

Annex: Summary of Guidance

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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.

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.

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

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.

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.
- ✓ Ensure the ongoing ability of the government to regulate for climate change purposes, and protect against the threat of arbitration by the company under any applicable investment treaty.

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.

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.

Guidance VIII: Respecting third-party rights

- ✓ The social, environmental and economic rights and benefits for local communities should be enforceable

- by the local communities, and not only by the contracting authority.
- ✓ Community development agreements and other third-party agreements are the best vehicle for creating direct legal right of enforcement by communities or other affected third parties.
 - ✓ When plans are used and mentioned as mandatory in the contract, the contract could name the third parties as third-party beneficiaries under the contract.
 - ✓ A material failure to implement the plans or agreements, or persistent failure to correct breaches of plans or agreements should be designated as a breach of the investment contract, and should attract the same sanctions as material non-compliance with the contract provisions themselves.

Guidance IX: Transparency of contracts

- ✓ Each contracting party should be free to disclose the investment contract when concluded.
- ✓ If the contract contains truly sensitive or proprietary information, it can be redacted. It is important to note that redactions lead to questions as to what is withheld and why.
- ✓ An online, publicly accessible database can be used as an access point for public contracts.
- ✓ After material modification or amendment, the contract should be disclosed again.

Guidance X: Options for compliance promotion

- ✓ The contract should anticipate the project's monitoring and reporting needs and allocate the responsibilities appropriately between the contracting parties.
- ✓ Community members should be enabled to participate in project monitoring.
- ✓ The private operator should inform the project's contractors and subcontractors of the project's obligations with respect to environmental, social and economic sustainability, and be legally required to pass on the appropriate requirements down to them in order to ensure these entities comply with them.

- ✓ Targets should be well defined and measurable, but should be treated as goals to be achieved collaboratively rather than black and white compliance issues. This allows all parties to learn as the project unfolds. At the same time, a persistent failure to achieve the goals, or to make best efforts to achieve them, should be elevated to an issue of material compliance with the project company's obligations.
- ✓ Regular disclosure of the project's monitoring information will enable affected communities to act as de facto enforcers of specific obligations owed to them.

Guidance XI: Applicable law

- ✓ The domestic law of the host state should be defined as the applicable law governing the contract and the project.
- ✓ Contracts should comply with the applicable domestic law, and not contain provisions in breach of the laws. Contracts should be negotiated to implement the domestic law applicable to an investment, not replace it.
- ✓ Governments should strive to have as much of the legal regime applying to investments in the domestic law as possible to have the most transparent and consistent application of the law, avoid unnecessary negotiations with each large investor, and minimise the opportunities for corruption and imbalances in results.
- ✓ Contracts should, where necessary, particularise the application of the domestic law to a specific project, providing sufficient detail to ensure it is clear and enforceable in terms of the obligations on the investor and government parties.

Guidance XII: Non-fiscal stabilisation

- ✓ Governments should not agree to accept clauses stabilising the non-fiscal laws applying to an investment.
- ✓ If, despite this clear guidance, governments choose to agree to a stabilisation clause, they should ensure that, consistent with Principle VII, non-fiscal laws such as environmental, labour, health and safety, disclosure

and other related laws that aim to protect people and the environment should be excluded from any stabilisation provisions (sometimes also called change of law provisions).

- ✓ Governments should acknowledge that the costs to companies of meeting changes in law should be treated as tax deductible expenses of the company in keeping with other operational expenses.
- ✓ Companies should anticipate changes in national law as an ongoing process and budget to comply with changes in the normal course of affairs.

Guidance XIII: Dispute avoidance and dispute settlement

- ✓ Dispute settlement provisions should be comprehensive and clear and ensure a step-by-step approach to resolving disputes.
- ✓ The tools with the lowest risk of escalating disputes should be tried first, including mediation, expert reports, and other ADR options.
- ✓ National courts remain the first choice for formal dispute settlement. This should be the default position of governments.
- ✓ Only if this cannot be achieved should arbitration be considered, beginning with arbitrations in national settings, then regional and finally as a last resort international.
- ✓ Arbitrations should be transparent and open. Third-party funders, if permitted, should be made known at the beginning of the arbitration.
- ✓ Arbitration provisions are growing in complexity to ensure against misuse and multiple proceedings. These issues have to be taken seriously and addressed in writing in the contract to protect governments from such practices.

