

Chapter 4

Guidance on Drafting
Environmental, Social and
Economic Sustainability
Provisions in Investment
Contracts

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Many public officials and government lawyers tasked with investment decisions and contracts rank environmental and social risks at or close to the top of the list of project risks and opportunities they grapple with. Many fear internal criticisms and a public outcry if mistakes are made, yet they feel they lack the knowledge and experience to address these issues appropriately. Considering the technical nature of the substantive issues, the perceived intricacies of procedural requirements, and a lack of clear boundaries of responsibilities inside government and between the contracting authority and the private operator, their apprehension is understandable. At the same time, some are also frustrated that investment contracts are not being put to use more purposefully to create a common purpose and modality for investment projects to facilitate the sustainable development of the host country and people. Chapters 4 and 5 respond to these concerns and desires to address risks and opportunities appropriately in contracts through practical and concrete pointers. Sections 4.1–4.7 explain the procedural and substantive rights and obligations involved in environmental, social, and economic development clauses, whereas Sections 5.1–5.6 continue with guidance related to general, legal and procedural provisions that apply to the entire contract, making it fair and balanced.

This part of the Resource aims first and foremost to serve the needs of practitioners involved in investment contract drafting, negotiation or review. It aims to unpack the seemingly vague concept of sustainable development in the context of investment projects and to demonstrate how to create concrete legal obligations – for both doing no harm and doing good – that support and enhance sustainable development. In doing so, the guidance focuses on issues commonly faced by investment projects regardless of the sector, and should benefit all practitioners who work with investment contracts

Investment contracts are not being put to use to allow projects to facilitate the sustainable development of the host country.

(of course, illustrations and concrete clauses are derived from sector-specific contracts). In addition to the practitioners, the guidance will also benefit government officials involved in developing negotiation positions, legislators involved in enacting legislation that promote and regulate large-scale projects, and those involved in negotiating IIAs, since the guidance tends to expose areas that would work best when appropriately regulated and reinforced through national law and international agreements.

Chapter 4 envisages the government lawyer working with other officials to develop government negotiating positions, and then getting ready to draft or review a draft of an investment contract. If the project has gone through a procurement process with a draft contract as part of the requirements for bidders, once the winning bidder is announced the detailed contract negotiation would begin. Or, in some cases, the lawyer may be asked to review a draft contract submitted by the project proponent.¹

The starting point of contractual negotiation should be a credible document that provides sufficient guidance on the environmental, social and economic development aspects of projects.

If at all possible, the starting point of contractual negotiation should be a credible document that provides sufficient guidance on environmental, social and economic development aspects of projects, such as an industry model agreement, provided the model has incorporated a sustainable development approach;² model agreements suggested by the host government for certain sector or activity can also serve this purpose. If the negotiation must be based on the draft submitted by the proponent, the government lawyer should review such model contracts and good practice examples of signed contracts for reference, in addition to this Resource. Numerous extractive contracts and some in the infrastructure sector are publicly available, as mentioned above. Finally, pro bono legal assistance and legal clinics associated with universities and non-profit organisations may be able to offer hands-on help for large-scale or complex projects, especially in countries with less developed national law.³

4.1 Sustainable development objectives in a contract

The contracting parties should include in the investment project's objective – whether it is to build a metro rail system or start a palm oil plantation – their intent to enter into a fair and balanced relationship with rights and responsibilities that contributes to the sustainable development of the host country

and its people. The statement should also affirm the parties' intention to avoid or minimise harm to the environment and people, especially those who are vulnerable or marginalised, respect human rights, and maximise the environmental,⁴ social and economic benefits of the project.

The parties could point to any number of international and national documents and initiatives that best support their vision of sustainable development. They could mention the SDGs, or the host country national sustainable development plan, if one exists. A contract can also identify relevant international agreements that the project intends to be guided by, such as the Paris Climate Agreement, the Convention on Biological Diversity, or the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples Convention.

This statement of objectives can be inserted into several places in the contract, including the preamble section, if it exists, or the definition section that defines the project. It may also precede as a chapeau to a cluster of environmental, social and economic development requirements. Alternatively, it could be a free-standing 'Objectives' clause that states the overarching sustainable development purposes of the project. Wherever it appears, the parties should expressly agree that the contract should be read in light of this statement.

Such a statement sets the tone of the contract and the contractual relationship, and could serve as a valuable touchstone between the parties throughout their decades-long relationship. The statement will be valuable when the project is faced with a novel issue not contemplated in the contract, particularly disputes related to environmental, social or economic development aspects of the project. This is all the more relevant when a dispute involves the rights of local communities who have no standing in the contractual relationship. The point about the rights of communities is discussed further in this chapter and Chapter 5.

Guidance I: Stating the sustainable development objectives of a contract

- ✓ The contract should state clearly, in the preamble or an 'Objectives' clause, that the project seeks to support the sustainable development objectives of the host country, and specifically the environmental, social and economic development of the nation and host community.

- ✓ The contract should specifically itemise the critical international agreements or standards and sustainable development goals it will seek to support.
- ✓ The contract should include a statement that makes clear the contract should be interpreted and applied in a manner that best ensures the intent of the objectives are met.

Sample Text: Sustainable Development Objectives

MMDA, Preamble:

[...] Whereas, the objective of this Agreement is to develop the Minerals in a manner to promote long term stability in the conditions of mining investment and contribute to the sustainable development of the State and its communities through a process in which the production and use of non-renewable natural resources takes place in an equitable framework; and

Whereas, the Parties to this Agreement believe that the Project can be developed, economically operated, and closed while protecting the natural environment of the State and the productivity of its ecosystems, and while managing adverse environmental impacts to eliminate, minimize, or mitigate them to acceptable levels, and compensating for any remaining impacts; [...]

4.2 Due diligence on environmental, social and economic obligations

The quality of environmental, social and economic development clauses in contracts depends greatly on the quality of due diligence.

Due diligence is a key activity by which a project's environmental, social and economic risks and opportunities will be identified and managed (environmental, social, economic and governance considerations in due diligence are often aggregated and called 'non-financial' due diligence to differentiate from financial due diligence). The quality of environmental, social and economic development clauses in contracts will depend greatly on the quality of such due diligence. The project lawyer should inquire about the nature and quality of such non-financial due diligence conducted so far, whether by the contracting authority or the private partner, and attempt to correct any gaps through contractual provisions, to the extent feasible. When initiating the review of the nature and quality of non-financial due diligence, the lawyer (and other government officials) should be aware that the environmental, social and economic responsibilities of and opportunities in investment projects will likely arise from several sources, which are:

- national laws and regulations;
- international standards derived from international agreements or international organisations;
- generally accepted industry standards;
- environmental and social impact assessment (ESIA) processes and other assessments, such as climate change impact assessment, health impact assessment, human rights impact assessment, gender assessment, and related assessments (see References for more on ESIA and other related instruments);
- environmental permits or licences; and
- inputs from consultations with affected communities and other stakeholders with an interest in the project.

The role of the ESIA in due diligence

The ESIA is an instrument that is a critical part of the upfront due diligence process for both the investor and the government. It identifies potential positive and negative environmental and social impacts of a proposed project, and suggests specific measures to avoid, minimise or manage the negative impacts and to enhance the positive ones in an environmental and social management plan (ESMP). The ESIA process should involve iterative consultations with affected communities and other stakeholders, and in some cases should enable affected stakeholders to guide and inform the process in a participatory format, especially in projects with significant local development components or involving indigenous peoples. The ESIA process informs decisions and guides the critical points, targets and specific responsibilities to include in the contract. The scope of the ESIA should be consistent with the proposed project's potential impacts and risks.⁵

This guidance refers to the process of ESIA, which combines environmental impact assessment with social impact assessment in an integrated way, so that the two disciplines can inform each other, eliminate duplications, and explore efficiencies and synergies. It is possible to have two free-standing processes, one for the environment and another for the social side, but this approach is generally considered to be suboptimal. The ESIA could be supplemented with free-standing assessments for specialised topics, such as climate change, human rights, biodiversity, gender, and so on, as appropriate for the project. If these assessment processes

are ongoing or will occur at a later date, the contract should specify them, identify the responsible party to conduct them, set out the government approval process clearly, and require implementation of the findings and recommendations. (The ESIA could also benefit from other studies, possibly carried out ahead of the ESIA, such as strategic impact assessment, sectoral assessment, regional assessment, and cumulative impacts assessment (see References), but these may be the responsibility of other agencies and not the contracting authority.)

Some projects use experts or expert panels to determine the quality of the ESIA or supplemental assessments, or monitor management activities and results on the ground. This may be a useful mechanism when such assessments do not require the approval of any government agency, or when they are very technical in nature and the government lacks capacity for review, provided that the experts are appropriately qualified in the relevant environmental and social areas and act independently of the project.

Each contracting party has an active responsibility to take part in due diligence. During project preparation and as part of feasibility studies, the contracting authority should either initiate or actively monitor the ESIA process initiated by the project proponent, so that the environmental and social risks and opportunities can be specifically identified and inform the content of the ESMP. Responsibility and monitoring for the public consultation process related to the ESIA should also be clearly set out. The private operator should be responsible for setting up the more detailed project management programme that will give effect to the ESMP. The private operator's responsibility to implement the ESMP and the management programme should be clearly documented in the contract. If this is not done, the contracting authority could bear the consequences and the knock-on costs of such impact, which could be significant depending on the sector and circumstances.

Because of the special expertise involved in the ESIA process, it takes place apart from other corporate activities, yet it is crucially important that the ESIA findings and recommendations are integrated into other business processes, including architectural, engineering, financial, human resources, legal (and vice versa). For instance, the cost of implementing the ESMP must be estimated and included within the project budget; failure to do so can result in poor implementation, contractual disputes, or project interruption. Such budget

should be adjusted from time to time to take into account periodic technology upgrade.

The result of the ESIA should be a set of specific ESMPs that are then incorporated into the contract to give effect to the project-specific application of the domestic legal requirements, other normative standards, and the due diligence process. This is addressed in Section 4.3.

A critical aspect to be addressed in the due diligence process is the correct sequencing of the process that should follow the ESIA, and the translation of the results of the process into legal obligations. A failure to provide clarity on this sequencing has resulted in multiple international arbitrations. The next part of this guidance explains the relevance of this process.

Sequencing of assessments, approvals, and licences and permits

A typical sequence of environmental and social assessments, approvals, and licences and permits contemplated under many national laws is shown in Figure 4.1.

The sequence of events is explained below:

1. A **feasibility study** explores the practicality of a proposed project, and delineates the project in sufficient detail. This process will generate a project description, which will be the basis for a number of processes, including an ESIA process and the environmental permitting process (see item 4). The feasibility study would benefit from other parallel upstream processes, such as disaster and climate change risks studies, alternatives analyses, as well as cumulative, regional, sectoral, or strategic environmental assessments, which are particularly

Figure 4.1 Flow of environmental and social assessments, approvals, and licences and permits



important in large projects, transboundary projects, projects proposed in sensitive locations, and in the case of investment programmes with multiple projects under consideration.

2. An ESIA will establish the ‘baseline’ environmental and social conditions prevailing at the time of the assessment, identify all potential negative and positive environmental and social impacts of a project, and suggest how negative impacts can be avoided or mitigated and positive impacts enhanced through an ESMP. Consultation with affected communities and other relevant stakeholders helps verify the impacts predicted by the assessment process and identify additional impacts. This process may be carried out by the consultants hired by the project proponent (the contracting authority or the private operator). Regardless of who takes the responsibility, the assessment at this stage, if it takes place at all, may be a high-level document, and the ESMP may lack sufficient detail.
3. If the ESIA and ESMP provide sufficient level of detail, they can be submitted for **approval** by the responsible government ministry or agency (ideally the ministry

Box 4.1 Public procurement and ESIA

Public-private partnership projects in the infrastructure sector typically go through a competitive public procurement process to select the private operator of the project. In these cases, the findings of the ESIA, including the ESMP (assuming the government has already commissioned it) must be handed over to the procurement process so that the bidders can propose and price out the environmental, social and local development components of the project. Bidders should be required to specify their qualifications with respect to the implementation of the ESMP.

When this ‘handover’ is done well, the winning bidder will have a clear understanding of its responsibilities in regard to the environmental, social and economic development requirements, which can be reflected in the investment contract in detail. When this step is missed, the value of the ESIA and ESMP is entirely lost; furthermore, the onus of carrying out a new ESIA is often placed on the winning bidder.

The procurement process should be structured as sustainable procurement that prefers bids that demonstrate the bidders’ capacity for addressing the environmental, social and economic conditions of the project. Women- and minority-owned businesses should be given preference where appropriate.

of environment, but in some jurisdictions this would be the ministry in charge of the sector, such as the ministry of mines for mining projects).

4. The approval of the ESIA should precede or coincide with the issuance of an **environmental permit or licence**. The permit or licence will be based on the project description, should include key requirements from the ESMP, and may attach additional conditions to the project. In addition, and depending on the jurisdiction, other related permits for specific sectors, such as fishing, forestry, or exploitation of ocean resources, may be necessary. It is only when all requisite permits and licences are issued that a project should be considered as receiving final approval and thus when construction activities can start.
5. It is usually left to the private operator to translate the results of the ESIA and the ESMP into engineering and operational **management systems and programmes**. (If a full ESIA has not been conducted prior to the selection of the private operator, and the expectation is that it is the responsibility of the operator to carry it out, it must do so before it can even translate the results of the ESIA and ESMP into management programmes. This is clearly a practice that is out of proper sequence, but is frequently observed.) The private operator will propose detailed management programmes that are tailored to the technical specifications of the project, consistent with items 2 and 4 above, and will apply the programmes through an appropriate management system, setting aside sufficient human and financial resources for implementation of the management programmes. Some detailed programmes and plans, such as mine closure plans, mandated by law in certain jurisdictions for the mining sector, can only be set up once project details are settled. If this is the case, these programmes and plans should be mandated in the contract.
6. The project should be constructed, operated, monitored, reported, and wound down in accordance with the ESIA, ESMP, the environmental licence, and the management programmes (including the closure plan mentioned in point 5 above).

This sequencing of events broadly applies to most countries, though obviously there are variations. In some countries, there may be additional steps, such as a pre-feasibility study phase, and more complex rules relating to the process of ESIA, while others may rely on contracts to set out all requirements.

In many jurisdictions, the sequencing outlined above occurs smoothly with all steps intact, whereas in others the process may be less clearly structured. In a rush to expedite projects, environmental permits may be issued prematurely without, or in anticipation of, an appropriate ESIA. The permits or contract may specify that an assessment must be completed at a later date, but the follow-up process may be neglected. Permits may be issued by line ministries in charge of specific sectors, without a meaningful review and comment by the environmental agency. Worse, permits may be issued on payment of bribes in order to expedite the approval process. Considering these possible scenarios, the lawyer must be generally familiar with the legal requirements and the sequence of events for ESIA and environmental permitting under their national law, and be clear about the point at which the contract is being signed in relation to the process described above. This is critical for ensuring clear obligations on the investor.

The lawyer must be familiar with the legal requirements and sequence of events for ESIA and environmental permitting under national law.

If the contract is signed after stage 5 above, with all the steps occurring in the correct sequence, the contract should provide for the private operator to commit to constructing and operating the project in compliance with the ESMP and the environmental and related permits. These documents could be attached to the contract, or if too numerous or lengthy, referred to in an annex. Whether the project should also be made to comply with the rest of the ESIA will be a case-by-case determination. Generally, its main purpose is to predict potential impacts, both negative and positive, of a proposed project based on agreed project description, and is not intended to be a compliance document on its own; instead, it forms the basis for the ESMP.

Whether the project should comply with the environmental and social management system and programmes will also depend on the content of the programme. In some cases, it may not make sense for the project to have to comply with detailed engineering and operational specifications, which may be extremely detailed and technical and may have to adjust flexibly to the situation on the ground. On the other hand, it will be of comfort to the contracting authority to be able to insist that the management

system and programme be followed carefully. On balance, if the management system and programmes have a good change management process written into them, it will be worthwhile to specify that the investor comply with them.

If the contract is being signed before stage 5, or if the assessments and approvals are out of sequence or missed, then the contract should provide that: (i) no construction activities should commence until such time as the appropriate ESIA and ESMP have been carried out, they are approved by the responsible ministry or agency, the environmental licence and other requisite licences have been issued, and the private operator has established appropriate environmental and social management system and programmes, consistent with the ESIA and ESMP and the terms of the environmental licence; and (ii) the private operator should commit legally to operating the project consistent with the ESMP and the environmental and social management system and programmes, as noted in the paragraph above.

Operational-phase 'due diligence'

The due diligence process for environmental, social and economic sustainability should be carried out at an early stage of an investment-making process, leading to the ESIA and ESMP, among other things. Although due diligence is typically associated with the project's preparation phase, it has also become the expectation that it should be periodic and ongoing, since changes will occur as projects develop. While the ESIA and ESMP originate at a certain point in time, project circumstances are dynamic and require constant adjustments. It is thus important that the ESMP and the management system and programmes be updated continuously as issues arise or new activities are proposed. The private operator should rely on a change management process in its management systems to adjust its ESMP to meet any changed circumstances in a flexible manner, and establish corrective action plans as needed to address poor performance.

If a material change to the project description is necessary during construction or implementation, such as unplanned resettlement becoming necessary later in the construction timeline, the project should carry out a supplemental ESIA, consult stakeholders on the proposed change, seek any amendments to permits as necessary, and update the management programme. The contracting authority must

Although due diligence is typically associated with the project's preparation phase, it should be periodic and ongoing.

approve such a supplemental ESIA. Because these changes are by definition material, the contract should anticipate such changed circumstances and provide for the supplemental ESIA process and related approvals, which may include a default approval by the environmental ministry or other responsible agency, subject to a valid reason to object to the change. Corrective action plans should be reviewed by experts, approved by the contracting authority, and made public, and should not lower the standards set out in the initial plans.

Other types of supplemental assessments may become necessary. For example, a changed country context during the operational phase, such as conflict, or labour or general unrest, or new legislation being proposed by the government may necessitate the process of human rights due diligence by either or both contracting parties. This topic is discussed further in Section 4.6.

As a follow-up to due diligence and contractual obligations, each of the contracting parties should also discharge its respective responsibility to monitor the project's environmental and social performance, and stay in close communication with the other party during all phases of the project. The contracting parties should agree on key performance indicators (KPIs) on environmental and social issues specific to the project, and actively use such indicators to report on the project's ongoing sustainability performance (see Section 5.3).

Guidance II: Conducting environmental and social due diligence in the pre-contract and operational phases

- ✓ Ascertain the extent of due diligence carried out in the pre-contract phase and identify gaps, if any, making sure that the due diligence process is not being curtailed by a rush to contracting.
- ✓ Pay particular attention to the process of the ESIA so that the approval and permitting events that should follow the ESIA are in the correct sequence.
- ✓ Require compliance with ESMP and the environmental and related permits at a minimum as contractual obligations; if there are gaps in documents or incorrect sequencing of assessments, approvals and permits, remedy them before the execution of the contract, and if this is not possible, provide for the appropriate sequencing and corrective measures in the contract.
- ✓ Ensure ESMP implementation cost is part of the total project cost to avoid project shortfall, and adjust the budget periodically for technology upgrades and other changing needs.

- ✓ Provide specifically for the responsibility of the contracting authority to approve changed project descriptions or plans that alter the underlying obligations in any material way, and guard against any deviations that lower standards.
- ✓ Provide for ongoing operational phase reviews of the ESMP implementation plan and the need for adjustments to be made to it over the life of the project.

4.3 Manage negative and positive environmental and social impacts

Investment projects should impact the environment and people positively, but all too often the negative impacts outweigh the positives and thus require special attention in investment contracts. When asked to name the main environmental and social obligations of investment projects, most lawyers will likely respond that they consist of compliance with national environmental and labour laws, and a requirement for an ESIA. Some may also mention compliance with certain international standards (such as the safeguard policies or performance standards of a multilateral development bank (MDB), or the Equator Principles – see below). But these requirements are incomplete and don't create meaningful substantive and procedural obligations that are necessary for the project's negative environmental and social impacts to be avoided, minimised, mitigated, or compensated for effectively (in this exact order – this is known as the 'mitigation hierarchy').

Several tools can help inform the project of the risks and potential negative (and positive) impacts from their planned activities, most notably the MDBs' environmental and social safeguard policies or performance standards. They help the lenders anticipate these impacts in projects they finance, and identify the mitigation requirements to impose on the borrowers. Examples include the International Finance Corporation's (IFC) Performance Standards,⁶ which are also the basis of the Equator Principles,⁷ used by 105 international banks engaged in project finance; furthermore, the Standards are shared with the OECD export credit agencies under their Common Approaches to Environmental and Social Due Diligence,⁸ and the European Development Finance Institutions.⁹ Some policies of the regional development banks reflect regional considerations (for example, in-depth provisions concerning indigenous peoples in the environmental and social framework of the Inter-American

Several tools can help inform the project of the risks and potential impacts of their planned activities, most notably the MDBs' environmental and social safeguard policies or performance standards.

Development Bank¹⁰). Industries also frequently make use of the World Bank Group's Environmental, Health and Safety Guidelines (EHS Guidelines) as a technical reference containing general and industry-specific examples of good international industry practice. These standards and guidelines are frequently used as reference points in the process of ESIA, in addition to national law references. The following summary broadly follows IFC's Performance Standards, unless otherwise noted. This summary of issues is not meant to be comprehensive, but illustrative. Each sector will raise its own specific issues, as will the technology, geography and other issues relevant to a specific project. However, the impacts identified below are common across multiple sectors and projects and so serve to illustrate the key issues and approaches.

Environmental impacts

The environmental impacts are better known in comparison to the social impacts (see below) and can range from brown (pollution and resource efficiency) to green (biodiversity) issues, and, depending on the project location and sector, blue (impacts on the ocean and its biodiversity and other resources). The common **pollution** and **resource efficiency** issues that should be considered for specific obligations, where implicated, are:

- emission of pollutants to the air, water, and soil
- generation of hazardous and non-hazardous wastes
- use, transportation and disposal of hazardous materials and pesticides
- use of resources and inputs, such as water and energy
- supply chain issues associated with construction materials (sand, concrete, timber, steel, etc.)
- emissions of greenhouse gases.

Release of pollutants and use of resources must be minimised through the use of best available technology and good operational practices, as well as good hazardous substances management techniques. Greenhouse gas emissions should be estimated, mitigated, tracked and reported publicly. Projects should abide by international agreements as well as the applicable national law on these issues. The detailed management protocol should be managed through the

ESMP and the project's management programme. (See IFC Performance Standard 3.)

The key impacts to **biodiversity** include:

- loss of biodiversity through destruction of habitats and other project activities
- damage to ecosystems, including ecosystem services on which humans and other living things rely
- management practices for the sustainable management of living natural resources.

Biodiversity (both terrestrial and marine living resources) and ecosystem services (nature's services for human wellbeing) must be protected through avoidance of disturbance of critical areas, minimisation of habitat destruction, and habitat restoration. Biodiversity assessment and management plans are frequently used to manage impacts on biodiversity due to the technical nature of the subject matter. This process may require significant lead time because baseline information collection could require one or more reproductive or annual cycles in order to describe the baseline and inform the mitigation measures adequately. Mitigation and management measures vary significantly depending on the type of habitats (from already converted land to critical or legally protected areas) and the ecosystem services involved, and may include habitat restoration or reclamation, set-asides within the project area, the establishment of biodiversity corridors, and various management techniques. Since biodiversity and ecosystem services must be assessed at a landscape level (going well beyond the project boundaries), collaboration is usually required with local, national and international stakeholders and conservation experts. In certain cases, biodiversity loss at the project site could potentially be offset by biodiversity protection elsewhere (using the 'like-for-like or better' principle), though this is extremely challenging to achieve in practice, both in terms of techniques and management of relationships with third parties. (See IFC Performance Standard 6.)

Social impacts

These negative environmental impacts affect not only the environment but also people's health, wellbeing and livelihoods. But social impacts of projects go well beyond the environmental

impacts described above and affect many stakeholder groups differently depending on their vulnerability. Within project-affected people are certain subgroups, such as workers, persons displaced due to project activities, indigenous peoples, women, children, older persons and persons with disabilities, all of whom will feel differentiated impacts from projects due to their identity or condition.

Negative impacts on the **health, safety and security of local communities** can be:

- environmental health issues
- resilience and safety issues associated with the project's infrastructure and assets, especially during disasters and emergencies, and project and community disaster preparedness
- use and disposal of hazardous materials
- damage to ecosystems services relied on by the communities
- emergency situations
- security of people when projects deploy security personnel to safeguard project assets and personnel.

Several instruments are available to evaluate these impacts, such as ESIA's, health assessment, climate risk or disaster risk assessment, and security risk assessment. Established management techniques for mitigation by specific sectors may be available in the EHS Guidelines. Impacts may be exacerbated in a situation of conflict, especially with respect to the project's use of armed security personnel, and should be monitored carefully. Other community impacts could include induced in-migration (see below) and gender-based violence generally associated with projects, and especially during the construction period.

The specific impacts on **workers** include:

- poor labour practices, especially failure to follow ILO's Fundamental Principles and Rights at Work (freedom of association, the right to collective bargaining, the elimination of forced or compulsory labour, and abolition of child labour, and the elimination of discrimination in respect of employment and occupation)

- other poor practices relating to working conditions and terms of employment
- impacts associated with retrenchment (collective dismissals)
- poor labour practices involving vulnerable workers (in addition to the use of child and forced labour/modern slavery), such as migrant workers, workers engaged by third parties, and those in the project's supply chain
- health and safety in the workplace.

Considering the globally connected supply chains, it is important to assess labour practices not only through the lens of national law but also through the relevant international standards, especially those established by the ILO (and reflected in many of the safeguard policies and performance standards mentioned above). The ESIA process, or a free-standing labour assessment, and in the case of existing enterprises, a labour audit, are used to assess labour practices. Depending on the legal status of the worker – whether engaged directly by the project, contracted through third parties, or engaged in the project's supply chain – the leverage and techniques of the project to influence the labour practices will vary, but poor practices with any of these types of workers are likely to be associated with the project and can cause reputational damage and even legal liability issues. (See IFC Performance Standard 2.) Contract provisions can address these issues, reinforce relevant domestic legal provisions and improve the domestic law standards through higher levels of obligations where needed.

Resettlement can involve physical displacement (loss of housing) or economic displacement (loss of income-producing assets and livelihoods) and a multitude of potential human rights violations. Adverse consequences of resettlement are numerous, complex and significant, and require detailed attention and vigilance over an extended period of time. They can be divided into:

- risks to persons being resettled, such as loss of shelter and household property, income-producing land and assets, access to jobs, social services, and communities, and livelihoods, potentially leading to lower living standards and poverty, and
- risks to communities that receive resettled people.

Since resettlement carried out under national law could entail the risk of compulsory acquisition for private use of land rather than for public purposes, risk of low (or no) compensation (based on depressed assessed value of the lost property), and forced eviction, it is advisable to plan resettlement under international standards.

Risks associated with resettlement in rural areas are different from those in urban resettlement, though lack of land to ensure land-for-land resettlement is a prevalent issue. In both situations, risks can stretch over years, and possibly beyond the life of the project, especially when livelihood restoration is required. As a result, resettlement should be avoided or minimised where possible and especially for high-risk groups, such as indigenous peoples.

Resettlement planning normally involves many years and multiple steps, including household surveys, compensation negotiation (in some cases involving the national eminent domain or compulsory acquisition process), compensation payment or settlement of replacement property, physical relocation, and resettlement or livelihood restoration monitoring. Typically, these steps are recorded in resettlement action plans. The assistance of competent resettlement specialists is required, often in collaboration with the ministry of housing or other authorities. (See IFC Performance Standard 5.)

Contract provisions should establish clearly who is operationally and financially liable for establishing and implementing resettlement plans. Governments often undertake to carry out land acquisition and resettlement. If the private operator is offered cleared land for the project, it should ascertain that land acquisition and resettlement have been carried out appropriately. If the private operator is tasked to acquire land and resettle people, the government should carefully monitor the process. In particular, safeguarding the rights of the local communities and individuals is a basic obligation of the government in this process that should not be contracted out to the private operator. This creates an important balance for negotiators to address in the contract.

Over 300 million indigenous people live around the world, often in resource-rich areas. These areas can become subject to development, triggering negative impacts on the territories and culture of indigenous peoples, including:

- loss of land, resources, livelihoods, ways of living, cultural heritage, and unique knowledge and practice, and
- high risks associated with relocation of indigenous peoples from lands subject to traditional ownership or under customary use.

As a result of their unique circumstances, international instruments (ILO Convention 169 and the UN Declaration on the Rights of the Indigenous Peoples) guarantee the process of free, prior, and informed consent (FPIC) of indigenous peoples with respect to measures that affect them, such as impacts on their ancestral land and the resources on it. A few countries have reflected the FPIC requirement in national law. However, today, businesses are obligated to respect the FPIC rules as part of customary international law, or through the application of safeguard policies (such as IFC's Performance Standards or the Inter-American Development Bank's policies) when the rights of indigenous peoples are at risk. Many projects, especially natural resource and hydroelectric projects, have been derailed and/or ended in international arbitration when governments have belatedly recognised the need to address and protect their rights after a contract was signed or a permit was issued, but no consent of the indigenous peoples was obtained.

In addition to protecting basic rights, the principle of project benefits enhancement and sharing that applies to all project-affected people and communities is particularly pertinent in the context of development taking place in the territories of indigenous peoples. This means community development planning for the affected communities should regard indigenous peoples as partners in development, and should be carried out with their active participation, and with ample lead time and expert advice. Implementation should be accompanied by close monitoring. Typically, these issues are addressed in a free-standing indigenous peoples development plan, though in cases where affected communities of indigenous people exist near non-indigenous communities that are also project-affected, care should be taken to ensure equity¹¹ among all involved communities. (See IFC Performance Standard 7.) In the case of communities of indigenous peoples who are in self-isolation, projects must avoid them (as provided in the policy of the Inter-American Development Bank).

International instruments guarantee the process of the free, prior, and informed consent of indigenous peoples with respect to measures that affect them.

Cultural heritage encompasses both tangible (or physical) forms and intangible forms (cultural knowledge, innovations, and practices of communities embodying traditional lifestyles). Both forms can be subjected to adverse project impacts, such as destruction, degradation or desecration, or other forms of abuse, such as commercial exploitation in the case of intangible culture. Although in-situ preservation of tangible forms of culture is the best, other mitigation measures may be possible, including removal and preservation, which should be decided in consultation with the affected local communities and, depending on the situation, experts and national antiquities or similar authorities. See IFC Performance Standard 8.

In addition to all the impacts mentioned above, which are direct impacts, projects could also generate **indirect or induced impacts**. Within a project life cycle, the construction phase normally generates the most adverse impacts, including induced impacts. For example, job prospects at the project site could attract a temporary rush of job seekers, who may contribute to the boom-town effects of construction to the communities surrounding the project, with prostitution, gender-based violence, diseases, and competition for scarce local resources. As these acts may not be well regulated by national law, projects must avoid the negative impacts or minimise, mitigate or compensate for them, often in collaboration with local law enforcement.

Transboundary impacts, such as impacts on rivers that cross national boundaries, pollution that spreads to neighbouring nations, potential transmissions of epidemics or pandemics, and impacts from facilities that the project relies on but does not control (e.g. dedicated transmission lines associated with a power plant) should also be considered in the ESIA process as appropriate.

In some sectors, projects may promise infrastructure and social services to local communities as part of mitigation or compensation for negative environmental or social impacts. These programmes are also offered as a way to promote local economic and social development (see Section 4.4). But they are also frequently added on as part of the private operator's corporate social responsibility or charity programme, or as a way to earn and maintain the project's social licence to operate. Projects may offer to share their soft or hard infrastructure with the local population, such as health clinics for staff, access

roads for construction, or railway system for transporting commodities to the nearest port. Or, they may agree to build new facilities and installations, such as schools and libraries, wells, irrigation systems, off-grid electrical stations, and so on. It is important to be clear what is being proposed in order to specifically mitigate or compensate for negative impacts identified in the ESIA process. When this is the case, specific compliance, monitoring and reporting obligations should apply.

Finally, **gender issues** cut across all the issues discussed above. Some MDBs specifically require the process of gender assessment in order to identify and address project impacts that are differentiated on the basis of gender. Under certain circumstances, the risk of gender-based violence must be considered and appropriately addressed.¹² Social obligations with respect to women and girls, including health, education and economic development can be very controversial in some areas, but require ongoing care by companies and governments.

Enhancing positive impacts

ESIAs and ESMPs in theory are intended to address both negative and positive impacts of projects; yet, in practice they tend to concentrate on the former, and frequently miss opportunities to offer insights into how potential positive impacts can be realised and enhanced so as to contribute to the host country's sustainable development. On the environmental side, project activities could potentially offer opportunities for restoration of land, soil and water sources and improvement of air quality, and conservation and restoration of biodiversity and ecosystem services, among others. These positive environmental impacts can help projects manage negative impacts and, in some cases may even offset the negatives (for example, biodiversity offsets). Realising positive environmental impacts will invariably also lead to direct or indirect positive impacts on people.

On the social side, projects can potentially offer opportunities to remedy past inequities and exclusion and enhance greater social equity and the inclusion of many. Resettlement programmes, while presenting great risks, can also offer great potentials for improving resettled people's livelihoods, living standards and wellbeing, if well executed. Socially positive outcomes can also enforce positive environmental outcomes, as in generation of green jobs. Good analysis of positive impacts is valuable for

Negative impacts on certain people cannot be offset by positive impacts on others. Corporate social responsibility programmes cannot be used as a mitigation measure for harmful impacts on people.

local economic and social development planning purposes. However, it should be noted that negative impacts on certain people cannot be offset by positive impacts on others. Corporate social responsibility programmes cannot be used as a mitigation measure for harmful impacts on people.

The due diligence process should ensure that these opportunities have been adequately explored, including the opportunities that can be revealed through the process of ESIA. Specific project commitments to boost positive project impacts should be documented in the contracts.

Guidance III: Strong environmental and social obligations to manage negative and positive impacts

- ✓ Strong environmental and social obligations go beyond the requirement for compliance with law or international standards, or the obligation to carry out an ESIA. The obligations should be based on precise understanding of potential negative and positive impacts.
- ✓ Review the ESIA to understand the potential negative impacts of the project and the ESMP for the proposed management measures. Ascertain what specific plans are required to manage the negative impacts.
- ✓ In addition to the ESMP, the contract should explicitly require the implementation of the specific mitigation measures or plans, or third-party agreements.
- ✓ Although not tailored for the specific purpose of identifying economic impacts of projects, ESIA's can also provide valuable information for the purpose of local economic and social development planning.
- ✓ Social obligations should be identifiable and verifiable. They should be developed with the community involved, for their benefit.

Sample Text: ESIA Requirements

Model Exploration and Production Sharing Contract [hydrocarbons] Republic of Cyprus (2012) [environmental provisions excerpted from several sections]

[Note that the following illustrates how to obligate the private operator to conduct ESIA's at various key milestones during the project for approval by the relevant government agency. It does not include other relevant environmental provisions discussed in the Resource.]

'Proposals relating to production procedures shall ensure environmental protection conforming to best practices in the petroleum industry and comply with the relevant regulations.

The licensees will conduct a preliminary environmental impact assessment study prior to the initiation of any exploration work and a full environmental impact assessment study prior to the initiation of any exploitation work, both of which

Sample Text: ESIA Requirements (Continued)

will comply with the provisions of the strategic environmental assessment of the hydrocarbon licensing program of the Republic of Cyprus and with the relevant opinion of the environmental authority, as well as with the relevant provisions of the Directive 85/337/EEC.

If the company declares that a discovery is a commercial discovery, the company shall submit to the government for approval within 4 months of such declaration: a full environmental impact study prepared in accordance with the applicable environmental legislation, covering the proposed development and any related facilities or infrastructure inside or outside of the contract area, which shall be subject to prior approval in accordance with the applicable environmental legislation.

The licensees will conduct a full environmental impact assessment study prior to the initiation of any exploitation work, which will comply with the provisions of the strategic environmental assessment of the hydrocarbon licensing program of the Republic of Cyprus and with the relevant opinion of the environmental authority, as well as with the relevant provisions of the Directive 85/337/EEC.'

MMDA, Article 2.4.2 Environmental Assessment and Environmental Management Plan (NB: Art. 2.4.3 includes similar provisions for Social Impact Assessment and Action Plans)

[NOTE: The objective of the Environmental Management Plan is to prevent any unnecessary and undue degradation of the environment by the Project; to protect public health and safety, particularly for communities in the Mining Area; to preserve water quantity and quality; to ensure that impacts within the Mining Area are contained in that area; to stabilize the site physically and chemically at the end of mining operations to prevent offsite impacts; and to ensure that the Mining Area may be safely and beneficially used by future generations.]

- a. The Company shall have an Environmental Assessment prepared based on sound engineering and economic principles, and having regard to Good Industry Practice including IFC Performance Standard 1, establishing a baseline of environmental conditions existing at the Effective Date, and assessing the Project-related environmental effects and impacts.
- b. The Company shall have an Environmental Management Plan prepared (which if prepared by the Company is verified by an independent environmental consulting firm recognised as having expertise in the international mining industry), based on the Environmental Assessment and sound engineering and economic principles, and having regard to Good Industry Practice including IFC Performance Standard 1. The Environmental Management Plan shall upon request by the State, be made publicly available in a language and in a form that is accessible to affected communities in the Project Area, and shall be placed in the document files identified in Section 30.1 of this Agreement. The Environmental Management Plan shall be and updated prior to any major change to the mine plan. The Environmental Management Plan shall include [elements as the Parties may agree, such as the following]:
 - i. Measures that the Company intends to use to mitigate adverse consequences of further of the Project as described in the Feasibility Study;

Sample Text: ESIA Requirements (Continued)

- ii. Plans for the management, remediation, rehabilitation and control of all environmental aspects of the Project, excluding all historic environmental matters that are not assumed by the Company, including
 - A. A plan to avoid, minimise, mitigate, rehabilitate and offset, where appropriate, impacts on biological diversity within the Mining Area;
 - B. A plan for preventing, minimising or mitigating adverse environmental impacts to rivers and other potable water and ensuring that such pollution does not cause unnecessary harm or destruction to human or animal life or fresh water fish or vegetation;
 - C. Opportunities for the improved management and conservation of natural resources in the Project Area;
 - D. A plan to avoid or minimize greenhouse gas air emissions (as defined by the IPCC) from the Project taking into account economically and commercially feasible technology;
 - E. A plan to effectively manage soil resources to allow future use of the surface land consistent with the proposed post mining land use;
- iii. A description of the actions to be taken during any periods of temporary closure or cessation of operations and for the closure activities to be performed should closure be required prior to the completion of the planned mine life;
- iv. A plan for concurrent reclamation to the extent practicable;
- v. A plan to restore all mined areas to a final landform that is safe, stable, and suitable for the proposed post mining land use.
- vi. A plan regarding the intended post mining land use in the Project Area;
- c. The Company shall comply with the environmental laws of the State in force at any time during period of this Agreement [including any provincial and local laws], including laws relating to protection of water quality, air quality, quality of land, the preservation of living natural resources, the protection of biodiversity, and the disposal of hazardous and non-hazardous wastes. Subject to Section 33.2.2, a material failure to comply with environmental laws, the terms of environmental licenses or Environmental Management Plan, as the same may be amended from time to time, constitutes a breach of this Agreement. (Emphasis added)

MMDA, Article 10.2: Applicability of IFC Performance Standards and Equator Principles

Where Applicable Law and regulations on environmental and social impact assessment and management, and pollution prevention are less stringent than the IFC Performance Standards, the Company shall undertake its activities in a manner consistent with the IFC Performance Standards. To remove any doubt, the Company and the State recognise that the IFC Performance Standards outline processes to be followed enabling site-specific environmental compliance limits to be developed, where required.

4.4 Maximise opportunities for local economic and social development

Investment projects are usually justified on the basis of expected national and local economic growth. The many direct and indirect project benefits that can help propel economic growth, especially during the construction period, and to a lesser extent during operations, are of major value and interest to communities and local governments near the project site. Although direct job opportunities with the project company and its foreign contractors will be finite, depending on the scale and nature of the project, local businesses that supply goods and services to the project can generate new local employment. Projects can also create opportunities for training and skills and knowledge transfer, and help nurture careers, entrepreneurship and leadership, both within and outside the project.

It is frequently assumed that economic benefits should accrue automatically to local communities by virtue of the project, and that the larger the project the larger the benefits. However, studies show time and time again that larger projects consistently experience cost overruns and shortfalls of benefits.¹³ Unless the national and local governments and the project proponent purposefully set their sights on maximising local economic development in the early stages of the project development, and articulate the economic development objectives in a strategic manner through appropriate planning and consultation with stakeholders, the risk of economic benefits falling short for local communities will be real and can be significant. Well-meaning but unilateral charitable donations or community development programmes based on the private operator's existing corporate social responsibility (CSR) programmes may not meet the needs, expectations and ambitions of communities. Resentment and discontent can spread quickly when hoped-for project benefits fail to materialise, and can provoke unrest, protests, project stoppages and even violence.

It should go without saying that projects can generate tax revenues that can fund future social programmes by local governments. However, it is important to ensure clarity on allocations of tax revenues between different levels of government, because this is almost always not automatic. Tax payments to the central government may never be shared with the local governments, and jobs may easily bypass local

Unless the national and local governments and project proponent aim to maximise local economic development, the risk of economic benefits falling short for local communities can be significant.

communities and go to those outside the communities, or even outside the host country. To address this problem, some domestic law sets out a specific sharing ratio for taxes collected in order to ensure that local communities share in the increase in tax revenues a project generates. Such an arrangement can also be specified in a contract. Negotiators may wish to address this issue as well.

It is not the traditional role of the investment contract to right the omission of national, sectoral or project-level planning and stakeholder consultation early in the project phases, but it can prompt the contracting parties to take a hard look at the project and its potential to promote local economic development, propose an approach or a plan, and help ensure its systematic implementation. While planning is generally the responsibility of the government, the project can be designed to align with the official plan(s), and the contract then becomes one means for supporting this process. Successful local development plans seek to maximise the value of local skills and resources for the duration of the project and beyond, and both within and outside the project boundaries, based on active input from the local government, business and community members. Needless to say, companies making community investments should not become a substitute for local government, but should work with local government on these issues.

The detailed modalities, targets, budgets and timelines for local employment and project procurement of goods and services should be provided in specific provisions.

The lawyer should not rely on a simple contractual statement that the private operator will give preference to local labour, goods and services, as was the case with most of the contracts reviewed for this project. Instead, the detailed modalities, targets, budgets and timelines for local employment and project procurement of goods and services should be provided in specific provisions, in an annex to the investment contract, or if too lengthy, in a separate community development plan, or even a free-standing community development agreement. Regardless of the mechanics, the contract should specify that implementation is a legal obligation of the private operator. Section 5.1 elaborates on how to create legal obligations enforceable by communities. Targets and indicators could provide the basis for the project's periodic reporting on local economic participation and development (see Section 5.3). In many cases, national laws may set minimum levels or targets for these issues, which must be maintained or exceeded within any contract.

Although it is usually not the job of the lawyer to draft local economic development plans, it may be useful to consult handbooks on community development¹⁴ and, critically, engage with the appropriate government ministries or agencies. The following pointers may provide a quick orientation on the topic. Even though not all of them are legal in nature, they could help improve the plans and the chances of local development.

- The private operator should give preference to the project procurement of local goods and services for the project, provided that the conditions of price, quality, delivery time and terms of payment are similar to those from non-national sources. This qualification is necessary to ensure that the project benefits from competitive goods and services.
- Some international trade or investment agreements may include limitations on preferential purchasing requirements. However, these requirements are now very common in the extractives sector and infrastructure procurement and can also be applied in other sectors.¹⁵
- Projects should offer training programmes designed to enable local participation in projects through a range of positions and skill levels. As a matter of priority, local businesses should be offered training on how to bid for project contracts, and manage operational, financial, accounting, and other management challenges. Targets for percentages of local purchasing of goods and services should rise over time, to take into account the benefits of mutual experience and capacity-building.
- In many instances, companies will have very large procurement packages. These should be unbundled as much as possible in order to maximise opportunities for local procurement. Working with local communities, companies can identify possible 'low-hanging fruit' that can be enhanced through appropriate unbundling.
- Employment of local personnel from communities around the project and from the host state should be factored into the contract or a related agreement.

Employment in higher-skill positions and management positions should be anticipated to grow over time, and targets should reflect this over time. It is essential also for human resource departments to establish longer-term career planning for employees, not simply to focus on short-term job placements. This is known to improve job retention for both the employees and employers.

- The private operator should treat its workforce based on the principle of non-discrimination, equal opportunity and fairness, and apply this principle to women and men, minorities and non-minorities, and so on. At the same time, we note that it is now widely accepted that measures or assistance to remedy past discrimination, and to promote the hiring of local community members and nationals of the host state for this purpose, will not be deemed as discrimination so long as they are consistent with national law and policy.¹⁶
- Projects should be aware of the business case for paying attention to gender issues at the workplace,¹⁷ and should support women's participation in project activities on an equal footing with men. In addition, projects can create opportunities to support women's entrepreneurship and leadership generally. Activities that promote women in the workplace should be carried out in consultation with women. In countries where women's civic and economic participation is not culturally acceptable, gender experts should be engaged to solicit the views of women in a culturally appropriate manner.
- Provisions addressing all of the above must also reflect on the impacts of new technology across many sectors. Governments can no longer assume previous levels of employment and local purchasing for new projects, given the impacts of new technologies. In some sectors, employment is expected to drop 75 per cent or more in the next few years.¹⁸ Expectations must therefore be realistic and not create a recipe for failure.

Guidance IV: Local economic and social development

- ✓ Go beyond a general requirement to prefer local inputs, employment and other economic development measures by providing details and timelines that will improve the chances of implementation.
- ✓ Minimum requirements in domestic laws should be adhered to or exceeded.
- ✓ Ensure that the project plans its contributions to local economic and social development strategically and systematically. Large-scale

procurement requirements should be unbundled to allow greater access to local businesses.

- ✓ Ensure consultation with the local government, businesses and community members to develop the plans, and work with community groups to ensure implementation.
- ✓ Companies must work with the local government, not to replace it.
- ✓ Create a legal obligation on the part of the company to implement community development commitments and plans where these are separate from the actual contract.

Sample Text: Employment and Training / Local Content

Maryland Oil Palm Plantation Concession Agreement (Liberia 2012)

[local employment, training and procurement provisions]

'Section 13

EMPLOYMENT AND TRAINING

13.1 Employment. Investor's Employment practices shall conform to Law. In no case shall Investor hire non-Liberian nationals for unskilled labor positions. Investor shall give preference for employment at all levels of financial, accounting, technical, administrative, supervisory and senior management positions and other skilled positions to qualified Liberian nationals as and when they become available, it being the objective of the Parties that the operations and activities of Investor under this Agreement should be conducted and managed primarily by Liberian nationals as soon as is practicable. Subject to availability of qualified and capable applicants who meet the reasonable requirements of Investor, Investor shall cause Liberian nationals to hold at least fifty percent (50%) of the ten most senior management positions within five (5) years of the Effective Date, and at least seventy-five percent (75%) of such positions within ten (10) years of the Effective Date. As of the Effective Date, the ten (10) most senior positions are the President and Managing Director, the General Manager, the Comptroller, the Operations Manager, the Plant Manager, the Technical Services Manager, the Agricultural Operations Manager, the Research and New Development Manager, the Personnel/Human Resource Manager and the Chief Accountant. The list of the ten (10) most senior positions may be amended from time to time by agreement of the Parties. Appointment of a Liberian national to a particular position shall not, however, preclude subsequent employment of a non-Liberian in such position as long as, subject to availability, the overall percentage of Liberian nationals employed in senior positions is otherwise met. In the event Investor is unable to meet the targets set forth above, upon the request of Government, Investor must demonstrate that it used all reasonable efforts to fill such positions with Liberian nationals but was unable to do so.

13.2 Training. In furtherance of the objective stated in Section 13.1, Investor shall provide for the training of Liberian nationals in order to qualify them for the positions described in Section 13.1 and as required by Investor's operations under this Agreement. Investor shall also provide on-the-job training, vocational training, and undertake whatever other measures are necessary and reasonable to achieve the objectives stated in Section 13.1 (including, subject to operational needs and economic conditions, scholarships for qualified Liberian employees to

Sample Text: Employment and Training / Local Content (Continued)

pursue relevant advanced studies abroad). Investor shall prepare (and revise when necessary) detailed plans and programs for its on-the-job training programs, including time tables and schedules, as part of its reporting requirements under Section 21 hereof. Specifically, Investor shall make available to all of its employees, and to members of the surrounding communities, desirable vocational training and adult literacy programs. In addition to the foregoing, Investor shall also invest not less than US\$20,000, which amount shall be subject to inflationary adjustments, calculated in the same manner as Section 19.11 of this Agreement or as otherwise provided for in applicable Law, in internal vocational training programs. Investor has affirmed that, as a part of its support for education in Liberia, it shall provide annual scholarships for Liberian nationals or other educational support for Liberian nationals originating from the Developed Area. Specifically, Investor shall provide US\$40,000 per year, which amount shall be subject to inflationary adjustments in, calculated in the same manner as Section 19.11 of this agreement or as otherwise provided for in applicable Law, for scholarships and financial support for students at the WVS Tubman University or other similar institution of higher learning designated by mutual consent with the Government. Investor agrees to implement a policy of technology transfer, which shall include a transfer of operational techniques and modern management techniques. Investor shall provide on the job training necessary for employees to undertake their work competently and shall also provide them with opportunities to learn new techniques which will allow such employees to progress into positions requiring more complex and demanding skills.

Section 14

USE OF LIBERIAN PRODUCTS AND SERVICES

Investor shall, when purchasing goods and services related to Investor Activities, give preference to the maximum extent possible to goods produced in Liberia by Liberian nationals, and services provided by Liberian nationals resident in Liberia, or entities incorporated or formed in Liberia where Liberian nationals resident in Liberia are entitled to receive sixty percent (60%) of more of all profits from such entities, provided that such goods and services are equal to or better than comparable goods and services obtainable from other Persons taking into account price, quality, safety standards, service, quantity, delivery, schedules, availability and other terms. Investor shall make reasonable efforts to structure its procurement of goods and services so as to maximize the possibility of Liberian nationals providing such goods and services. In addition, Investor agrees to include in each contract or work order with any Investor Party a provision requiring it to adhere to the requirements of this Section 14, and to require its sub-contracts to do so, with respect to any activities undertaken in Liberia by such Persons (and their sub-contractors), on behalf of Investor. Subject to the foregoing, Investor may freely contract with any Person.'

MMDA Art. 22: Local Community Development

22.1 Community Development Agreement

Within thirty (30) Days after the Effective Date of this Agreement, the Company shall enter into Consultation and negotiations with the objective of concluding one or more community development agreements as described in this Section or agreements with communities impacted by the Project, to promote sustainable development and enhance the general welfare and quality of life of inhabitants, as well as to recognize and respect the rights, customs, traditions and religion of the affected persons (each, a "Community Development Agreement"). It is the objective of each of the Parties hereto that the Mining Operations shall be carried out in a manner that is consistent with the continuing economic and social viability of centers of population that have formed and which may form as a result of such operations during the term of this Agreement. Upon request of the State at any time the Company shall consult with the State and with the community mutually to establish plans and programs for the implementation

Sample Text: Employment and Training / Local Content (Continued)

of this objective and thereafter the Company shall cooperate with the State with regards to its effort concerning the realization of such plans and programs. Each Community Development Agreement shall be subject to Applicable Law, and shall;

- a. Address both how local communities can take advantage of the development opportunities presented by the Project, and how the Project's adverse impacts can be mitigated;
- b. Serve as the agreement that specifies how the Company's obligation to spend funds for local development shall be met;
- c. Address environmental, social, and economic conditions during mining and after mine closure, and the eventual transition from a mining economy to a post-mining economy in the Project Area as may be agreed upon among the Parties to such Community Development Agreement; and
- d. Be based on the objectives listed in Annex B.

22.2 Relationship of This Agreement to Community Development Agreement

[Where an inconsistency occurs between a provision in the Community Development Agreement and the terms or conditions of this Agreement, the provision in the Community Development Agreement shall prevail unless this Agreement specifically states that the provision in this Agreement shall prevail.] [A final written and reasoned decision of a duly constituted court or arbitral panel declaring a material breach of the Community Development Agreement by the Company, shall constitute a breach of this Agreement.] [A breach of the Community Development Agreement shall be governed by the terms thereof.] [See comments for discussion of issue.]

22.3 Local Business Development Plan

The Company resolves to cooperate with the State in carrying out the State's responsibilities by developing a local business development program to promote economic development and growth in the area of communities impacted by the Project. Such a program would be modified from time to time to fit the existing circumstances related to the particular operating phase (development, construction and operation) in the life of the Project.

The program would be based on the objectives listed in Annex C.

MMDA Art. 24: Employment and Training of Local Citizens**24.1 Minimum Employment Levels**

In selecting employees to carry out its Mining Operations under this Agreement the Company shall give preference to qualified and competent the State executives, officers, engineers, consultants, technicians and skilled and semi-skilled labour.

24.2 Investment in Skills of Local Work Force

The Company shall develop and implement an annual training plan with the objectives to:

- a. Organize training of its employees to upgrade employees' skills and provide further practical experience;
- b. Train employees in line with the Company's short and mid-term human resource plans; and
- c. Upgrade selected employees' qualifications by enrolling them in studies inside or outside the State on a contractual basis to further upgrade their professional qualifications.

24.3 Labour Training and Capacity Enhancement

Sample Text: Employment and Training / Local Content (Continued)

The Company shall develop and implement a comprehensive training program for the State personnel in the State and in other countries, if necessary, and carry out such program for training and education in order to meet the requirement for various classifications of skilled and semi-skilled full time employment for the Project.

24.4 Management Training and Capacity Enhancement

The Company shall develop and implement training for the State personnel in the State and in other countries, if necessary, in order to qualify them for technical, administrative and managerial positions, with the objectives to:

- a. Establishing and operating a vocational and training institute to provide vocational, technical and advanced training programs in the community;
- b. Furnishing on-the-job counterpart training, not only in the State but to the extent reasonably feasible in the offices of the Company in the State, in order that the beneficiaries may receive training in the overseas aspects of the Company's shipping, marketing and accounting functions;
- c. Providing scholarships for inhabitants of affected communities to pursue studies, including advanced studies in the State or abroad; and
- d. Enhancing such training and educational opportunities as already exist in the vicinity of the local community.

4.5 Anticipate and manage climate change risks

Climate change affects every major investment project, everywhere in the world. It is imperative that the climate-related risks be factored into the design, construction, operation and emergency plans for any large-scale project. Although climate change is a dynamic risk that will affect projects lasting two decades or more, the contracting parties must use the investment contract, which is traditionally an inflexible instrument, to agree to climate risk management at the outset of the project.

The understanding of how the contract should address incremental climate risks on an ongoing basis and extreme weather events through *force majeure* provisions is still evolving. Issues of foreseeability are changing rapidly. Even if a climate change event cannot be predicted for one specific location, events are increasing rapidly in frequency and severity, making climate change a foreseeable risk in broader terms. The contract allows the parties to allocate the risks of a climate event impacting the business between the parties, beginning with the inclusion of climate resilient construction and operating plans in the contract with the appropriate cost allocations.

As technical capacity is one of the attributes often being sought when attracting foreign investors, it is reasonable for governments to expect this capacity to extend to climate change resilience and mitigation issues. Due diligence and risk allocation provisions should reflect this expectation and allocate the risk to the private sector partner. This will also ensure maximum effort by the investor to address rather than minimise climate change risks.

In addition, failing to address climate risks in the design, construction and operation of large-scale projects risks impacting local and, in some cases, more distant communities if an event happens and a facility is largely or fully destroyed or services largely or fully stopped. The potential impacts on third parties can be significant, and cannot be contracted out of by the contracting parties. A failure to address the issues of climate change resilience in the design and operation of an investment thus exposes the contracting parties to the risk of multiple levels of liability arising from project designs and construction. The only way to address this potential liability is to incorporate it into the contract.

It is vitally important for the contracting parties to be able to work together in a flexible manner to resolve future difficulties that will inevitably arise from climate events. It is equally imperative that governments not be hampered from putting in place climate-related policies and regulations that may limit or even preclude generating or using carbon-based energy sources or their infrastructure in the future. Given the critical nature and breadth of climate change issues, and to dispel the common perception that climate change risks should be borne entirely by the host state, this Resource includes a specific section on it.

If climate assessment is not part of the original ESIA, a separate risk assessment should be carried out as appropriate. The contract should then memorialise the key elements needed for this purpose. This could be in terms of engineering standards, new construction materials or standards, operations and maintenance protocols, afforestation, agricultural practices, environmental health measures, future technology upgrades, a disaster response plan, or other terms that ensure clear responsibilities in this area. It is also important that the risk assessment focus on risks to people from project-induced incidents that could be exacerbated due to changing climate

It is vitally important for contracting parties to work together in a flexible manner to resolve future difficulties that will inevitably arise from climate events.

Resilience-building adaptations to infrastructure are not expensive if incorporated early in the project lifecycle, with research demonstrating average incremental costs of 1 and 2 per cent for infrastructure projects.

conditions, such as flooding, landslides, forest fires, and water shortages.

Resilience-building adaptations to infrastructure are not expensive if incorporated early in the project lifecycle, with research demonstrating average incremental costs of 1 and 2 per cent for infrastructure projects.¹⁹ By the contract negotiation stage, it would be late to introduce climate risk management into the design of a project, but it would be better to do so even at this stage than have the far greater costs of retrofitting a few years after the project is constructed because the risks have grown. Hence, climate risk mitigation and adaptation should be addressed in the project design and development stages, and should be integrated into the operations phase, with the contract setting out the agreed standards and liabilities for any impacts of a climate-related event. There are multiple risk assessment, cost-benefit analysis and climate modelling tools available to do so today, and it is the shared obligation of governments and investors to make sure these are used appropriately. The failure to do so will result in significant potential liabilities for the project and the government, so it is always appropriate for lawyers to raise this issue and ensure it is addressed, even if it is being done for the first time at the contracting stage. Lawyers should be well equipped to explain the increasing liability that a failure to do so entails.

In addition, the climate-related provisions of a contract should include emergency preparedness planning, taking into account the latest climate modelling data available for the project site. The private operator should work with the local communities to ensure that the planning can be implemented. Where practicable, the contract could specify a requirement to upgrade technology as new technologies become available. The contract should specify how and when such an upgrade should occur and who will pay for it. As upgrading technology is generally part of operational costs, it should be attributable to the project, subject to appropriate tax treatment for operational or capital expenses.²⁰

As noted above, the private sector party should have the expertise to address these issues in their project design and development. In some instances, such as infrastructure projects where the government provides project specifications for the private party to build and/or operate, the private sector partner may not have been part of the project design work. In such

Box 4.2 Example of corporate liability for climate change

In June 2020, Pacific Gas and Electric (PG&E), the large California electricity supplier, pleaded guilty to 85 legal infractions in relation to the so-called Camp Fire wildfires of 2018. The proximate cause was faulty transmission lines and equipment that ignited during the peak period of extended drought due to climate change. PG&E had not made required investments in new technologies to address the risks from the increasing impacts of climate change. PG&E was fined almost US\$4 million. But the major costs to them come from a requirement to establish a US\$13.5 billion trust for victims of the fire.

Source: 'PG&E pleads guilty to 85 counts in 2018 Camp Fire', Elliott C. McLaughlin and Stella Chan, CNN, updated 16 June 2020.

cases, the private operator should be required to undertake a climate risk assessment and provide recommendations on how to mitigate or eliminate identified risks. This will ensure that the operator is informed and liable for ensuring that its work does not create risks for others due to climate-related events.

Climate change events, such as increasing temperatures, intense rainfall and droughts, are no longer unforeseeable, and should thus not be treated as 'Acts of God' in contracts. Rather, the responsibility to address these climate events should be set out in the contract and in emergency response plans. The contract should also specify the type of insurance that the project will purchase to cover climate events, if available. Availability of insurance products for climate events continues to improve as the industry gains experience and innovates. These steps will avoid later arguments as to whether climate change impacts are *force majeure* or not, arguments which are subject to increasing doubts that *force majeure* would be a defence to claims between contract parties or claims for damages by third parties.²¹ Contract provisions here can be understood as akin to *force majeure* provisions, but with specific allocations of responsibilities and liabilities that obviate the need to actually argue the point.

The second type of issue to note is the need for governments to maintain the right to adopt new laws and regulations that reduce the reliance on fossil fuels and other greenhouse gases in energy and other sectors. That governments will have to increase regulations towards this end is well understood today. Domestic regulation can introduce clarity into existing investment policy and legal frameworks to enable contracting parties to proceed with confidence about their respective climate responsibilities.

Climate change events are no longer unforeseeable, and should not be treated as 'Acts of God' in contracts.

Governments need to maintain the right to adopt new laws and regulations that reduce the reliance on fossil fuels and other greenhouse gases in energy and other sectors.

Box 4.3 Preserving the government's right to regulate climate change and Sample Text

The following provisions are from a permit allowing the acquisition of a local major gas utility in Maryland and Washington DC by a Canadian company, AltaGas. Ensuring the right to regulate was a key issue for the government of Maryland. The company did not dispute the right to regulate for climate change purposes, but rejected issuing a waiver of its arbitration rights under the investment chapter of the North American Free Trade Agreement (NAFTA), the applicable investment treaty. Instead, the company acknowledged in writing the right of the government to regulate future levels of use of natural gas, and acknowledged that the government made no promises and raised no expectations to the contrary. This was important in that it negated any possible substantive claim under NAFTA if the government reduces or even eliminates the use of natural gas in the jurisdiction. The key provisions read:*

20. Notwithstanding any other provisions of these conditions, AltaGas, Washington Gas, and WGL recognize that the State of Maryland and the Government of the United States retain the full right to enact bona fide laws and regulations in relation to the production and distribution of natural gas and other carbon-based energy sources. Nothing in these conditions or the Commission's orders restrict or alter these rights or creates or implies any limitation on the State of Maryland or its agencies, or on the Government of the United States and its agencies, with respect to future measures in this regard. This includes measures to address climate change and other public interest issues such as air quality.

21. AltaGas, Washington Gas, and WGL expressly acknowledge that the Commission, by approving the Merger, is not creating any special expectations to induce AltaGas, as an entity covered by North American Free Trade Agreement ('NAFTA'), to close the Merger.

Procedurally, a merger permit is a negotiated process in Maryland, and this was no exception. The text of this provision was subject to several rounds of negotiation, with AltaGas represented by one the leading NAFTA experts in the United States. The result above is the first known instance where a fossil fuel company has expressly acknowledged the right of a government to, effectively, regulate it to the point of being out of business. It is perfectly applicable in either a permit or contract negotiation.

Sources: Order 88631 In the Matter of the merger of AltaGas Inc and WGL Holding Ltd., April 4, 2018, Public Service Commission of Maryland, Case 9449.

* Conditions 20-21 of the Order are found at p. A-11.

But many contracts in the past have limited this right of governments and some investment treaties have been read to limit government policy-making scope in this area.²² Thus, it has become increasingly important for governments to protect the space to act in this area.

The first step in doing so is to ensure that the contract does not include a provision stabilising non-fiscal laws applying to

the project. This issue is examined in more detail in Section 5.5. Existing good practice goes beyond exempting changes in law to address climate change from stabilisation clauses. The example above (Box 4.3) describes a contractual provision from an oil and gas sector acquisition in the State of Maryland in the United States that actually affirms the right of the government to regulate limitations in the sector and precludes claims under investment treaties.²³

Guidance V: Climate change provisions in contracts

- ✓ Go beyond the environmental provisions in the contract and address climate change risks explicitly, including climate event resilience, climate mitigation, and the right of governments to regulate in this area.
- ✓ Ensure that the project has carried out a climate risk assessment prior to finalising the contract.
- ✓ Ensure design and operational standards are appropriate to address climate-related weather events that can impact the investment, based on available scientific data and best industry practices.
- ✓ Ensure the design and operational standards are consistent with anticipated future reductions of greenhouse gas emissions, and new technologies can be implemented.
- ✓ Ensure that in any risk allocation provisions the project company is liable for the consequences of any foreseeable climate-related weather event, and that appropriate insurance is obtained where possible.

4.6 Project must respect human rights

What does it mean for investment projects to respect human rights? This question was considered in detail in the UN Guiding Principles on Business and Human Rights (UNGPs), issued in 2011, and the accompanying Principles for Responsible Contracts.²⁴ The former establishes a ‘protect-respect-remedy’ approach to addressing human rights risks arising from business activities. This means a state has a duty to *protect* human rights,²⁵ business has a corporate responsibility to *respect* human rights,²⁶ and both must ensure access to effective *remedy* for adverse human rights impacts from business activities. The UNGPs inform all sectors and all business enterprises, whether owned publicly or privately. At the core of the UNGPs is the responsibility to carry out human rights due diligence, which involves the identification and assessment of the nature of the

At the core of the UNGPs is the responsibility to carry out human rights due diligence.

actual and potential adverse human rights impacts with which a business enterprise may be involved. This process of inquiry should take place when proposing new activities, such as making an investment, and when changes or new issues arise.

The Principles for Responsible Contracts offer 10 pointers to help integrate the management of human rights risks into various phases of state-investor contracts, from contract preparation, negotiation, guidance for specific clauses such as on stabilisation, monitoring and compliance, to transparency. Although these Principles were written for a general audience and not directed to the legal community, they provide helpful explanation for anyone on how human rights risks from investment contracts – from risks to labour rights to stabilisation of environmental and social laws to investor-state dispute settlement mechanisms, to name a few – can be addressed. Principle 2 suggests that the responsibilities for preventing and mitigating human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalised. And the methodology for identifying the risks is human rights due diligence.

Human rights due diligence need not be distinct from other types of assessments, such as environmental and social assessments, as long as it appropriately identifies human rights risks against the minimum set of human rights instruments identified in the UNGPs,²⁷ and targets especially those who

Box 4.4 Principles for Responsible Contracts

1. Preparation and planning
2. Managing potential adverse human rights impact
3. Project operating standards
4. Stabilization clauses
5. 'Additional goods or service provision'
6. Physical security for the project
7. Community engagement
8. Project monitoring and compliance
9. Grievance mechanisms for harm to third parties
10. Transparency / Disclosure of contract terms

Source: UN OHCHR (2015), *Principles for Responsible Contracts: Integrating The Management Of Human Rights Risks Into State-Investor Contract Negotiations: Guidance For Negotiators*.

are worse off, such as those who are vulnerable, marginalised or poor. For the most part, ESIA will adequately identify project-specific human rights issues, because ultimately social and environmental issues are also human rights issues.²⁸ But it is also the case that human rights due diligence is qualitatively different from ESIA. Issues regarding the host country context and the behaviour of national or municipal governments, the judiciary, police, army, political parties and interest groups (which are likely understood as public governance or law and order issues rather than environmental or social issues) tend not to be covered in ESIA.²⁹ While this type of information may be generated as part of an initial country screening by the private operator, it may not be recognised and processed as information pertaining to human rights. ESIA also do not include ‘know your client’ (KYC) due diligence, which can expose environmental and social issues, as noted above, and even human rights issues. As one example, a KYC team at one MDB discovered that a project proponent had close ties with a person wanted by the International Criminal Court for genocide crimes in a target host country. ESIA would not have exposed such an issue, whereas human rights due diligence could have done so.

As a matter of practice, the process of human rights due diligence requires an expertise in human rights law and the output of the due diligence is often separate from the ESIA document. Companies often task lawyers to carry out human rights due diligence in order to assure attorney-client privilege on the output. This makes it virtually impossible for outsiders to understand the exact nature of human rights issues identified in the process.

Another difference between the assessment and the human rights disciplines is that negative human rights impacts cannot be offset by positive impacts, unlike biodiversity loss in one place, which can sometimes be offset by gains elsewhere. Furthermore, the materiality lens used in financial due diligence is not appropriate in the case of human rights due diligence, which concerns rights of individuals as well as groups, communities and peoples. As a result, human rights due diligence is qualitatively different and cannot always be presumed to be covered by the ESIA process alone.

Taking these considerations into account, investment contracts should clearly obligate both contracting parties to conduct human rights due diligence when risks to people can be

A KYC team at one MDB discovered that a project proponent had close ties with a person wanted by the International Criminal Court for genocide crimes in a target host country. Human rights due diligence could have exposed this issue.

Investment contracts should clearly obligate both contracting parties to conduct human rights due diligence when risks to people can be anticipated.

Box 4.5 Supreme Court of Canada judgment: International human rights law applies directly to companies

On 28 February 2020, the Supreme Court of Canada issued a ground-breaking ruling in the case of *Nevsun Resources Ltd. v Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle*. The court held that Canadian mining companies operating abroad have direct obligations under international human rights law relating to torture, forced labour and cruel and inhumane treatment in particular. The Court ruled that these laws can be enforced against the company in Canada, including for actions by subsidiaries of the company outside Canada. The court ruling is important for stating two key points:

1. An alleged breach of international human rights law can be the basis for a claim for legal damages directly against a company; and
2. Such a claim can be made in Canada's domestic courts for the acts of a subsidiary company abroad, thus reducing the barriers to uphold jurisdiction for holding a company liable for its acts abroad.

Notably, the Court stated:

The rapid emergence of human rights signified a revolutionary shift in international law to a human-centric conception of global order. The result of these developments is that international law now works not only to maintain peace between states, but to protect the lives of individuals, their liberty, their health, and their education. The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors.

The majority of the court based its decision on the nature of the alleged breaches, stating these were of the highest level of customary international law (torture, forced labour, cruel and inhumane treatment). It remains to be seen whether the court will make the same conclusion in the future for other breaches, such as those related to environmental law, right to water, local community rights including indigenous peoples' rights, etc.

Source: *Nevsun Resources Limited v Araya*, 2020 SCC 5, available at: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/18169/1/document.do>

anticipated. Prior to signing the contract, each party should ensure that the provisions in the contract do not create adverse human rights impacts (for the state, this means that nothing in the contract should conflict with its international human rights obligations). Ongoing due diligence should be carried out before taking major business decisions, when business circumstances change, when certain national contexts change, when new issues arise, etc. There may be more urgency for such due diligence depending on the prevailing host country condition or the proposed project location or activities, sector, etc. The contract could make these 'triggers' for the due diligence specific. And the obligation should bind both parties. Although the private operator is likely to benefit most from human rights

due diligence, any proposed regulatory or procedural change, including proposed change in tariffs in certain projects, by the contracting authority may also trigger such due diligence.

Depending on the sector and the human rights risks posed by the project, compliance with international human rights and humanitarian laws should be signalled as a legal obligation, regardless of whether the international instruments expressly bind states and not business enterprises, with appropriate recourse for different breaches. Indeed, one major value of the contracting process here is to erase any doubt on this question by transforming the international law standards directly into contractual obligations (in the event that these standards are not reflected in national law). Some projects already reference ILO 169 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) when they impact indigenous peoples. Public-private partnership projects in the water, health and education sectors could reference the explicit human rights standards set out in the International Covenant on Economic, Social and Cultural Rights. When the project must engage public or private security personnel, who may be armed to protect project assets and personnel, it would be appropriate to mention the United Nations Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³⁰ And even though project scenarios involving gross violations of human rights³¹ are not commonplace, projects located in conflict situations and other exceptional circumstances may need to make specific undertakings to refrain from gross human rights violations.

The exact nature of business responsibility with respect to international human rights law continues to be examined and efforts are being made to clarify the shift of business responsibility from a voluntary one to mandatory. The above-noted Supreme Court of Canada case is a useful illustration of this shift in action. Transforming international human rights standards into contractual obligations is another example. Lawyers should also be aware that an intergovernmental working group organised by the UN Human Rights Council is working on a new treaty that would create a 'legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'³² Case law is also evolving in this area. As seen above, one very recent Canadian case makes companies directly responsible for human

The exact nature of business responsibility with respect to international human rights law continues to be examined and efforts are being made to clarify the shift of business responsibility from a voluntary one to mandatory.

rights violations under certain international human rights laws, in particular torture, forced labour, and cruel and inhumane treatment practised by a mining company.

Finally, guidance on human rights would not be complete without recognising the fact that environmental and human rights defenders, labour union leaders and leaders of indigenous communities around the world remain subjected to intimidation, criminalisation, violence and even murder for voicing their opinions against investment projects and defending their land and resources. As such, lawyers should take care to ensure that the investment contract requires the contracting parties to refrain from retaliations against defenders and put in place measures to protect the rights and freedoms of these defenders, including protecting them from violence by third parties.

The UNGPs, as noted, include a ‘remedy’ component. This issue is addressed in Section 4.7 under stakeholder issues.

Guidance VI: Incorporating human rights obligations into contracts

- ✓ Prior to the execution of the investment contract, carry out human rights due diligence so that the host state can ensure that nothing in the contract contradicts the state’s international human rights obligations.
- ✓ Check that the ESIA for the project adequately covers key human rights issues; if it does not, and human rights risks can be expected, obligate the contracting parties to carry out human rights due diligence with respect to the expected activities of the project.
- ✓ Obligate contract parties to carry out human rights due diligence throughout the duration of the contract, specifying the circumstances when it is required.
- ✓ Add specific references to international human rights and humanitarian law or other international standards depending on project circumstances.

Sample Text: Human Rights

MMDA, Art. 10.3: Parties’ Commitment to Protecting Human Rights

- a. The Parties each commit themselves to the protection and promotion of the human rights of all individuals affected by the Project, as those rights are articulated in the United Nations’ 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and Applicable Law.

- b. In all dealings between Company security departments and the police, military, or other security organs of the State, the Parties pledge themselves to comply with Applicable Law and to respect the guidance set forth in the Voluntary Principles on Security and Human Rights.
- c. The Company shall ensure that its operational policies reflect the responsibility to respect human rights and that the policies have the objectives of preventing, mitigating and remediating any potential or actual negative human rights impacts from Mining Operations.
- d. A process to procure an independent assessment of the potential for human rights impacts from the presence and activities of the Project, and how the Company's policies, procedures, and practices affect the human rights of the population in the area of the Project, such process will be guided by the tenets of transparency, independence, and inclusivity, as defined by international standards.

4.7 Engage with stakeholders and address their concerns

The contract parties should view stakeholder engagement as a fundamental aspect of creating common expectations for the project among all stakeholders, and mitigating risks for themselves, for the project, and for the individuals, communities and other stakeholders affected by the project.³³ Stakeholder engagement is enabled through stakeholder identification, multiple avenues of communication and periodic reporting, two-way dialogues and responding to feedback, addressing grievances through an appropriate mechanism, and communications regarding emergencies that pose risks to the public. A commitment to transparency and disclosure underpins successful stakeholder engagement.

Stakeholder identification and engagement³⁴ should occur at the outset of the project (e.g. during early stage project consultations or the ESIA process). Environmental assessment laws usually require stakeholder consultation as part of the ESIA process, but engagement should not stop there. It should be carried out throughout the life of the project, on a regular and iterative basis, and whenever new activities or significant changes are proposed, or a new issue or risk arises. The contracting parties should engage with the respective stakeholders proactively for early identification of issues and adequate resolution, before issues turn into disputes. Engagement should be based on prior

Environmental assessment laws usually require stakeholder consultation as part of the ESIA process, but engagement should not stop there. It should be carried out throughout the life of the project.

disclosure of an appropriate and sufficient level of information, including in the local language, to enable stakeholders to participate actively.

Since stakeholder engagement is a recurrent activity throughout the project, a sufficient budget should be estimated and set aside for the implementation of the stakeholder engagement plan. Projects should anticipate transportation costs for remote stakeholders, meals and stipends for those who forego their daily wages, venue and translation costs, and in some cases fees for experts who can help design consultation meetings when women, LGBTQ persons, indigenous peoples and others are unable or unwilling to participate in public meetings. It is also helpful for the private operator to employ community liaison staff, who can be the 'face' of the project and a regular point of contact with communities.

When indigenous peoples are involved, the engagement process will require careful attention. The existence of 300 million indigenous people around the world, often in resource-rich areas, means project encounters with and encroachment on their land occurs not infrequently. Since in-depth guidance on the topic of engagement with indigenous peoples is available, this Resource does not discuss the dos and don'ts of engagement with indigenous peoples.³⁵ This section will only point out that indigenous peoples' free, prior and informed consent (FPIC) must be sought and obtained on key project issues that concern them, in accordance with the requirements under UNDRIP, ILO Convention 169, and in some cases national law. This FPIC process likely will require a longer lead time and an iterative and culturally sensitive approach. The lawyer should be vigilant when this is likely to be an issue.

This consent issue is especially difficult for lawyers where there is debate over whether there are indigenous peoples in a given area. Many states deny the presence of indigenous peoples within their borders. At the same time, investors have independent responsibilities to apply the FPIC standard and respect other rights of indigenous peoples. Given that the social licence to operate for many projects will depend on how they have addressed this issue, purely legalistic debates will not solve this problem in these instances. Thus, structuring how engagement takes place may become an important role for the lawyers to ensure any gaps are bridged in a constructive way.

When asked, government agencies often say stakeholder engagement is a responsibility of the private operator. In fact, it is a responsibility of the project, and as a result specific tasks should be shared between the contracting parties. The contracting authority's representative(s) should always be present at public consultation events organised by the project, and on specific topics within its domain, such as regulations, tariffs, or law and order, to name a few, it may be appropriate for the contracting authority to initiate public meetings. The respective engagement responsibilities of the contracting parties should be recorded in the contract. This can be in the form of a structured ongoing stakeholder engagement plan, which could be mandated in the contract.

As noted above, the UNGPs include a component on remedying breaches of human rights. The private operator and the contracting authority should both consider ways to facilitate access to effective grievance mechanisms that meet the requirements of Principles 28 through 31 of the UNGPs. For the private operator, it would be appropriate to establish a non-judicial operational-level grievance mechanism.³⁶ When a project is providing infrastructure or other public services, the contracting authority could consider ways to enable consumers and members of the public to provide project feedback. These can be a national ombuds function or other quasi-regulatory complaints or feedback mechanisms. The investment contract should explicitly provide for these mechanisms, so that grievances of all relevant stakeholder groups are captured and considered. The volume and nature of complaints received and the project follow-up actions should be accounted for (without attribution) in the project's regular reporting.

As part of the project's emergency preparedness and response system, the private operator should collaborate with local governments and affected communities to prepare them for emergencies, and actively communicate appropriate response activities, resources and responsibilities on an ongoing basis. Such engagement is crucial when the relevant local governments have little or no capacity to respond to emergency situations. The contract should also make clear that, when an emergency situation is anticipated or ongoing, the contracting parties must co-ordinate in order to ensure proactive, clear and precise communications to the affected communities, and to carry out the respective emergency response measures.

Guidance VII: Identifying and engaging with stakeholders

- ✓ The project should: have a systematic approach to stakeholder identification and engagement; set out a plan and budget; and make implementation a contractual obligation.
- ✓ Ensure that both contracting parties have responsibilities for ongoing stakeholder identification and engagement.
- ✓ Pay particular attention to engagement with indigenous peoples and their right to free, prior, and informed consent.
- ✓ Establish grievance mechanisms and ombuds systems and other measures to receive grievances of the affected stakeholders.
- ✓ Be specific about the need for open and precise communication regarding and during project emergencies.

Notes

- 1 Accepting a contract prepared by the investor as a starting point of negotiations is guaranteed to set the government negotiators up to respond to what the investor wants as opposed to setting forth its own goals and interests forcefully. This may create an imbalance that is reflected in the final result. If the government does not have a model or template of its own, it is better to start with a term sheet of negotiable items rather than a draft produced by the investor.
- 2 Such as the MMDA.
- 3 Organisations that offer such services include the Commonwealth Secretariat, the German CONNEX initiative, IISD, CCSI, and the International Senior Lawyers Project. Numerous other city and national bar associations and non-profit organisations also offer services.
- 4 Some question the notion of maximising environmental benefits. In our view this comes from moving past notions of doing no or minimal harm to understanding how ecosystem services and uses can be enhanced by careful stewardship of the environment and by utilising environmental restoration processes as much as possible when generating environmental plans. These processes can help enhance the environmental benefits of a project.
- 5 See: IFC Performance Standard 1 on the requirements of ESIA's. Other MDBs also have specific requirements on the assessment processes. In addition, some have a free-standing standard on community engagement, whereas IFC Performance Standard 1 incorporates community engagement requirements alongside those for ESIA's.
- 6 Available at: https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards. Also see the detailed Guidance Notes that correspond to the Performance Standards.
- 7 See Equator Principles website, <https://equator-principles.com/>
- 8 OECD (2020), *Recommendation of the Council on Common Approaches for Officially Supported Export Credit and Environmental and Social Due Diligence*, available at: <https://legalinstruments.oecd.org/public/doc/280/280.en.pdf>
- 9 See: *EDFI Policy*, available at: <https://www.edfi.eu/policy/>

- 10 IADB (2006), *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development*, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032081>
- 11 Equity here does not mean identical. Indigenous peoples have special rights under international law for cultural and other protections that may lead to very specific results. The point, however, is that these rights should not be addressed at the expense of addressing the impacts on non-indigenous communities.
- 12 See, for example, World Bank (2018), *Good Practice Note Addressing Gender Based Violence in Investment Project Financing involving Major Civil Works*, available at: <http://documents1.worldbank.org/curated/en/399881538336159607/Environment-and-Social-Framework-ESF-Good-Practice-Note-on-Gender-based-Violence-English.pdf>
- 13 Flyvbjerg, Bent (2011), *Over Budget, Over Time, Over and Over Again: Managing Major Projects*, in Peter W G Morris, Jeffrey K Pinto, and Jonas Söderlund (eds), *The Oxford Handbook of Project Management*, Oxford: Oxford University Press, pp. 321–344, 2013, DOI: 10.1093/oxford/dhb/9780199563142.003.0014
- 14 See, for example: IFC (2010), *Strategic Community Investment: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_communityinvestment_wci_1319576907570
- 15 An early analysis of this is seen in Cosbey, Aaron and Howard Mann (2014), *Bilateral Investment Treaties, Mining and National Champions: Making it Work*, IISD, available at: https://www.iisd.org/sites/default/files/publications/bilateral_investment_treaties_mining_national_uneca.pdf
- 16 See IFC Performance Standard 2, para 17.
- 17 See, for example: IFC, *Investing in Women: New Evidence for the Business Case*, available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+at+ifc/priorities/entrepreneurship/investing+in+women_new+evidence+for+the+business+case
- 18 Cosbey et al. (2016), *Mining a Mirage? Reassessing the shared-value paradigm in light of the technological advances in the mining sector*, IISD, available at: <https://www.iisd.org/sites/default/files/publications/mining-a-mirage.pdf>; Ramdoo, Isabelle (2019), *New Tech, New Deal: Technology Impacts Review*, Intergovernmental Forum on Mining and Sustainable Development, available at: <https://www.iisd.org/publications/new-tech-new-deal-technology-impacts-review>
- 19 World Bank (2018), *Emerging Trends in Mainstreaming Climate Resilience in Large Scale, Multi-sector Infrastructure PPPs*, available at: <https://library.pppknowledgelab.org/PPIAF/documents/2874/download>
- 20 This is consistent with Principle VII of the 2020 OECD Guiding Principles on Durable Extractive Contracts, available at <http://www.oecd.org/dev/Guiding-Principles-Durable-Extractive-Contracts-2020.pdf>, discussed in more detail in section 5.5.
- 21 See, for example, Knoll, Jocelyn L and Shannon L Bjorklund (2014), 'Force Majeure and Climate Change: What is the New Normal?', *Journal of the American College of Construction Lawyers*, Vol. 8 No. 1, available at: <https://www.dorsey.com/-/media/files/newsresources/publications/2017/force-majeure-and-climate-change-what-is-the-new-normal.pdf?la=en>
- 22 The Energy Charter Treaty (ECT) is one such treaty that investors have frequently turned to in order to block government climate change measures. This treaty has led to decisions that have supported both states

and investors on exactly the same facts, highlighting the deep levels of risk states assume with the ECT. This is important as the ECT Secretariat is actively pursuing membership from developing countries, despite the fact the European Commission and other agencies have expressed the need for deep changes to the treaty text. See Bernasconi, Nathalie (2018), 'How the Energy Charter Treaty Could Have Costly Consequences for Governments and Climate Action' (blog), IISD, available at: <https://www.iisd.org/articles/how-energy-charter-treaty-could-have-costly-consequences-governments-and-climate-action>

- 23 The provisions are discussed in more detail in Mann, Howard (2019), 'Reducing IIA Risks to Climate Change Rules Using Permits' (blog), IISD, available at: <https://www.iisd.org/articles/foreign-investment-climate-change-rules>. For full disclosure, Howard Mann advised the Maryland Attorney General's office on this merger and the negotiation of these clauses to protect the government's right to regulate for climate change purposes.
- 24 UN OHCHR (2015), Principles For Responsible Contracts: Integrating The Management Of Human Rights Risks Into State-Investor Contract Negotiations: Guidance For Negotiators, available at: https://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf; also see: UN OHCHR (2015), A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment, available at: <https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-OHCHR-Final.pdf>
- 25 Although this duty to protect is mentioned explicitly in the context of business and human rights, states also have the additional responsibility to respect and fulfil human rights under international law.
- 26 Under the UNGPs, human rights are understood, at a minimum, as those expressed in the International Bill of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols) and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work. The commentary on Principle 12 of the UNGPs goes on to state that, 'Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.' The responsibility to respect these human rights is a responsibility that exists over and above compliance with national laws and regulations protecting human rights (UNGP, Principles 11 and 12).
- 27 UNGPs Principles 11, 12 and 18.
- 28 UN OHCHR and Heinrich Böll Stiftung (2018), *The Other Infrastructure Gap: Sustainability, Human Rights and Environmental Perspectives*, available at: https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap_FullLength.pdf
- 29 See: IFC (2012), 'The International Bill of Rights and IFC Sustainability Framework', available at: <https://www.ifc.org/wps/wcm/connect/>

topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/ibhr_ifc_sustainability_framework

- 30 It is also appropriate to mention the Voluntary Standards on Security and Human Rights (available at: <https://www.voluntaryprinciples.org/>), a multi-stakeholder initiative with government, business and NGO members committed to addressing the use of security personnel in business in a human rights compatible manner.
- 31 UN General Assembly in its Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels defines gross violations of human rights as genocide, war crimes and crimes against humanity, or for violations of international humanitarian law and gross violations of human rights law (para 22). United Nations A/RES/67/1 (2012).
- 32 Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
- 33 Principles for Responsible Contracts, Principle 7, Community Engagement.
- 34 For a complete guide to stakeholder engagement see, for example: Inter-American Development Bank (2013), *Guidelines on Consultation and Stakeholder Engagement in IDB Projects*, available at: <https://publications.iadb.org/publications/english/document/Guidelines-on-Consultation-and-Stakeholder-Engagement-in-IDB-Projects.pdf>; IFC (2007), *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_stakeholderengagement_wci_1319577185063; and OECD (2017), *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, available at: <https://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>
- 35 Several resources are available to guide FPIC implementation; for example, see: FAO FPIC Tool Kit, available at: <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>
- 36 See: The Office of the Compliance Advisor/Ombudsman (2007), *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, IFC, available at: <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>

