



RESPONSIBLE CONTRACTING

25 AND 26 JUNE 2009 PARIS, FRANCE

SUMMARY REPORT

BACKGROUND

At its June 2008 session, the UN Human Rights Council was unanimous in welcoming the “protect, respect, and remedy” framework for managing business and human rights, which had been proposed by Professor John Ruggie, the Secretary-General’s Special Representative on Business and Human Rights (SRSG). The UN framework rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access for victims to effective remedy, judicial and non-judicial.

This marked the first time that the Council or its predecessor had taken a substantive policy position on business and human rights. The Council also extended the SRSG’s mandate for another three years with the task of “operationalizing” the framework—providing “options,” “practical recommendations” and “concrete guidance” to states, businesses and other social actors on implementing the framework.

The SRSG has identified investment, and in particular host government agreements (HGAs) — the agreements signed by foreign investors and host states for an investment project — as one key issue for the state duty to protect human rights and as directly relevant to the corporate responsibility to respect human rights.

In line with his new mandate, the SRSG convened a group of experts to explore the feasibility of producing specific recommendations about how HGAs can be geared to achieve appropriate investor protection while ensuring that states keep the necessary policy space to fulfill their duty to protect human rights, and that investors respect human rights.

During his first three-year mandate, the SRSG and the International Financial Corporation published empirical research on the potential impact of so-called “stabilization clauses” in HGAs on the host state’s ability to fulfil its duty to protect. The Stabilization and Human Rights Report (“the Report”) examines whether governments are preserving the necessary policy space in HGAs to discharge their duty to protect.¹ The Report was used as a basis for multi-stakeholder consultations during the second half of 2008.

The research found that a majority of the contracts in the study from countries outside the OECD either insulated investors from having to implement new environmental and social laws or provided investors with an opportunity to be compensated for compliance with such laws.

In formal and informal consultations, various stakeholders (including industry members and legal practitioners representing both investors and host states) welcomed the Report as an important step

¹ The final report can be found at:

[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf)

towards learning more about current contracting practice and how it might impact the ability of states to protect human rights. There was broad support for the proposition that stabilization clauses should not interfere with a host state's efforts to protect health, safety, the environment or other human rights interests of its population. A number of those consulted expressed an interest in promoting innovative approaches to respond to the legitimate interests of investors, lenders and host states in protecting against political risk and fostering and attracting foreign investment, while refraining from interfering with the state duty to protect.

At the same time, others expressed concern with an overly narrow focus on stabilization clauses as such. They warned that stabilization clauses are only one factor in a contract that may influence human rights implications of the project, and that many other factors may be at least as relevant—such as the legal and policy context in which the investment takes place, including applicable social and environmental standards.

Furthermore, even where stabilization may be provided for in a key clause, in the end it may not be effective to target these clauses in isolation from other parts of investment contracts. Rather, some suggested, various aspects of the agreement, or even the deal as a whole, should be evaluated to recommend effective ways to foster and appropriately safeguard investments while integrating the state duty to protect and corporate responsibility to respect.

WORKSHOP SUMMARY

I. INTRODUCTION

Gerald Pachoud, Special Advisor to the SRSB, framed the workshop in the context of the SRSB's mandate and his interest in exploring the contours and feasibility of a broader approach to the issue of HGAs and human rights. He highlighted that this brainstorming exercise, on a controversial and often antagonistic issue, was not aimed at discussing the desirability of "globalisation" at large or investment contracts themselves. Nor was it aimed at assigning "blame" or responsibility to one or other of the negotiating parties, but to explore ways to maximize both state and investor interests and concern for human rights. He noted that the workshop was not about making decisions for the mandate, but was geared to provide expert views to the SRSB.

In order to facilitate frank and open discussion, the workshop was conducted under the Chatham House Rule of non-attribution.

II. IDENTIFYING KEY TOPICS IN INVESTMENT CONTRACTS AND HUMAN RIGHTS

To identify the key challenges and dilemmas, and to offer the opportunity for all the experts to share among themselves their own understandings and visions, the first plenary session addressed the various issues that participants had experienced in contract negotiations and other aspects of investment projects related to human rights.

Regarding the theme of the meeting itself, there was broad agreement that further understanding of the intersection between HGAs and human rights is critical because of the large and often long-term impacts stemming from investment projects. Further, many felt that the factors to be considered were multiple and interconnected, and should be understood as such to improve contracting practice.

Some participants expressed concern that pursuing strong, formal human rights policies in HGAs could be seen as a distraction vis-à-vis other issues that governments have to balance, such as attracting investment and poverty reduction. Some participants also mentioned that human rights issues even could be a "deal breaker" due to fears of the politicization of commercial negotiations and also because of disagreements on

how to handle social investments. Some said that facilitating the parties' understanding of human rights challenges would help overcome existing obstacles to discussing human rights in the context of investment negotiations. One participant warned that any discussion of contracting and human rights would become moot if human rights concerns were seen to undermine commercial viability or obstruct negotiations.

Participants discussed the proper balance between realizing the most positive benefits from investment projects and enforcing human rights standards. Many participants felt that the aim should be realizing maximum benefits for people from investment projects. Others felt that mainstreaming social issues into commercial contracting would benefit the protection of human rights; bring additional benefits into the host state in terms of project stability and realizing financial and other gain from the investment; and benefit investors' commercial interests in terms of risk management. Some participants made the point that, while the capacity of the host state to negotiate and adequately value its assets often was lacking, integrating human rights concerns into contracting would require capacity building among all involved—including commercial negotiators, lawyers, arbitrators and others.

The plenary discussion resulted in the following list of topics that participants felt were relevant to human rights and HGAs: the capacity of negotiating parties and others; due diligence by the investor and host state; standards in contracts relating to social issues, including environmental, health and safety standards, and whether international standards should be included; expropriation processes and standards; revenue sharing as a positive contribution to the host state's ability to fulfil rights—in particular, economic, social and cultural rights; stabilization of human rights in contracts; investor-state dispute resolution and renegotiation provisions; addressing third party grievances and access to remedy for issues arising out of the investment project; transparency and its relationship to human rights; and corruption and its impact on social issues in the context of investment projects.

III. PRIORITIZING KEY TOPICS IN INVESTMENT CONTRACTS AND HUMAN RIGHTS

The participants went into three small breakout groups to discuss the list of themes that emerged from the first session and to come up with a prioritized list. The purpose was to describe why certain themes should be the focus of discussion during the rest of the workshop—either because their impact is so great or because of the relative ease with which they might be addressed. The three groups reported back in very different ways.

One group categorized the list into issues to be addressed at different phases of contracting (i.e. negotiation, contractual clauses, implementation and addressing grievances). This group said that none of the topics should be a priority as they were highly interrelated. They described corruption and transparency as cross-cutting themes that should be considered in the context of addressing any of the topics on the list.

The second group identified the capacity of the host government as an over-arching challenge that needed to be addressed in all international contractual negotiations. This group noted that social and environmental standards must be included within contracts. They thought it might be desirable to do away with stabilization clauses completely, and instead find other tools to protect investors (such as incorporating a reference to international law into investment contracts). They noted that in any case there was a query about the enforceability of stabilization clauses and that fiscal stability could be addressed by other means. This group said there was a strong connection between the contract and the local community, and dialogue should occur between the corporation and the local community from the outset. It was suggested that dialogue should take place at the national level and at the local community level. This group also queried whether simpler contract models might assist in addressing the capacity issue on the host state side. There was disagreement in this group about whether addressing stabilization and bilateral investment treaties (BITs) and their relationship to host state policy space were the most urgent and pressing concerns to be addressed. Some thought that these topics should be prioritized, while others thought that other topics were at least as important.

The last group identified cross-cutting topics such as transparency, capacity, due diligence and the interest in integrating international standards into contracts. They then categorized topics according to themes: revenue issues (sharing and management); social issues (such as environmental, health and safety standards, stabilization, social impacts, labor and land expropriation issues) and this group also added the topic of security. This group did not prioritize issues but stressed the relationships between them.

IV. EXPLORING THE TOPICS

Although there was no consensus on priorities, there was broad agreement that the workshop should not limit itself to picking or choosing discussion topics without a sound rationale. It was agreed that the better approach would be to keep all of the topics on the table to see what might emerge.

For the afternoon session, and for the morning session of the second day, the questions put to the participants were (1) why is this issue related to human rights; (2) how can you address the issue; and (3) what levers or obstacles exist that will facilitate or prevent addressing the issue?

Capacity building of states, companies, lawyers and arbitrators

Participants said that the skills and capacity of the negotiating parties influences all phases of the contracting process, i.e. negotiation, implementation and enforcement. It was noted that some governments struggle with the complex agreements that companies and their lawyers propose. Many said that states should be provided with the means to negotiate effectively. It was even cautioned that in situations where the government does not have adequate capacity, negotiations can be risky and not advantageous for investors. One participant indicated that under French law there is a duty on lawyers to make sure there is a certain equilibrium between the parties, but this may only apply to court cases and not negotiations. A few participants pointed out that capacity is not just about the host state's need for legal skills, but also about obtaining financial, economic and technical assistance to understand the potential impacts of a project. Further, lenders, insurers, accountants and parliaments who facilitate and have a role in overseeing investment projects need to understand the deals as well.

Due diligence by the host state and investor

It was suggested that human rights concerns should be part of both the host government's and the company's due diligence at the earliest stages of a contract negotiation. It is important for a state to look at a company's human rights practices and any "red flag" issues early. One participant queried whether a company should invest at all if it was concerned about the government's human rights record (complicity in human rights abuses was described as "the elephant in the room", meaning that this issue should be fundamental in determining whether to invest in certain contexts, yet it was not part of the workshop's discussion). It was said that both sides to a negotiation need adequate information so that there is a level playing field. The investor needs to understand the local environment including in relation to human rights, fiscal regimes and other relevant policies and laws. If this knowledge is obtained and shared before the contract is agreed, it makes the contracting process much easier and there is less likelihood of disputes later. There was a question about whether either side has the capacity to undertake full due diligence including on human rights issues, and it was noted that many governments would need assistance in this area.

Environmental and social standards; International standards

Some participants suggested that standards should be the same in home and host countries. However, there was a question about what "standards" means. One incident was described where damage to dwellings occurred because the company's blasting standards were based on the robustness of construction techniques and materials that were not applicable to that particular host state context. It was proposed that contracts should not prescribe specific steps with regard to managing human rights issues, but instead should refer to laws in the host state and perhaps general international human rights standards. Some participants felt that the key to improving standards lies in compliance and independent monitoring.

Generally, it was felt that there is no universal rule with regard to these issues, and that each situation should be looked at individually. The question was raised whether international human rights standards should be regarded as “floors” or “ceilings” in such contexts.

Stabilization

Some participants thought that this was the area where the SRSB could make the most impact because people can generally agree that human rights issues should not be stabilized in investment contracts. Others felt there would be no real problem or particular controversy about explicitly limiting stabilization in the contract to fiscal issues. The OECD Guidelines for Multinational Enterprises were mentioned, which include the provision that investors should not seek or accept exemptions from the law. Others thought that some existing practice might provide a model framework for achieving stabilization without interfering with human rights protection.

Revenue sharing and management

Some participants thought that responsible contracting should include consideration of how revenues are shared between investors, government, and local, regional or national populations and suggested that this is at the heart of the “responsible contracting” and human rights debate, especially when minority or indigenous populations are involved. One participant said his experience shows that conflicts and even civil wars can arise out of disputes over revenue sharing and management, especially when a project is significant for the host state’s budget. Some participants said that the principle of fairness should underpin considerations of revenue sharing, including giving the investor a fair rate of return. The point was made that investors are interested in seeing that appropriate procedures are in place for revenue sharing and management because local communities will approach the company demanding compensation when there is a perception that they are not obtaining adequate benefit from the project.

Other topics: transparency, community engagement, dispute resolution and renegotiation, grievance mechanisms for third parties

A number of additional topics were identified as important but discussed together due to time constraints. Transparency was seen as a cross-cutting issue by many: some participants urged that at least certain clauses should be made publicly available, because secrecy can create suspicion or conflict even if the contract is appropriately drafted.

Those who spoke about community engagement suggested that this should be happening much sooner than it currently does in their experience. They said it often only happens when funders come into the picture, which may be too late to head off potential problems. It was noted that land compensation is also directly related to the need for effective and timely community engagement. One participant spoke about land expropriation and felt that this issue in particular should be addressed because of the potentially serious human rights implications that displacement and inadequate compensation for land use can have.

Access to remedy by third parties was identified as a key theme, although time did not permit a full debate on this. Participants considered it likely that this would be addressed in the SRSB’s ongoing work under the “third pillar” of the UN framework. It was noted that considering issues around “responsible contracting” could not be done in isolation and needed to incorporate work being done in other areas of the mandate.

Many of those attending the workshop had specific expertise in the extractive industry. The debate therefore focused on this sector, but it was noted that the SRSB should address all sectors. It was also noted that the outcomes of further work on investment contracts could be just as applicable to national companies as international companies.

V. EXPLORING THE ROLE OF THE SRSG

The last session was aimed at identifying what role, if any, the SRSG could play regarding the topics explored at the workshop. There was widespread consensus that negotiators and others who are involved in negotiating investment projects do not have a common set of reference points for identifying and analyzing the various topics that can significantly impact upon human rights. Several participants thought it would be appropriate for the SRSG to develop a set of “markers”, which would at least in part serve this purpose. Many said that a prescriptive approach should be avoided, whereas an educational approach that involved setting down markers for due diligence, community engagement and other such topics potentially could be very useful to companies, governments and lenders.

Some participants said that more specific guidance from the SRSG on stabilization and human rights would be welcome, and many acknowledged that the SRSG’s work in this area has educated relevant parties, raised awareness and could potentially shape practice. Some concern was expressed regarding whether pursuing broader guidance on HGAs and human rights, such as in the form of the markers described above, would risk diluting the SRSG’s important work on stabilization. Many participants felt that an effort by the SRSG to provide further guidance on stabilization would not necessarily preclude him from providing markers or general guidance on other contracting topics that are deemed by experts to be significantly related to human rights. Those two projects, it was said, could take different forms – the first offering more detailed guidance and recommendations, while the latter perhaps being more like a set of reference points.

NEXT STEPS

The SRSG is now considering possible next steps. He will continue exploring what guidance and recommendations he can make about how to avoid stabilizing human rights in investment contracts. He will also look further into the links between the topics identified in this workshop, the state duty to protect and the corporate responsibility to respect, as one way to provide guidance that will then be tested with stakeholders. There will likely be a multi-stakeholder consultation on these issues in November 2009 to discuss what further guidance from the SRSG to states, companies and others would be most helpful.

ANNEX 1 – PARIS WORKSHOP PARTICIPANTS AND AGENDA

1. Dominic Ayine, Center for Public Interest Law (CEPIL) in Ghana
2. Joseph Bell, Senior partner, Hogan & Hartson LLP
3. Stéphane Brabant, Herbert Smith LLP
4. Lorenzo Cotula, Senior Researcher in Law and Sustainable Development, International Institute for Environment and Development (IIED)
5. Antony Crockett, Clifford Chance LLP
6. Peter Fox, Barrister Victorian Bar
7. Christopher Goss, Head of Business Development for Oil, Gas, Mining and Chemicals, IFC
8. Raja Kaul, Chief Technical Advisor, Regional Bureau for Africa's Regional Project for Capacity Development for Negotiating and Regulating Investment Contracts, UNDP
9. Lahra Liberti, Advisor on International Investment Law, Investment Division, Directorate for Financial and Enterprise Affairs, OECD
10. Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development
11. Susan Maples, The Revenue Watch Institute
12. Herbert P M'Cleod, Adviser, Office of the President of Sierra Leone
13. Gerald Pachoud, Special Advisor to the SRSB
14. Steven R. Ratner, University of Michigan Law School; International Committee of the Red Cross
15. Ahsan Zahir Rizvi, Senior & Managing Partner, Rizvi, Isa, Afridi & Angell
16. Peter Rosenblum, Co-Director, Human Rights Institute, Columbia University Law School
17. Andrea Shemberg, Legal Advisor to the SRSB
18. Andrea Saldarriaga, Legal Consultant
19. Christopher Sheldon, Senior Mining Specialist in the World Bank's Oil, Gas and Mining Policy Division, World Bank
20. Julie Vallat, International Petroleum Industry Environmental Conservation Association [IPIECA]; Total

RESPONSIBLE CONTRACTING

AGENDA

EXPERT WORKSHOP

25 AND 26 JUNE 2009 PARIS, FRANCE

OVERVIEW

The Paris expert workshop aims to provide advice to the SRSB on the feasibility of developing guidance on how host government agreements could most effectively (1) ensure legitimate investor protection **and** limit potential interference with the state duty to meet its international human rights obligations; and (2) reflect the corporate responsibility to respect human rights. The workshop comprises participants from a broad range of experience and perspectives to see where common ground might exist.

The meeting is structured as a brainstorming workshop with plenary sessions and break-out groups. Participants have been asked to either offer remarks to kick off certain plenary sessions or provide syntheses of the discussion at the end of each session. Discussions will be held under The Chatham House Rule of non-attribution and participants will not be asked to agree to or endorse any of the conclusions of the meeting.

JUNE 25, 2009

8:30-9:00 ARRIVAL, BREAKFAST AVAILABLE AND GREETINGS

9:00 – 9:30 WELCOME AND INTRODUCTIONS

A quick round of introductions of participants. Brief overview of the SRSB mandate, and the meeting's approach, objectives and goals.

Andrea Shemberg (Legal Adviser to the SRSB) and Gerald Pachoud (Special Adviser to the SRSB)

9:30 – 10:45 SESSION I: IDENTIFICATION

Plenary discussion: This session is designed to identify the most relevant human rights issues in the context of host government agreements. The outcome of the discussion should be a list of pertinent issues for “responsible contracting” based on the collective experience and expertise of the group.

The guidance questions for the session are:

- What aspects of contracts have the most important potential positive or negative impacts on human rights?
- What are those impacts?
- What are the aspects of contracts that are relevant to “responsible contracting”?

10:45 – 11:00 COFFEE BREAK AND MOVE TO BREAK OUT ROOMS (SEE LAST PAGE)

11:00 – 12:15 SESSION II: PRIORITIZATION

Breakout discussion: This second session, in 3 small break-out groups (listed on last page), will aim to identify two sets of issues:

- (1) Those human rights issues with host government agreements that the group widely agrees should be considered as a matter of priority by the SRSG and why (either for legal, political or practical reasons, for instance because the impacts of the issue are among the most serious or because there are fewer barriers to addressing the issue); and
- (2) Those issues flagged as important but where the group did not reach a point of wide agreement, with an explanation of what the arguments are for and against putting those issues on the priority list.

12:15 – 1:30 SESSION III: REPORTS BACK AND PLENARY DISCUSSION

Coming back from the groups, each rapporteur will have 15 minutes to present the choice and reasoning for the items identified on each list by his/her group to the plenary. This will be followed by a facilitated plenary discussion to

- (1) identify those issues on which there was broad agreement across groups for making them a priority
- (2) gain an understanding as to why there was not agreement regarding other issues.

Based on this discussion, a set of issues will be chosen by the facilitators that will be the focus of the remainder of the workshop. The time allocated to discussion in the afternoon of day 1 and the morning of day 2 will be divided among the issues chosen.

1:30-2:30 Lunch

2:30 – 4:30 SESSION IV: ISSUES FOR ACTION

Plenary discussion by issue: This session will be divided into several time slots to look at the potential for addressing each priority issue identified during sessions II and III. We will look at the pitfalls, leverage points and obstacles in terms of practicality, political viability, level of awareness or other for each issue individually. A participant will provide kickoff remarks at the beginning of each issue discussion and one will synthesize the discussion on each issue.

4:30 COFFEE BREAK

4:45 – 5:25 SESSION IV: ISSUES FOR ACTION CONTINUES...

The discussion by individual issue continues.

5:25 – WRAP UP FOR THE DAY AND REVIEW OF AGENDA FOR TOMORROW'S SESSION

Gerald Pachoud

JUNE 26, 2009

8:30-9:00 ARRIVAL AND GREETINGS

9:00 – 9:30 CONSOLIDATING THE FINDINGS

This session will look at findings of day 1.

Gerald Pachoud and Andrea Shemberg

9:30 – 11:15 **SESSION V: THE ROLE OF THE SRSG**

Plenary discussion: This session is aimed at drawing on the discussion of the last day to explore what would be the value added of the SRSG addressing any of the priority issues within his mandate, how to maximize the value added, how would he do so. Issues can be addressed individually, collectively or as subsets of related issues.

11:15-11:30 **COFFEE BREAK**

11:30 – 12:40 **SESSION VI: FROM HERE TO THERE?**

Plenary discussion: This session is aimed at exploring who should be involved in such efforts identified above and what would a research, drafting and work plan look like?

12:40 - 1:00 **CONCLUDING REMARKS FOLLOWED BY BUFFET LUNCH**

Gerald Pachoud and Andrea Shemberg