

UN OHCHR Self-Study on the Principles for Responsible Contracts:

Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators

Transcript to accompany training slides

Slide #	Transcript
Slide 1	Welcome to the UN OHCHR Self-Study on the Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators.
Slide 2	This self-study should take approximately 90 minutes and is organized into five sections. The first section will cover the relevance and objectives of the training.
Slide 3	The second section will introduce some basic definitions from the text that will also be used in the training
Slide 4	Section Three, is a very brief introduction to the Mandate of the UN Secretary-General's Special Representative for Business and Human Rights
Slide 5	Section Four, describes the special representative's development of the Principles for Responsible Contracts
Slide 6	And in Section Five, the bulk of the training, this training will cover the substance of the Principles for Responsible Contracts with some practice examples.
Slide 7	Section 1 The relevance and objectives of this training.
Slides 8 - 9	This self study and the Principles for Responsible Contracts are important for a range of users in any context where large, long-term investment projects (such as dams, mining, oil and gas projects, infrastructure or agriculture) are taking place or are likely to take place in future.

Slides 10 – 11	While the Principles for Responsible Contracts directly address State and company negotiators and their external legal counsel, they were written with all kinds of audiences in mind, including people within ministries or government departments that are not typically involved in negotiations but have an interest in the outcome of those. This could be the attorney general's office, the environmental ministry and other ministries that should be consulted in setting and implementing investment policy.
Slide 12	The Principles can be useful for Parliamentarians and civil society organizations to better understand investment contracts and to formulate relevant questions for ministries and other representatives regarding how the State will protect human rights in the context of investment projects or to pose questions to business investors about how the Responsibility to Respect will be fulfilled in the context of projects.
Slide 13	The Principles are useful for national human rights institutions who may comment on impending investment-related legislation or who may be interested to submit questions to government agencies and ministries regarding the State's contractual practices.
Slide 14	They are also useful for those within companies who deal with compliance, risk management, health and safety, environment, community relations and business-to-business relations, such as with contractors or others.
Slide 15	Lenders, investors and others who have to evaluate investment deals can use the Principles to evaluate project contracts to understand if human rights risks were indeed considered in the development of the project.
Slide 16	The Principles and this training can help UN Field staff grow their awareness of potential human rights implications of relevant investment projects and will allow them to use the Principles for Responsible Contracts as a tool for interaction with State and company representatives.
Slide 17	Finally this training and the Principles can be used for those in development or multilateral organisations who are working in countries in the context of large, long-term investment projects to learn about how to plan for and manage the human rights risks of those projects.
Slide 18	There are four objectives to this self-study: 1. By the end of this self-study, participants will know about the Mandate of the UN Secretary General's Special Representative on Business and Human Rights.
Slide 19	2. They will know about the development of the Principles for Responsible Contracts;
Slide 20	3. They will have some awareness of how the management of human rights risks can be integrated into the planning for such projects.

Slide 21	4. And they will know how the Principles for Responsible Contracts can be a tool to help ensure human rights risks are managed throughout the life of the such projects
Slide 22	It's a good idea to have a copy of the Principles for Responsible Contracts in front of you as you go through this self-study. This study will refer to those principles and it will be helpful to have the text as a reference point.
Slide 23	Section 2, A few basic definitions will get us started: Please see page 4 of the Principles for Responsible Contracts, towards the bottom of the page.
Slide 24	In this self-training The “State”, is the State where the investment is taking place. It can also be called a “Host State”. The “State” can be represented by a ministry, a local entity, or it could be a national company – like a state-owned oil company, mining company, or rail company.
Slide 25	The “business investor” is the foreign-controlled business entity that participates in the negotiation itself. Together the Host State and the Business Investor are the “Parties”. When this self-study refers to the “Parties” it is referring to the State where the project will take place and the business investor.
Slides 26 - 31	A “State-investor contract” is an agreement, or a contract, between the Host State and the business investor or investors. These can be called by several names: They can be called Host Government Agreements, Investment agreements, In some industries they might be Production Sharing Agreements, Concession contracts, or License agreements. All of these names are referring to the same thing for the purposes of the Principles for Responsible Contracts that's because the Principles deal with the negotiation between the Host State and the business investor, for an investment project. This will be the negotiation for a document or a group of documents that describe the roles and responsibilities and obligations between the parties for that deal.
Slide 32	And the last definition that is useful is “lender”. “Lender” as used in this document refers to private, public, and multilateral organizations (for example, the World Bank or African Development Bank, Asian Development Bank, or the European Investment Bank) that support investment projects with financing or guarantees. Now that the basic definitions are covered, please proceed to Section 3

Slide 33	Section 3 is an introduction to the Mandate of the UN Secretary General's Special Representative for Business and Human Rights
Slide 34	In July 2005, the then UN Secretary-General Kofi Annan appointed John Ruggie as his Special Representative (SRSG) on Business and Human Rights. The new administration of Ban Ki-moon extended the assignment to 2011.
Slide 35 - 38	<p>The first Mandate asked the Special Representative to identify and clarify standards of corporate responsibility and accountability regarding human rights. It asked that the Special Representative elaborate on State roles in regulating and adjudicating corporate activities.</p> <p>The Mandate used an evidenced-based approach with extensive consultation worldwide, including 47 multistakeholder consultations, including with business.</p> <p>In 2008, the Special Representative proposed the Protect, Respect and Remedy policy framework for better managing business and human rights challenges. The Human Rights Council unanimously welcomed the framework, and extended the Special Representative's mandate by three years with the task of operationalizing it.</p> <p>In June 2011, the Special Representative presented The Guiding Principles' on Business and Human Rights, which were then unanimously endorsed by the Human Rights Council.</p>
Slide 39 – 42	<p>The Guiding Principles do not create new international legal obligations but they elaborate on the implications of existing obligations, standards and practices for States and businesses.</p> <ul style="list-style-type: none"> ✓ The Guiding Principles apply to all States and all companies, regardless of size, sector or context ✓ As stated above, they were unanimously endorsed by the UN Human Rights Council, providing them with a strong political foundation ✓ The Guiding Principles are now a global reference point. They are a common standard for action and benchmark for accountability for both States and companies
Slides 43 - 44	<p>Let's briefly review the Protect, Respect and Remedy Framework, as this will help comprehension of the Principles for Responsible Contracts later on.</p> <p>Under the 'State Duty to Protect,' the guiding principles recommend how governments should provide greater clarity of expectations and consistency of rules for business in relation to human rights. The foundational principle of the State Duty to protect is based on international human rights law and it says that:</p> <p style="padding-left: 40px;">"States must protect against human rights abuse within their territory and/or jurisdiction</p>

	by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication.”
Slide 45	The “Corporate Responsibility to Respect” principles provide a blueprint for companies on how to know and show that they are respecting human rights. It says they should act with due diligence to avoid infringing on the human rights of others and should address adverse human right impacts with which they are involved.
Slide 46	The “Access to Remedy” principles focus on ensuring that where people are harmed by business activities, there is both adequate accountability and effective redress, judicial and non-judicial. It says that as part of the State Duty to Protect, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.
Slide 47	Let’s listen to Special Representative Ruggie present his framework to the Human Rights council in 2011.
Slide 48	Section 4 will cover the development of the Principles for Responsible Contracts
Slide 49	Early on, the Special Representative recognized that investment agreements (contracts between foreign investors and Host States) were relevant to human rights risk management in the context of large investment projects. These investment agreements identify the respective roles and responsibilities of the parties to the investment project, and they allocate responsibility for managing risks in the project. The Special Representative wanted to explore how these agreements might relate to the State Duty to Protect and the Corporate Responsibility to Respect.
Slide 50	There had been growing interest among NGOs, institutions, and companies, with respect to human rights and investment agreements partly because several NGO reports had come out on various project contracts claiming that the contracts signed between host States and investors restricted the Host State government’s ability to implement laws to protect human rights, such as in the areas of labor law, environmental protection laws, health and safety. At one of the Special Representative’s early consultations, there was lively debate about human rights and investment agreements between foreign investors and States and the duty of States to protect human rights through use of their domestic policy space.
Slide 51	Once the Special Representative identified the issue of investment agreements as relevant to the Mandate, the International Finance Corporation and the Special

	<p>Representative decided to engage in a joint research project on the issue. The research focused on the State Duty to Protect and looked at whether contracts signed between foreign investors and host states might contain clauses that restrict a State's ability to implement social and environmental laws that aim to protect human rights.</p> <p>This research looked at 88 real contracts and model contracts from all over the world, including countries that are members of Organisation for Economic Cooperation and Development (or the OECD) and those countries not belonging to the OECD.</p>
Slides 52-54	<p>The research found that that really the sample of contracts could be split into two categories.</p> <p>Those contracts signed by investors and non-OECD country governments where a majority of contractual clauses reviewed restricted in some way the ability of the State to apply new social and environmental legislation to the investment projects –including by contractual exemptions granted to investors;</p> <p>The second category was those contracts in OECD countries, where no exemptions and the investors were expected to comply with new laws, even if there were compensatory approaches that helped investors mitigate the financial impact of new laws.</p>
Slide 55	<p>This research was published in draft form in 2008 and served as a springboard for three years of consultations, multi-stakeholder, single stakeholder, formal and informal. The Special Representative participated in meetings of developing country negotiators, convened many conversations with in-house and external counsel, law firms from different regions around the world, companies and governments-also in collaboration with the UN Development Program in West Africa.</p> <p>The outcome of the consultations was a widely shared idea that the Mandate could create something useful by offering a set of principles on integrating the management of human rights risks into the negotiations of investment agreements – this would guide States on what the State Duty to Protect means in the context of making investment negotiations with investors, and companies on what it means to integrate the Responsibility to Respect into the negotiations.</p>
Slide 56	<p>The Principles for Responsible Contracts answers a demand that was put before the Special Representative for further guidance on investment contracts and human rights.</p>
Slides 57 - 62	<p>Now that this training has given a brief introduction to the Mandate of the Special Representative on Business and Human Rights and some background into the development of the Principles for Responsible Contracts, we are ready to look at the substance of those Principles.</p> <p>In this section, we will cover key points about the Principles for Responsible Contracts.</p>

	<p>We will discuss in what context the Principles apply. We will cover general key messages and features of the Principles document itself, key implications and messages for each principle.</p> <p>And finally, for some principles practice examples will be provided and discussed.</p>
Slide 63-63	<p>There are 3 key points about the Principles for Responsible Contracts:</p> <ol style="list-style-type: none"> 1. The Principles are grounded in the recognition that investment projects can have positive and negative impacts on human rights 2. As discussed, they are based on 4 years of research and multi-stakeholder consultations, after which the Special Representative presented the Principles for Responsible Contracts to the Human Rights Council with his final report. 3. The Principles for Responsible Contracts are an authoritative text relating the UN Guiding Principles on Business and Human Rights to investment contract negotiation
Slide 67 - 70	<p>The Principles for Responsible Contracts, as discussed in the introduction to this training, apply across industry sectors,</p> <p>They apply to infrastructure projects such as dams, highways, rail, ports and roads. They apply to agricultural industries, forestry, mining, oil and gas, or other extractive industries.</p> <p>These projects tend to have large social and environmental footprints. They are often long-term projects and present opportunities for people as well as risks.</p>
Slide 71	<p>If you turn to page 6 of the document, you'll see Figure 1, which is the same as you see on this slide.</p> <p>The major question for understanding if this document might apply to the project you are interested in is whether the project is directly and significantly relevant to human rights?</p> <p>To understand the answer to this question, one can ask: "Does the project present significant social, economic or environmental risks or opportunities?"</p> <p>or</p> <p>"Does the project involve the significant depletion of renewable or non-renewable resources?"</p> <p>If the answer is "yes" to one or both of these, then integrating the management of human rights risks is an essential consideration at the negotiation stage.</p>
Slide 72	<p>Where a project presents opportunities, often there are high expectations about positive impacts projects can bring in terms of employment or the improvement in livelihoods that people are going to reap from a project. High, or even unrealistic, expectations of</p>

	<p>opportunity from investment projects are factors that can impact how accepted a project will be throughout its lifecycle. When such expectations are not met, or when people encounter negative impacts this can directly impact the social license to operate.</p> <p>Similarly, where projects pose real risks to people and the environment, or imply physical or economic displacement, damage to eco-systems connected to health, negative impacts on existing livelihoods, cultural rights or other, there is a need to identify and engage with people who are at risk, so the risks can be prevented, mitigated and remediated.</p>
Slide 73	<<Embedded video>>
Slide 74	<p>Why should human rights be considered at the stage of the project where the contract is negotiated?</p> <p>This helps the parties:</p> <ul style="list-style-type: none"> -to facilitate the early identification and early management of potential negative human rights impacts of the investment, -it also helps establish clear roles and responsibilities for the prevention and mitigation of potential impacts and the remediation of impacts when they occur, -it helps the parties make appropriate assessments and cost allocations for the prevention, mitigation, and remedy of negative human rights impacts; -it helps to facilitate the cooperation and effective management of issues as they arise throughout the life-cycle of the project, and -it helps increase the overall positive benefits of the project, including to human rights.
Slide 75	<p>You will find this chart at page 7 of the Principles. This illustrates the appropriate risk management for human rights issues within a project. Before negotiation of the project documents, potential human rights risks should be identified. This allows the parties to codify mitigation mechanisms and processes during the negotiation, ensure appropriate roles and responsibilities of the parties for managing such risks. During project implementation the mitigation mechanisms and processes will be further defined and refined. If these steps are followed it is more likely that a project will contribute positively to human rights and that negative impacts will be avoided, mitigated and remedied.</p>
Slides 76 - 78	<p>There are some general key messages that come from the Principles for Responsible Contracts.</p> <p>The first key message is:</p> <ol style="list-style-type: none"> 1. Managing human rights risks for investment projects requires early planning for both governments and business investors. That early planning must include factoring in the financial, legal and administrative processes to put in place for managing these risks and how they can be properly managed throughout the lifecycle of the investment.

	<p>The second key message is:</p> <p>2. This planning must relate explicitly to preventing, mitigating and ensuring remediation of potential negative human rights impacts.</p> <p>It is no longer good enough to rely on environmental impact assessments or social impact assessments that do not integrate internationally recognized human rights.</p>
Slides 79 - 80	<p>There are several features of the document that are important to remember:</p> <p>First, the document speaks both to States and companies their differential duties and responsibilities and how these different roles should manifest in the contract negotiation.</p> <p>Second, the principles relate to the preparation for negotiation and legislative frameworks in domestic contexts</p>
Slides 81 - 86	<p>The design of the document is also important. The document offers 10 Principles.</p> <p>Each Principle is followed by a description of the key implications of that principle for the negotiation.</p> <p>The document then provides a recommended negotiator's checklist to help those using the guide to understand whether they have fully thought through the issue.</p> <p>Then the document provides a brief explanation of each issue.</p> <p>The Principles for Responsible Contracts do not dictate contract terms. Instead the brief explanation provides negotiators with an opportunity to more fully understand the issue at hand and find the best solution for their specific context.</p> <p>In this way, the Guide aims to build understanding of the issues, rather than dictate how States and companies should draft contracts.</p> <p>This training will not discuss all of the key implications and the negotiator's checklist, but it will highlight some of the key points for each principle for each users' comprehension of the document itself.</p> <p>Now that we covered the key features of the document, we're ready to review the substance of the 10 principles themselves.</p>
Slide 87	<p>Please see page 7 of the Principles for Responsible Contracts at Principle 1.</p> <p>Principle 1 relates to project negotiations preparation and planning.</p> <p>The Principle reads: "The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations."</p>

Slide 88	<p>The first key implication for this principle is:</p> <p>1. The State should enter the negotiation knowing how project objectives, opportunities and risks relate to its Duty to Protect, respect and fulfill human rights.</p> <p>In other words the State representatives should know how the investment project will contribute to the State's plans for development, and what are risks that the State should be aware of when planning the investment. For example, will it be foreseeable that the project will incentivize a large influx of immigrants or will it create incentives for migration in country to work on the project, and how does the State plan to prepare for these eventualities in terms of services and security?</p>
Slide 89	<p>The second key implication is:</p> <p>2. The Companies should enter negotiation knowing how project objectives, opportunities and risks relate to its Responsibility to Respect human rights. That requires thinking up front about its Responsibility to Respect and understanding how the project activities may impact people, including workers, and people who will be in close proximity to the investment or others who will be foreseeably impacted by the project.</p>
Slide 90	<p>The third key implication is:</p> <p>3. The State and the business investor should enter the negotiation aiming to ensure that adverse human rights impacts are avoided, mitigated or remedied throughout the life-cycle of the project.</p> <p>*This should be the case, even where a State participates as a State-owned enterprise, where it participates as an investor or a beneficiary of revenues of the project or both. Irrespective of the States role in the project, its State Duty to Protect will apply.</p> <p>*This also implies that managing human rights related risks should be on the negotiation agenda and integrated into each party's negotiation objectives. If human rights risks are not on the agenda, or if they are not among the objectives for the negotiators' work, they will not be discussed. Both parties need to be incentivized to manage human rights risks at the time of the negotiation.</p>
Slide 91	<p>The fourth key implication is:</p> <p>4. Both parties' should have access to expertise that can support negotiating teams on these issues, Including legal, technical and financial expertise so that they can think about the cost implications of planning for Human Rights risks.</p>
Slide 92	<p>Turning to page 9 of the Principles we arrive at principle 2 on the management of potential adverse human rights impacts.</p> <p>Principle 2 is about the need for the parties to set out clearly who has responsibilities with</p>

	<p>regard to human rights in the context of the project.</p> <p>The Principle reads: “Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.”</p> <p>That means that the parties should discuss who will be in charge of certain prevention, mitigation and remediation measures for human rights risks throughout the life of the project.</p> <p>Let's review the key implications for Principle 2</p>
Slide 93	<p>The first key implications is:</p> <p>1. Initial assessment of potential HR impacts from the project should be done. While more specific studies on potential adverse human rights impacts should occur throughout the life-cycle of the project, parties need to be aware of any potential adverse impacts that are foreseeable from feasibility studies, early impact assessments, due diligence assessments or other initial project preparation.</p>
Slide 94	<p>The second key implication is:</p> <p>2. The parties need to have adequate expertise to identify and manage human rights risks throughout the project and before impacts occur, either by building their internal capacity or by securing external expertise.</p>
Slides 95 - 96	<p>The third key implication is:</p> <p>3. Ensuring that adverse impacts can be prevented and mitigated requires that appropriate funds are available and allocated to enable the necessary measures to be taken.</p> <p>Planning for the prevention and mitigation measures may require setting up special financial mechanisms with independent or joint accountability to ensure that adequate resources are available to carry out prevention and mitigation plans. Proper structures for oversight for the collection and use of funds would be necessary. For example in a mining project, mine closure will take place at the end of the lifecycle of the project. There will be no further project revenues to cover costs. This poses the risk that inadequate funds will be available at the end of the project to ensure the mine is closed responsibly in a way that prevents harm to people and the environment. To ensure funds will be available, it may be useful to set those aside in a special financial mechanism, consistent with anti-corruption rules and standards, to set aside the budget for closure while there is a revenue stream from the project to help ensure proper mine closure. Such a special financial mechanism can give assurance to the State and to Companies that there will be adequate funding to ensure risks are handled properly, despite the projects' revenue stream at any given time.</p>

Slide 97	<p>The fourth key implication is:</p> <p>4. Prevention and mitigation plans should be developed by including information and insight gained through community engagement efforts with those who may be adversely impacted.</p>
Slide 98	<p>As with all the principles, Principle 2 includes a recommended negotiator's checklist. Let's review 2 of the items on that checklist. One item says that The contract clearly delineates who is responsible and accountable for mitigating the risks of adverse human rights impacts, as well as for how mitigation efforts will be financed</p>
Slide 99	<p>Another item on the checklist recommends that the parties either agree on a set of human rights baselines—measurements of the state of human rights enjoyment before a project begins, or they agree on how such baselines will be established before project work begins</p> <p>These methodologies may be derived from domestic law or internationally recognised good practice or other good practice rules or standards.</p>
Slide 100	<p>Turning to Principle 3.</p> <p>Principle 3 is about project operating standards and it reads:</p> <p>“The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation, and remediation of any negative human rights impacts throughout the life cycle of the project.”</p>
Slide 101 - 104	<p>Let's briefly discuss this principle. In the brief explanation for this principle it explains that investment is a challenge for both investors and States where domestic frameworks lack either policies and laws or enforcement capacity.</p> <p>While not an ideal situation, one idea that the guidance offers for mitigating gaps in domestic legal frameworks is to agree external standards in addition to domestic law as a temporary stop-gap measure to help provide the investor with leverage to require of its own employees, contractors and sub-contractors performance above where domestic law currently stands. Of course this is suggested in the Principles only as a temporary measure and not a replacement for domestic law.</p> <p>Indeed, external standards are not a replacement for the development of domestic law. They should not stand in the way of the development of domestic law, nor should they stand in the way of improvements in enforcement of domestic law</p> <p>It is unlikely that domestic agencies would be able to ensure compliance with external standards, and so this is one of the real challenges of the situation where domestic law is lacking. Thus, the last key message for Principle 3 is that the contract should delineate how compliance with external standards, if used, will be assured.</p>

Slide 105	<p>The 2 key implications for Principle 3 are:</p> <ol style="list-style-type: none"> 1. That the parties should be aware of any legislative, regulatory and enforcement gaps, and they are prepared to work to identify whether or how these can be overcome.
Slide 106	<ol style="list-style-type: none"> 2. The parties should supplement local laws, regulations and standards with external standards not currently incorporated into domestic law where these can facilitate the prevention, mitigation and remediation of negative human rights impacts throughout the life cycle of the project.
Slide 107	<p>Let's take a look at an example from practice where an investor and State agreed to use external standards in addition to domestic law for the project.</p> <p>*But first a quick note on all the practice examples in this training. All these practice examples come from contracts or models in the public domain. However, they may have been altered for training purposes.</p> <p>Now let's take a look at this clause, it reads:</p> <p>“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.”</p>
Slide 108	<p>Here, the investor and the State have agreed that in any instance where environmental or social impact assessment and management requirements or where pollution prevention requirements are less stringent than the IFC Performance Standards, then the higher standard applies. That's a positive point. It's filling a gap or a potential gap in domestic law.</p> <p>However, while this practice example provides an automatic upgrading of applicable standards, what was not found in this example is an indication of who will adjudicate, in the case of doubt, whether the domestic or IFC standard is more stringent. Additionally, it does not indicate how compliance with the external standard is to be demonstrated.</p>
Slide 109	<p>Let's take a look at another practice example that uses international human rights law and standards as the external benchmark augmenting domestic law.</p> <p>In this clause, there are obligations on the government to act in accordance with its International human rights obligations as they develop from time to time. There is then an acknowledgement of the company that its Responsibility to Respect human rights is</p>

	set out in the following international human rights legal documents.
Slides 110 – 111	<p>Then there is a specific company undertaking that says:</p> <p>“In order to meet the obligations set out in this article, the company shall</p> <ul style="list-style-type: none"> (a) Seek to prevent, mitigate and remediate all negative human rights impacts resulting from its activities or through its relationships with third parties relative to this agreement; (b) Undertake an initial, independent human rights impact study prior to initiating the Development Plan set out in this Agreement, to determine where its activities or relationships (including any anticipated security measures) may have a negative impact on human rights, and update this study on an annual basis; (c) In all dealings between the security personnel of the Company, or the Company’s Contractors or Subcontractors, and police, military or other security forces of the State, assure compliance with the norms of the Voluntary Principles on Security and Human Rights.” <p>The clause continues to say:</p> <p>“(d) Ensure that its operational policies reflect the Responsibility to Respect human rights and that the policies and procedures required to prevent, mitigate and remediate any potential or actual negative human rights impacts from its operations or relationships, taking into account the above-mentioned impact studies, are in place;</p> <p>(e) Remediate any apparent negative human rights impacts from its operations or relationships as soon as is practicable, including through, as appropriate:</p> <ul style="list-style-type: none"> (i) Providing adequate compensation or other appropriate remedy to any victim of the negative impact; (ii) Removing or altering the cause of the negative impact so as to avoid further negative impacts of the same type; (iii) Revising its operational policies and manuals to seek to prevent a recurrence of the actions or failures to act leading to the violation; and (iv) Such other actions as may be necessary to avoid similar negative impacts in the future.”
Slide 112	The clause goes on to require reports. The initial human rights impact study and the annual updated report shall be made available to the central government office, to a central location in each mine affected province, at the principle Company office in the Mine Area, and at any additional agreed upon location. The study shall be made available in the local language of the area where it is deposited.
Slide 113	<p>Let’s look at a few positive points about this clause.</p> <ol style="list-style-type: none"> 1. Here the State accepts the contractual obligation to fulfill the contract, while acting in accord with its international human rights law obligations. The company, likewise, accepts contractually that it has a Responsibility to Respect and the clause delineates more specifics around what that means in the current project. 2. Does not replace domestic law but augments it in addition to requiring compliance with domestic laws.

	<p>3. This clause also indicates that the Company shall deposit reports to be made available in local languages with its impact assessments and management plans on human rights impacts to demonstrate its compliance with this article.</p>
Slide 114	<p>Principle 4 is about stabilization clauses:</p> <p>Principle 4 reads:</p> <p>“Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s <i>bona fide</i> efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.”</p>
Slide 115	<p>This principle can sound quite confusing if you’re not familiar with what a stabilization clause is. So here are a few stabilization clause basics that help you understand the principle:</p> <ol style="list-style-type: none"> 1. First, ‘stabilization clauses’ refers to contractual clauses that are sometimes used to protect investors from future changes in law in the host state. For example, a contract offering investors a set fiscal term for a fixed period of time, notwithstanding any changes in the tax or fiscal policy of the State that might occur during those years, is a type of stabilization clause.
Slide 116	<ol style="list-style-type: none"> 2. The second basic point about stabilization is that business investors view project financing predictability and consistency as a primary concern, as most large investments are long-term and of irreversible nature. And they view the stabilization clause, sometimes, as a way to gain financing predictability.
Slide 117	<ol style="list-style-type: none"> 3. The lenders to investment projects view stabilization clauses as a way to ensure certain benefits to the project, such as a guarantee that the State will not enact laws that make loan repayments more difficult.
Slide 118	<ol style="list-style-type: none"> 4. Sometimes, at least in some areas of the world, these stabilization clauses are used to offer exemptions for investors even from laws meant to protect human rights such as labor laws, health and safety laws, or laws on environmental protection.
Slide 119	<ol style="list-style-type: none"> 5. Additionally, sometimes stabilization clauses give investors the right to full compensation for complying with new laws, even in these areas related to human rights.
Slide 120	<ol style="list-style-type: none"> 6. And the last basic about stabilization clauses and human rights is that under international human rights law, States are under obligation to fulfill their human rights obligations to protect human rights through policies, legislation, regulation or adjudication. In practical terms, this means that States must use their policy space to protect rights in a broad spectrum of areas such as health, safety, labor, environmental

	<p>protection, security, and non-discrimination. Therefore, this principle states that where stabilization clauses are used in contracts, it's important that such clauses do not interfere with the State's ability to pass and implement laws in these areas. This interference can be either in the form of exemptions or in the form of compensation requirements that may make it less feasible for a State to apply new legislation to protect human rights in the context of investment projects.</p>
Slide 121	<p>Recalling the research that the Special Representative carried out with the International Finance Corporation, described above, we will review those findings again here. In the 88 contracts and models studied, a majority of such clauses from investments outside the OECD, provided exemptions for or awarded compensation to business investors for compliance with future laws, even in areas that are directly related to protecting human rights, such as health and safety, environmental protection or labor law. None of the investment contracts within the OECD countries provided exemptions from environmental or social laws.</p>
Slide 122	<p>Understanding a bit about stabilization, we will move on to the key implications of this Principle.</p> <p>The first key implication is:</p> <ol style="list-style-type: none"> 1. It is legitimate for business investors to seek protections against arbitrary or discriminatory changes in law. However, stabilization clauses that "freeze" laws applicable to the project or that create exemptions for investors with respect to future laws, are unlikely to satisfy the objectives of this Principle where they include areas such as labor, health, safety, the environment, or other legal measures that serve to meet the State's human rights obligations."
Slide 123	<p>The second key implication is:</p> <ol style="list-style-type: none"> 2. Stabilization clauses, if used, should not contemplate economic or other penalties for the State in the event that the State introduces laws, regulations or policies which are (a) implemented on a non-discriminatory basis; and (b) reflect international standards, benchmarks or recognized good practices in areas such as health, safety, labor, the environment, technical specifications or other areas that concern human rights impacts of the project.
Slide 124	<p>The third key implication is:</p> <ol style="list-style-type: none"> 3. Where they're used, mechanisms to manage the material and economic impacts on the investor of non-discriminatory changes in law should be carefully designed to mitigate the specific risks to which the investor is exposed.
Slide 125	<p>And a final key message from stabilization clause principle is that the resulting contract from the negotiation should reflect these points.</p>

Slide 126	<p>Let's look now at two practice examples where stabilization clauses were used in contracts. This first example is a clause that is likely not to be in line with the principles.</p> <p>The clause reads:</p> <p>“The Government undertakes that new legislation, regulations or determinations of the Government (including new taxes that may be adopted) shall not be applicable to the [investment] Project. The provisions of this clause will be extended to [company’s] Investors, Financiers, Employees, Contractors and Sub-Contractors in relation to their activities pertaining to the Project.”</p>
Slide 127	<p>There are 3 problematic points with that clause when looking at Principle 4 of the Principles for Responsible contracts.</p> <ol style="list-style-type: none"> 1. First, it can be interpreted to apply to all policy, even those laws, policies and regulations meant to protect human rights. 2. Second, the clause provides exemptions, making new laws inapplicable to investment. 3. And third, the clause is not time limited, or otherwise tailored, to specific risks of investor.
Slide 128	<p>And now let's take a look at a better practice example.</p> <p>There are no perfect stabilization clauses, and every contract will be different and every project will be different, but here is how in one project they tried to ensure that the stabilization clause would not negatively interfere with the State's ability to use its policy space to protect human rights.</p> <p>The clause says:</p> <p>“[Investor will] not assert or advance any claim against an interpretation of any project agreement that confirms that the health, safety, environmental and human rights standards for the project are dynamic. They will evolve when and as any standards under domestic law in the relevant State, EU [European Union] Standards, and applicable international treaty standards evolve, and thus require conduct of the Project's human rights and health, safety and environmental activities in accordance with such evolving domestic standards from time to time.”</p>
Slide 129	<p>Let's look at the positive points of this clause.</p> <p>There are at least three positive points about this clause when looking at Principle 4:</p> <p>Positive Points:</p> <ol style="list-style-type: none"> 1. First, the clause explicitly states that standards on health, safety, environmental protection and human rights are dynamic and will apply as they change over time. 2. Second, the Investor promises to not make claims that more stringent requirements in the areas of health, safety, environment and human rights do not apply to its project. Third, the investor uses international standards to protect itself against arbitrary

	treatment.
Slide 130	<p>Now to moving on to Principle 5. It deals with “additional goods or services provision”.</p> <p>In some cases, States require investors to provide non-commercial services or infrastructures such as schools, healthcare services, roads or other. These are not essential to either carrying out the project or mitigating project impacts. In these cases, the State is effectively contracting out for such goods or services. But it does not relinquish its human rights obligations by doing so. The Investor’s Responsibility to Respect human rights also applies to the provisions to the goods or services, even where these are additional to the project and additional to the investor’s core business activity.</p> <p>Principle 5 reads:</p> <p>“Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State’s human rights obligations and the investor’s human rights responsibilities.”</p>
Slide 131	<p>There are several key implications for this Principle:</p> <ol style="list-style-type: none"> 1. The provision of additional goods or services risks a blurring of roles, responsibilities and accountability for their quality and sustainability between the parties.
Slide 132	<ol style="list-style-type: none"> 2. Second, States maintain their human rights obligations when they contract with investors for the delivery of additional goods or services. And as said before, Investors’ Responsibility to Respect human rights applies to this additional provision of goods or services.
Slide 133	<ol style="list-style-type: none"> 3. Expectations regarding such goods and services and their sustainability throughout the project’s life-cycle need to be aligned among all relevant parties. Efforts to align expectations may be necessary. In other words, when the stakeholders have certain expectations for the quality and sustainability of certain services. It is important those expectations are realistic and managed throughout the lifecycle of the project.
Slide 134	<ol style="list-style-type: none"> 4. Assessments of human rights risks and the design of prevention and mitigation measures for the project should include any risks flowing from the business provision of additional goods and services. It is therefore it is not seen as external to the project in consideration to human rights risks.
Slide 135	Finally, the resulting contract from the negotiation should reflect these points.
Slide 136	Principle 6 is about physical security around the project and the potential impacts on the community from security arrangements.

	The principle reads: "Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards."
Slide 137	<p>The key implications from Principle 6 are:</p> <ol style="list-style-type: none"> 1. The provision of physical security for investment projects, irrespective of private or State provision of security services, requires clarity of roles, responsibilities and accountability, and should in all cases be carried out in compliance with internationally recognized principles on human rights and humanitarian law.
Slide 138	<p>The second key implication is</p> <ol style="list-style-type: none"> 2. Where security is needed, parties should create clearly written protocols to manage security provisions, aimed at avoiding and mitigating any related human rights risks and remediating any abuses that occur, including through a credible grievance mechanism in addition to existing judicial remedies.
Slide 139	<p>Let's take look at a practice example with regard to physical security for a project. In this contract, the government is authorizing the investor to establish and manage their own security services for the planned project. To ensure that these security services operate in accordance with human rights standards, the government and the investors have agreed to subscribe to the Voluntary Principles, which a set of operational principles to manage human rights risks in the provision of private security.</p>
Slide 140	<p>There are at least a couple of positive points about this practice example:</p> <ol style="list-style-type: none"> 1. First, it requires a "security plan" so that State can ensure planning for private security is in line with all law, including those related to human rights and apprehension and detention. The State recognizes its Duty to Protect even if not providing security directly. 2. Secondly, the clause requires the parties subscribe to and adhere to a well-respected international standard on security and human rights, namely the Voluntary Principles on Security and Human Rights.
Slide 141	<p>This is another example of how a company and a government integrated management of the risks to human rights from security. It is a more vague clause, but usefully, it does require the company to comply with a recognized international standard.</p> <p>It reads under Obligations:</p> <p>"The Government shall fulfill its obligations under this agreement while acting in accordance with its international human rights obligations as they develop from time to time..."</p> <p>Company Undertaking</p> <p>In order to meet the obligations set out in this Article, the Company shall ...</p> <p>(c) In all dealings between the security personnel of the Company, or the Company's Contractors or Subcontractors, and police, military or other security forces of the State, assure compliance with the norms of the Voluntary Principles on Security and Human</p>

	Rights.”
Slide 142	<p>A couple positive points about this clause:</p> <ol style="list-style-type: none"> 1. Requires the parties subscribe to and adhere to a well-respected international standard on security and human rights. 2. Although more vague, and not connected specifically with security, this clause does refer to the State duty to fulfill its human rights obligations
Slide 143	<p>And a final note on security. While the Voluntary Principles is an extractive industry initiative, the guidance and requirements of the Principles can easily be applied to projects in other industry sectors.</p> <p>Here are a couple of useful links for the Voluntary Principles and their implementation:</p> <ol style="list-style-type: none"> 1. http://www.voluntaryprinciples.org/ 2. http://www.voluntaryprinciples.org/files/Implementation_Guidance_Tools.pdf
Slide 144	<p>Principle 7 is about community engagement, and it reads:</p> <p>“The project should have an effective community engagement plan throughout its life-cycle, starting at the earliest stages of the project.”</p>
Slide 145	<<Embedded Video>>
Slide 146	<p>Let’s review some of the key implications of Principle 7 on community engagement:</p> <ol style="list-style-type: none"> 1. Both the State and business investor should view community engagement as fundamental aspects of creating common expectations for the project, and mitigating risks for themselves, for the project and for individuals and communities impacted by the project.
Slide 147	<p>The second key implication is:</p> <ol style="list-style-type: none"> 2. The community engagement plan should be inclusive with clear lines of responsibility and accountability. It should be initiated as soon as practicable.
Slide 148	<p>The third key implication is:</p> <ol style="list-style-type: none"> 3. Consultation with impacted communities and individuals should take place before the finalization of the contract
Slide 149	<p>The fourth key implication is:</p> <ol style="list-style-type: none"> 4. Disclosure of information about the project and its impacts is an integral part of meaningful community engagement.
Slide 150	<<Embedded Video>>
Slide 151	<p>The fifth key implication for the community engagement principle 7 is:</p> <ol style="list-style-type: none"> 5. The history of any previous engagement efforts carried out by either of the parties

	with the local community regarding the investment project needs to be known by both parties in order to take this into account in planning.
Slide 152	<p>And finally, the sixth key implication is:</p> <p>6. Community engagement plans should be aligned at a minimum to the requirements of domestic and international standards. For example, where indigenous peoples are involved, free, prior informed consent may be required.</p>
Slide 153	<p>Let's take a look at a practice example. It can be helpful to integrate commitments to community engagement into the contract itself as one investor and company did here.</p> <p>And it reads:</p> <p>“[Company] To lay out the formal bases and framework for its relationship with the local and national community of [COMPANY]’s operating philosophy and policies with respect to the social, economic, health and environmental aspects; (ii) To establish the ways and manner in which [COMPANY] will work with and take the concerns of the local and national communities into account (e.g., [COMPANY]’s operating procedures, industrial, community, and external relations practices, communication and consultation mechanisms, stakeholders participation models, long-term sustainable and development strategy);</p> <p>(iii) To formalize a function to promote and coordinate [COMPANY]’s activities with community stakeholders, and serve as an internal monitor, ombudsman and facilitator of cross-company performance with respect to sustainability objectives;...”</p>
Slide 154	<p>Let's talk about a couple of positive points of that clause.</p> <ol style="list-style-type: none"> 1. Clear lines of responsibility lead to company for creating and carrying out the engagement process 2. Clause indicates (at point iii) that the Parties view engagement as mitigating risks to themselves, the project and individuals and communities potentially impacted by the project <p>A few comments on Clause:</p> <ol style="list-style-type: none"> 1. The Principles state that engagement plans should be aligned at a minimum to the requirements of domestic and international standards. For example, free prior informed consent with those potentially impacted may be required. In the practice clause shown above, no standards for engagement are referenced, nor is it clear how it will be assured to be an inclusive process. 2. No timing for when the engagement shall begin. This can be problematic when we are looking at Principle 7.
Slide 155	Principle 8 is about project monitoring and compliance.

	<p>It states: "The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing necessary assurances for business investors against arbitrary interference in the project."</p>
Slide 156	<p>Let's review the key implications for Principle 8 on project monitoring and compliance:</p> <p>The first key implication is:</p> <ol style="list-style-type: none"> 1. The standards relevant to preventing, mitigating and remedying any adverse human rights impacts of the project need to be agreed in order for monitoring and compliance efforts to be effective (see Principle 3).
Slide 157	<p>The second key implication is:</p> <ol style="list-style-type: none"> 2. The State is responsible for ensuring compliance with standards, whilst the business investor is responsible for adhering to the standards.
Slide 158	<p>The third key implication is:</p> <ol style="list-style-type: none"> 3. Where State capacity for monitoring compliance of the project with such standards is lacking, alternative agreed methods of monitoring and compliance should be substituted. (For an example of this, you can see practice example 2, which we will cover)
Slide 159	<p>The fourth key implication is:</p> <ol style="list-style-type: none"> 4. The contract should reflect the State's right to monitor compliance with all relevant standards, while at the same time integrating guarantees for business investors against arbitrary interference in the project.
Slide 160	<p>Let's look at a couple of practice examples on project monitoring and compliance.</p> <p>The first practice example shows that the contract reflects State's Duty to Protect human rights and its right to monitor compliance, while guaranteeing investors against arbitrary interference.</p> <p>The clause reads:</p> <p>"The Ministry and other agencies of the Government having jurisdictions (such as the EPA and any governmental entity at the time responsible for employee safety and welfare) shall have the right to monitor Operations (including inspecting relevant documents) from time to time and may, following receipt by the Company of at least three Business Days' prior written notice, visit and inspect any of the facilities and Operations of the Company in [country], provided that no prior written notice is required where the inspection relates to a concern regarding employee health and safety or a negative environmental impact."</p> <p>There are also then conditions for allowing the inspection:</p> <p>"As a condition to permitting such inspection, the Company may require (i) receipt of a copy of written instructions to conduct such inspection from an official senior to the</p>

	<p>official purporting to conduct the inspection, manually and legibly signed on the letterhead of the relevant ministry or Government agency, and (ii) viewing and copying the identification of the persons claiming the right to conduct such inspection.”</p> <p>Where the exception to prior written notice only applies to employee health and safety or negative environmental impacts consistent with human rights and State’s Duty to Protect one might include a set of exceptions having to do with human rights of community members.</p>
Slide 161	<p>Let’s look at another project monitoring and compliance practice example.</p> <p>In this practice example, what we can see the use of community and stakeholders to help monitor to make up State capacity gaps.</p> <p>We can also see that the parties are planning for closure management and monitoring budget at initial stages of the project.</p> <p>And the clause reads:</p> <p>“The Environmental Management Plan must include a closure management plan and a closure management budget designed to ensure that upon closure (i) the Mining Plant and Infrastructure shall not present any significant health or safety issues (including provision for the control of acid drainage and other long-term environmental hazards) and (ii) each Proposed Production Area and the surroundings of any Mining Plant or Infrastructure not located in such Proposed Production Area shall be reforested or suitably remediated. The closure management plan must include a list and assessment of risk and any uncertainties associated with the preferred closure option, consider the social aspects of closure and rehabilitation, and provide a process for participation by the community and other stakeholders in closure management and monitoring. The closure management budget shall provide a realistic initial estimate of the expected closure cost, broken down by principal activities.”</p>
Slide 162	<p>Principle 9 is about grievance mechanisms for non-contractual harms to third-parties. It states: “Individuals and communities that are impacted by project activities, but not party to the contract should have access to an effective non-judicial grievance mechanism.”</p>
Slide 163	<p>Let’s review the key implications from Principle 9:</p> <p>The first key implication is:</p> <ol style="list-style-type: none"> 1. The contract should ensure that individuals and communities who are impacted negatively by the project have access to an effective operational-level grievance mechanism enabling grievances to be lodged and addressed at an early stage.
Slide 164	<p>The second key implication is:</p> <ol style="list-style-type: none"> 2. Operational-level grievance mechanisms should not prejudice or restrict access to

	<p>State-based or other non-State based complaint mechanisms, including judicial mechanisms or mechanisms provided by project lenders, regional tribunals or other.</p>
Slides 165-167	<p>Some additional notes on Principle 9 grievance mechanisms for non-contractual harms to third parties include:</p> <ol style="list-style-type: none"> 1. The parties should view such mechanisms as integral to their risk management for the project. 2. The mechanism should be budgeted for and planned for to the extent practicable at the time of negotiation. 3. UN Guiding Principles on Business and Human Rights, Article 31, sets out the criteria for effective mechanisms: legitimacy, accessibility, predictability, equitability, transparency, rights compatible, a source of continuous learning, and when at operational level, it should be based on engagement and dialogue.
Slide 168	<p>Let's look at a practice example for grievance mechanisms. This example comes from a model agreement and not an actual contract. The model clause comes from the Model Mining Development Agreement and requires the investor to fund a grievance mechanism for the project. This model was published prior to the Guiding Principles for Businesses and Human Rights so it does not cite to the United Nations Guiding Principles and the Grievance Mechanism effectiveness criteria. However, this clause does touch upon several of the criteria such as legitimacy, accessibility, predictability, and transparency.</p> <p>The clause reads:</p> <p>“(a) The Company shall, at its own expense, promptly respond to communities’ concerns related to the Mining Project as outlined in paragraph 23 of IFC Performance Standard 1.</p> <p>(b) Where not established under a community development agreement, the Company will establish a grievance mechanism to receive and facilitate resolution of the affected communities’ concerns and grievances about the Company’s environmental and social performance. The grievance mechanism should be proportionate to the risks and adverse impacts of the Project. The grievance mechanism should be established in Consultation with the communities who are anticipated to use it, through an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, at no cost to the affected communities and without retribution. The mechanism should not impede access to judicial or administrative remedies. The Company shall inform the affected communities about the mechanism in the course of its community engagement process.”</p>
Slide 169	<p>And the final principle from Principles for Responsible Contracts is the transparency and disclosure of contract terms.</p> <p>Principle 10 reads: “The contract’s terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.”</p>

Slide 170	<<Embedded video>>
Slide 171 - 173	<p>Let's review some Key Points from Principle 10 transparency and disclosure of contract terms:</p> <ol style="list-style-type: none"> 1. Once finalized, contract terms, with exceptions for compelling justifications, should be disclosed in an accessible manner. 2. The State should facilitate disclosure of contract terms by standardizing disclosure rules for all business investors and all contracts. 3. The contract should be published in an accessible manner, considering barriers to access such as linguistic, technological, financial, administrative, legal or other practical constraints.
Slide 174	<p>Let's look at one good practice example in the transparency and disclosure of contract terms. This is the Liberian Extractive Industries Transparency Initiative website. This is where the government of Liberia publishes the concessions, contracts and agreements from the mining, forestry, agriculture and oil sectors.</p>
Slide 175	<p>We have now covered the 10 Principles from the Principles for Responsible Contracts. This slide shows you three resources for further information.</p> <p>The first is the website for the Office of the UN High Commissioner for Human Rights on Business and Human Rights.</p> <p>The second resource is the website for the current UN Working Group on Business and Human Rights</p> <p>And the third is a document on Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned.</p>
Slide 176	<p>Congratulations, you have now completed the UN OHCHR Self-Study on the Principles for responsible contracts. Integrating the management of human rights risks into State-investor contract negotiations: Guidance for negotiators.</p>