams have this capacity. For States, support may be available through international or bilateral development cooperation.

## 2. MANAGING POTENTIAL ADVERSE HUMAN RIGHTS IMPACT

**Principle 2: Responsibilities for preventing and mitigating human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.**

### ***Key implications:***

- While there should be more specific studies throughout a project's life cycle on its potential adverse human rights impact, parties need to be aware of any potential adverse impact that is 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's life cycle and before any impact occurs, either by building their internal capacity or by securing external expertise.
- Both preventing and mitigating adverse impact require appropriate funds to be available and allocated so that the necessary measures can be taken.
- Prevention and mitigation plans should incorporate information and insight gained through community engagement with those who may be adversely affected.

### ***Recommended checklist:***

- ✓ The contract clearly delineates who is responsible and accountable for mitigating the risks of adverse human rights impact, as well as for financing mitigation efforts.
- ✓ 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.
- ✓ The parties have assessed their own capacity to fulfil their responsibilities related to the management of human rights risks under the agreement.

- ✓ The 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 affected individuals and communities on the project's risks of adverse impact 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 its ongoing management will be shared with potential beneficiaries (see principle 7).

### **Brief explanation:**

To be able to prevent and mitigate potential adverse human rights impact, States should ensure such potential impact is assessed from the project's earliest until its final stages (e.g., decommissioning, abandonment or rehabilitation of the sites). For the business investor, it is important to complete a first assessment as early as possible, even before contract negotiation, to better understand from the outset the project's potential risks and benefits to people.

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

National laws, local laws, lending standards or other external benchmarks may establish certain requirements for assessing impact or human rights-related prevention and mitigation measures. These may be part and parcel of social and environmental impact assessments or of other risk assessments or stand-alone requirements. But to ensure that the roles and responsibilities of the parties are clear, the contract should delineate responsibility for: (a) periodically assessing actual and potential adverse human rights impact;<sup>7</sup> (b) devising and carrying out a prevention and mitigation plan for potential

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<sup>7</sup> The assessment of human rights impact need not be distinct from other types of assessments, such as environmental and social assessments, as long as it is appropriate to identify human rights risks.



negative impact; and (c) ensuring funds for such activities are available and administered as planned.

The 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. Transparency, proper structures and oversight of the collection and use of the funds are necessary for the credibility of the mechanisms, to support good governance and to minimize risks or allegations of corruption. They can also reassure affected communities that appropriate plans are in place to prevent and mitigate potential harm and to build trust in the project.

### 3. PROJECT OPERATING STANDARDS

**Principle 3: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remedy of any negative human rights impact throughout the life cycle of the project.**

#### ***Key implications:***

- The parties are aware of any legislative, regulatory and enforcement gaps, and are prepared to work to identify whether, and how, they can be overcome.
- The parties should supplement local laws, regulations and standards with external standards<sup>8</sup> if these can facilitate the prevention, mitigation and remedy of negative human rights impact throughout the project's life cycle.

#### ***Recommended checklist:***

- ✓ The State negotiators have consulted the ministries or agencies that can advise on any current laws relevant to safeguarding human rights, on their adequacy for managing the risks posed by the project and on the State's capacity for enforcement.

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<sup>8</sup> "External standards" refers to standards not currently incorporated into domestic law, such as those set by lenders or international industry bodies or other good practice or internationally recognized guidelines or standards.

- ✓ 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 successors<sup>9</sup> and subcontractors.
- ✓ The parties have agreed on methods for: (a) ensuring compliance with the relevant external standards; (b) managing conflicts between domestic law and external standards should they arise; and (c) ensuring that project governance allows for updates in standards as they evolve.

### **Brief explanation:**

In most countries, a variety of laws and policies directly or indirectly require businesses to act with respect for human rights. These may include laws or policies on non-discrimination, labour, environment, health, property, mining and anti-bribery. Such laws and policies are an important foundation for ensuring the prevention and mitigation of negative human rights impact 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. Even if laws and regulations exist, gaps in capacity may prevent States from effectively monitoring and ensuring compliance.

Deficiencies in domestic laws and policies and their implementation are problematic not only for States and the people affected by projects. They also create a difficult situation for business investors as projects need to be carried out in a manner that prevents and mitigates both potential harm to people and the resulting risks to the investors themselves.

To overcome such obstacles, the parties can supplement domestic laws with external standards and spell them out in the contract. This can help to build shared expectations for the parties to the investment and subcontractors, as well

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<sup>9</sup> “Successor” refers to an entity that takes over and continues the role of the business investor.

as provide visibility, predictability and a common benchmark of performance for interested external bodies, such as lenders and insurers. It may also give the State adequate standards to fill the gaps in its own domestic laws, policies and capacity to monitor compliance.

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.

Furthermore, as successor companies and subcontractors 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.

The contract should indicate how monitoring and compliance with supplementary standards aimed at protecting human rights will be assured. In particular, the relevant State agencies should have the 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 take appropriate and timely action on these assessments. If the State currently lacks monitoring capacity, the contract should provide for alternatives, at least temporarily, such as self-reporting or external credible verification.

## 4. STABILIZATION CLAUSES<sup>10</sup>

**Principle 4: Contractual stabilization clauses,<sup>11</sup> 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:**

- It is legitimate for business investors to seek protection 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 if they include areas such as labour, 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 it introduces laws, regulations or policies that: (a) are implemented on a non-discriminatory basis; and (b) reflect international standards, benchmarks or recognized good practices in areas such as health, safety, labour, the environment, technical specifications or other areas that relate to the human rights impact of the project.
- If stabilization clauses are used, mechanisms to manage the material and economic impact of non-discriminatory changes in law on an investor should be carefully designed to mitigate the specific risks to which the investor is exposed. Such mechanisms should not undermine the State's bona fide efforts to meet its human rights obligations.

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<sup>10</sup> This section 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.

<sup>11</sup> “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.

**Recommended checklist:**

- ✓ The parties have understood the relationship between stabilization clauses and the State's human rights obligations.
- ✓ If 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 its 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 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:**

Contractual stabilization clauses aim to mitigate the risks to business investors generated by changes in the law. Not all investment contracts have these provisions but, if they do, research shows that the breadth of their application and their provisions for mitigating the impact of new laws on investors vary greatly.<sup>12</sup>

For business investors, project financing predictability and consistency are a primary concern, as most large investments are long-term and irreversible. 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, so investors who successfully explore for minerals or oil are vulnerable to unilateral changes in local rules once they have taken the initial risk of investing. 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 important.

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<sup>12</sup> See also "Stabilization clauses and human rights".

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 to encourage inward investment.

However, the comparative research carried out by the Special Representative showed that, depending on how the stabilization clause was drafted, it may unduly constrict the policy space a State needs to meet its human rights obligations. The research found that, compared to contracts agreed with Governments in developed countries, those negotiated with Governments in developing countries were: (a) typically much broader in their coverage; and (b) much more likely to include exemptions for or award compensation to business investors for compliance with future laws—even in areas that are directly related to human rights, such as health, environmental protection, labour and safety.

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

Concern on the part of business investors about predictability in the fiscal laws and regulations applicable to the project is often a primary driver for the inclusion of stabilization clauses in State–investor contracts.

In recent years, fiscal constraints have given rise to renegotiation demands by States.

If 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.<sup>13</sup> When properly designed, this type of arrangement can provide States and business investors with long-term fiscal certainty, lessening the interest in stabilization clauses and therefore their potential to interfere with a State's policy space to meet its human rights obligations.

Moreover, 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 formulas for appropriate risk-sharing or procedures and requirements for the parties to negotiate in good faith regarding mitigating any impact of changes in the law. Such mitigation measures or agreed procedures should be guided by the key implications and the recommended checklist set out above and, in particular, should not undermine the State's bona fide efforts to meet its human rights obligations.

Finally, if contracts have stabilization provisions, 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.

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<sup>13</sup> If the parties are considering this idea, at least three issues should be highlighted: (a) the realities of the State's current and projected ability to administer more sophisticated fiscal regimes; (b) the challenges of offering non-standardized regimes and administering purpose-built fiscal regimes for the current and future projects in the State; and (c) the impact of any fiscal regime on the pace at which a State receives revenues.

## 5. “ADDITIONAL GOODS OR SERVICE PROVISION”<sup>14</sup>

**Principle 5: If 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:***

- The provision of additional goods or services risks blurring the roles, responsibilities and accountability for their quality and sustainability between the parties.
- States maintain their human rights obligations when they contract 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:***

- ✓ The State is aware of the costs of requiring investor-provided additional goods or services, including any impact on the timing and the level of expected project revenues.
- ✓ The contract clearly sets out the standards that will apply to the provision of additional goods or services.

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<sup>14</sup> “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, if these goods and services are not related to any project activity and do not constitute measures to prevent, mitigate or remedy the project’s potential or actual adverse human rights impact.



- ✓ The parties have agreed how the sustainability of the provision of additional goods and services will be assured, if relevant, beyond the project's life cycle, and how affected individuals and communities will be informed of these plans.
- ✓ The parties have identified who is responsible for ensuring the effectiveness of the additional goods or service provision, and for adequately overseeing and monitoring it.
- ✓ The parties' prevention and mitigation plans regarding potential adverse human rights impact cover any risks arising from additional goods and service provision by the business investor.
- ✓ The contract requires the project's community engagement plan to include community engagement regarding the provision of additional goods and the creation and ongoing management of such additional services (see principle 7).

**Brief explanation:**

In some cases, States require investors to provide non-commercial services or infrastructure, such as schools, health-care services or roads, that are not essential to either carrying out the project or mitigating its impact.<sup>15</sup> In these cases, the State is effectively contracting out such goods or services, but it does not relinquish its human rights obligations by doing so.<sup>16</sup> The investor's responsibility to respect human rights also applies to the provision of goods or services even if these are additional to the project and the investor's core business activity.

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<sup>15</sup> It is not uncommon for States to require wider public use of infrastructure or services, such as electricity or roads or railway 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 the enjoyment of human rights and can foster broader economic development in the region affected 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.

<sup>16</sup> 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 [www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx).

States should therefore consider carefully whether and how to contract out 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: (a) any opportunity costs of not pursuing a public tendering process to obtain such goods or services; (b) the impact, if any, that investor-provided services may have on the sustainability of such goods or service provision; and (c) the risks that such arrangements can create by blurring the roles and responsibilities of the State on the one hand and the business investor on the other, in particular in relation to the beneficiaries of such goods or services.

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

## 6. 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:***

- The provision of physical security for investment projects, whether by private or State security services, requires clear roles, responsibilities and accountability, and should in all cases be carried out in compliance with internationally recognized principles of 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 draft clear protocols to manage its provision, so as to avoid and mitigate any related human rights risks and remedy any abuses that do occur, including through a credible grievance mechanism.

***Recommended checklist:***

- ✓ The parties have identified the human rights risks, as well as the potential criminal and civil liabilities, resulting from 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: (a) specify how to involve local law enforcement or other relevant public officials; (b) specify how to coordinate private and public security services; and (c) are in line with internationally recognized human rights law and humanitarian law relevant to the management and implementation of security.<sup>17</sup>
- ✓ The parties have agreed that an operational-level grievance mechanism will be available to address grievances regarding the provision of security

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<sup>17</sup> See the Voluntary Principles on Security and Human Rights ([www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)). See also the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169).

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 United Nations treaty bodies.

- ✓ 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:**

Some of the most serious human rights abuses in the context of business activity have involved security personnel—local police, armed forces or private security staff—charged with protecting business installations or operations. Episodes of violence, especially when they are not followed by appropriate investigation, prosecution and remedy, pose legal, reputational and financial risks to States and business investors. State representatives, the directors of businesses and possibly the business investors themselves can be accused of criminal behaviour for carrying out or being complicit in human rights abuses.<sup>18</sup> 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.

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 to managing the project's physical security should be agreed at the contracting stage and further developed through its life cycle.

When identifying risks, the current security profile of the area where the investment will take place should be considered, as should 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. Their security implications should be fully integrated in any risk assessment and should be reflected in the contract if appropriate.

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<sup>18</sup> See *Guiding Principles on Business and Human Rights*, in particular Guiding Principles 17 and 23. See also "Clarifying the concepts of 'sphere of influence' and 'complicity'" (A/HRC/8/16).

Based on initial security assessments, the parties can agree: the level of security needed for the project; the rules of engagement between parties; and how the involvement of other relevant officials, institutions or organizations will be facilitated. These should be compatible with human rights and humanitarian law standards. The Voluntary Principles on Security and Human Rights, 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 in this regard. The parties should also ensure that a project-level grievance mechanism is available for alleged harm to local communities and individuals from security services (see principle 9), and should agree on how best to engage with local communities on the specific issue of security provision.

## 7. 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:***

- Both the State and the 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 the individuals and communities affected 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 the affected communities and individuals should take place before the contract is finalized.
- Disclosure of information about the project and its impact is an integral part of meaningful community engagement.
- The history of any previous engagement efforts 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, at a minimum, meet the requirements of domestic and international standards. For example, free prior informed consent or consultation with those potentially affected may be required.

### **Recommended checklist:**

- ✓ Potentially affected communities and individuals have been identified to the extent practicable before the contract is finalized.
- ✓ The parties have agreed on the scope of community engagement and have agreed to their respective roles, responsibilities and accountability for these efforts.
- ✓ The parties have agreed on methods of communicating to affected 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 on how they will share information gathered through future community engagement.

### **Brief explanation:**

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

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, the 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.

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 that may not be party to the negotiation. For example, those individuals and communities that will be affected (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 negotiating the contract. For example, the parties can agree: (a) that a plan for engagement will be developed in an inclusive manner before project activities affecting local individuals or communities begin; (b) that specific prevention and mitigation measures will be developed, where possible, with those at risk of being affected; and (c) to minimum criteria for effective engagement.

Sharing information with potentially affected individuals and communities on the prevention and mitigation of potential negative impact 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 impact and other information relevant to human rights will keep people informed about the project and how it might impact on their lives (see principle 10).

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 affected 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 these individuals and communities, 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 risks down the road.

## 8. 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 the necessary assurances to business investors against arbitrary interference in the project.**

### ***Key implications:***

- The standards relevant to preventing, mitigating and remedying any adverse human rights impact of the project need to be agreed for monitoring and compliance efforts to be effective (see principle 3).
- The State is responsible for ensuring compliance with such standards, while the business investor is responsible for adhering to them.
- If State capacity for monitoring compliance with such standards is lacking, alternative methods of monitoring compliance should be agreed.
- 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:***

- ✓ The contract assigns responsibility for compliance with agreed operating standards.
- ✓ The contract gives the State the necessary rights to ensure that the business investor complies with agreed operating standards, including access to information and project sites reasonably required to ensure compliance.
- ✓ The necessary guarantees are in place for the business investor against arbitrary interference in the project.
- ✓ The State has assessed its capacity to monitor compliance effectively, and identified any gaps or weaknesses.



- ✓ The contract identifies how any gaps in capacity to monitor compliance 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:**

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

The State must ensure that it has appropriate rights to carry out all the necessary compliance monitoring work, such as rights to access information and project operations, either directly or through third parties. If State capacity is lacking, the 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 monitoring work. The necessary guarantees for the business investor against arbitrary interference by the State in the project operations should be provided.

## **9. GRIEVANCE MECHANISMS FOR HARM TO THIRD PARTIES**

**Principle 9: Individuals and communities that are affected by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.**

### **Key implications:**

- The contract should ensure that individuals and communities that are affected 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 others.

### **Recommended checklist:**

- ✓ The contract stipulates that individuals or communities that allege that they have suffered harm in the context of project activities will have access to an effective non-judicial grievance mechanism.
- ✓ The grievance mechanism will meet the effectiveness criteria for non-judicial grievance mechanisms contained in the Guiding Principles on Business and Human Rights.<sup>19</sup>
- ✓ The parties have ensured that the grievance mechanism will not prejudice or restrict access to State-based or other, non-State-based complaint mechanisms.

### **Brief explanation:**

Even with the best contractual provisions and operating standards in place, any major investment project is likely to lead to some concerns and grievances about its perceived adverse impact among those directly affected. These grievances may raise human rights issues or, if neglected or poorly handled, may lead to escalating tensions and confrontations that in turn have an adverse human rights impact. 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 should facilitate the remedy of human rights harm that it causes or contributes to, and that it should establish or participate in an effective operational-level grievance mechanism to this end. In this context, an "operational-level grievance mechanism" is a mechanism that will address grievances related specifically to the investment project or project activities.

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<sup>19</sup> The Guiding Principles describe both State obligations and business entity responsibilities regarding remedy. See specifically Guiding Principles 25–31.

Operational-level grievance mechanisms support the identification of adverse human rights impact as part of the business investor's ongoing human rights due diligence.<sup>20</sup> They also make it possible for grievances to be addressed and for adverse impact to be remedied early and directly by the business investor, thereby preventing harm from compounding and grievances from escalating (see Guiding Principle 29). Such mechanisms should not impede access to remedy through judicial or other, non-judicial processes.

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 occurs 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 Principle 28). 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 impact on individuals and communities, without prejudice to their ability to access State-based mechanisms.

Both parties can therefore enable the efficient and effective remedy of harm if they come to the negotiation: (a) having identified whether an effective operational-level mechanism already exists or whether it will have to be established specifically for the project; and (b) with the aim of ensuring an operational-level grievance mechanism is made available to individuals and communities that may be adversely affected 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.

If no effective mechanism exists, the parties should, before contract closure, assign responsibility for ensuring that one is established. Guiding Principle 31 sets out a number of criteria that non-judicial grievance mechanisms should meet in order to be effective, namely:

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<sup>20</sup> See Guiding Principles 17–21.

- (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 time frame 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.

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.

## 10. 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.<sup>21</sup>**

### ***Key implications:***

- Contract terms should be disclosed in an accessible manner and seen as part of the community engagement plan for the project (see principle 7).
- Exceptions to such disclosure should be based on compelling justifications, such as business proprietary information or information that could directly impact on the position of one of the parties regarding a concurrent or imminent negotiation. Exceptions to disclosure should be time-bound to fit the compelling justification.
- If there are exceptions to disclosure, the subject matter of the excluded clause(s) should be identified, along with the expected release date.
- Applying disclosure requirements to all business investors equally can contribute to alleviating business investors' concerns regarding competitiveness.

### ***Recommended checklist:***

- ✓ The State has considered how it can facilitate the 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 based on compelling justifications. The parties have agreed to a reasonable time frame for keeping exceptions confidential.

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<sup>21</sup> 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. Initiatives like the Extractive Industries Transparency Initiative and some lending standards offer additional benchmarks on disclosure that can be useful.

- ✓ The contract requires that, if 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 contract is finalized.
- ✓ 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:**

States should disclose information when the public interest is affected—this is the case with investment projects that present either a high risk to or high rewards for human rights. Contract disclosure is one way States and business investors can pursue their respective human rights obligations and responsibilities. States can facilitate disclosure by standardizing disclosure rules among competitors.

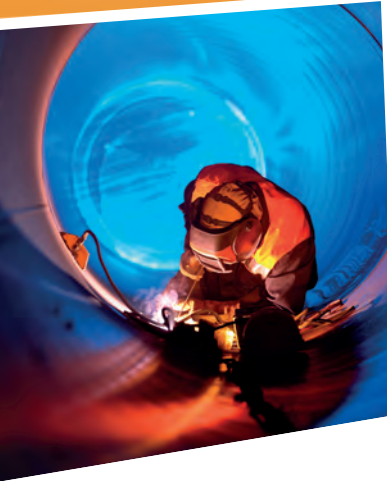
There can be a number of costs associated with not disclosing. For example, the State and the business investor may spend time and resources handling civil society complaints, stakeholder and other requests for disclosure or even campaigns calling for transparency. Furthermore, lack of disclosure can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

Appropriate disclosure of the contract terms allows both parties to communicate transparently with those who will be affected by the project in an effort to reduce suspicion regarding the fairness of the contract terms and guard against unrealistic expectations. Thus, disclosure 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.

While there may be legitimate reasons for some confidentiality during the negotiations, broad confidentiality provisions for the finalized contractual terms will not meet 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 regarding 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 during which the information should remain confidential. When the contract terms are not disclosed in full, the subject matter of the excepted clause(s) should be identified, along with the expected release dates.

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, disclosing 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 also have an opportunity to obtain the information. Making contractual terms accessible may require some resources, which should be considered an integral part of project costs. Before contract closure, the parties should agree on how the contractual terms will be released in an accessible manner.



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