# Keynote Remarks at
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Thank you for inviting me to be here with you this morning. My subject is "Incorporating the UN Guiding Principles on Business and Human Rights in Investor/State Contract Negotiations." As airy-fairy as that may sound to hard-nosed lawyers in a tough industry, the issue is highly significant for extractive companies and the communities in which they operate, especially in countries characterized by poor or weak governance. Costly experience shows that failure by such companies to achieve a sustainable social license to operate has become their single-biggest non-technical risk factor. The UN Guiding Principles address this challenge; and my message to you is that dealing with it should begin at the contracting stage.

My remarks are divided into four parts. First, I'll say just a few words about human rights challenges in the context of your industry. Then I outline the core elements of the UN Guiding Principles. Next, I address what I'll call the social license to operate risk premium. I conclude with some thoughts about how investor/state contracts should fit into the picture.

First, what do human rights harms have to do with oil companies? Aren't they a government problem? It's not so simple. Think of Shell in Nigeria: the steady downward spiral in trust between the company and Ogoni communities stemming from peoples' grievances being ignored and left unattended; the escalation of tension and conflict; the global advocacy campaigns; and then the law suits. Shell lost its social license to operate in the Ogoni territory a full decade before the Nigerian government pulled the plug on its legal license as well. This may seem like ancient history, but some companies continue to repeat one or more chapters even today.

Extractive companies have had adverse impacts on a broad array of human rights, such as resettlement of communities without adequate consultation and compensation; environmental degradation and its effects on health, sources of livelihood and access to clean water; as well as charges of forced labor, rape and even extrajudicial killings by security forces protecting company assets, with some cases meeting the legal definition of corporate complicity.

Is bad governance a factor? Of course; it often is. The worst corporate-related human rights abuses take place in conflict zones or areas of weak governance. But can companies take actions to prevent or reduce negative dynamics of this sort? Yes, they can, and many have. With the tools available today we have an excellent chance of avoiding future replays—provided that the tools are used.

It is also important to note that the language of human rights, quite apart from the invocation of specific internationally recognized rights, has become the dominant mode of discourse by those who are adversely impacted by large-scale extractive operations. It is becoming the lingua franca through which they express grievances and mobilize resistance throughout the world. Successful companies are learning the language.

This brings me to my second point. We have now achieved unprecedented convergence around a single set of global norms and policy guidance for business and human rights. Last June, the United Nations Human Rights Council unanimously endorsed a set of Guiding Principles on Business and Human Rights that I spent the previous six years developing through extensive consultations and intensive research. Core elements of the GPs have also been adopted by the OECD, the European Commission, the International Finance Corporation, and the new ISO26000 standard. The petroleum industry group IPIECA supports the GPs, and the American Bar Association has endorsed them. National governments and many companies that you represent are aligning their own policy requirements with the GPs. Civil society and workers organizations are using them in their advocacy work.

The GPs rest on three pillars: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and greater access by victims to effective remedy, judicial and non-judicial.

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. Under the corporate responsibility to respect, the GPs provide a road map for companies to know and show that they respect human rights, built around human rights due diligence and acting on its findings. Access to remedy focuses on ensuring that where business-related human rights harm does take place, there is both adequate accountability and effective redress. This can include grievance mechanisms that companies operate or participate in.

This convergence around the GPs provides companies with greater predictability than in the past as to how to manage their baseline responsibility for human rights. At the same time, it provides authoritative benchmarks for stakeholders to assess companies' claims that they respect human rights. It also has consequences for non-compliance. Stakeholders now have more specific human rights grounds for bringing grievances against companies to such mechanisms as the OECD National Contact Points and the World Bank's complaints procedures. And in the case of the IFC and its ripple effects on Equator Banks and export credit agencies, companies' access to capital can be affected.

My third point is that too many C-Suites and boards—as well as those who advise them—are still not sufficiently aware of the risk premium their companies are paying for failing to obtain and sustain their social license to operate. So let me cite some numbers.

A 2008 Goldman Sachs study of 190 projects by the IOCs provided some details. It found that the time for new projects to come on stream—to produce the first drop of oil—had nearly doubled over the previous decade, causing significant cost inflation. Delays were attributed to the projects' "technical and political complexity," with the category "political" including resistance from communities and other external stakeholders.

I had access to an internal and confidential follow-up analysis of a subset of these projects by one company. It found that non-technical risks accounted for nearly half of all risk factors faced by the oil majors, with "stakeholder-related risk" constituting the single largest category of non-technical risk. The company further estimated that it may have accrued $6.5 billion in such costs over a two year period, amounting to a double-digit percentage of its annual profits.

Additional research on mining companies conducted by my team showed that an operation with start-up capital expenditures in the $3-$5 billion range suffers losses of roughly $2 million per day of delayed or suspended production. This occurred recently in Peru when the government was compelled to shut down three large mining operations under a state of emergency, fearing the impact that massive demonstrations might have on public safety.

Now, whether it's $6.5 billion over two years or $2 million per day, those are big numbers. Why hadn't they been noticed in the past? Looking into it further I learned that these figures tended to be atomized within companies, rolled into local operating costs across different business units and functions, not aggregated into a single category and number that would trigger the attention of senior management and boards.

Perhaps the single most overlooked cost has been the staff time devoted to managing conflicts with communities. I am told that the working assumption in the mining sector is about 5 percent of an asset manager's time. Yet my research identified instances where it was as high as 50 and occasionally even 80 percent.

That's what I mean by the social license risk premium. It adds up to a situation where everybody loses. That's not where we should want to be. And before anyone raises the issue of Chinese companies having—quote—"advantages" in this regard, let me point out that one of the three operations the Peruvian government was forced to suspend last December is owned by the Zijin Mining Group.

So what's all this got to do with contract negotiations? A lot—it all starts there. We now know that major projects can produce not only benefits but also significant human rights risks. In your background materials for this conference you will find an addendum to the UN Guiding Principles, outlining 10 recommendations that I developed in consultation with all relevant stakeholder groups for integrating the management of human rights risks into investor/state negotiations. I invite you to have a look; let me just flag three shortcomings that I see in current practices.

First, the contracts I have seen exhibit little awareness of the fact that major projects can pose significant human rights risks. Therefore, they have few if any provisions for how those risks should be managed when they arise—above all, contracts fail to delineate the respective roles and obligations of governments and companies for when things go wrong. That's not good for people because it can lead to confusion and lack of direction in times of crisis. And it's not good for companies because they are community-facing even where governments are not. As a result, companies are often pushed into providing what are essentially public goods and services, a task for which they are ill-equipped, and which diminishes the incentives for governments to do their job.

Second, some of the stabilization provisions that companies insist on unduly constrain governments even when they act on *bona fide* public interest grounds and in a non-discriminatory manner. Based on my own reading of contracts, I have the impression that relative bargaining power can be as much in play as financial risk in determining the scope of stabilization provisions—or whether they're in a contract in the first place. Governments need to be able to construct a proper non-discriminatory regulatory framework without fear of being sued under binding international arbitration. We cannot, in all good conscience, call for good governance, and at the same time undermine the capacity of governments to develop the instruments for it.

Finally, physical harm to people in communities—including loss of life—at the hands of security providers remains a major challenge for this industry. Therefore, when companies operate in difficult environments it is imperative that investor/state contracts include more explicit and extensive references to the need for public and private security providers to be subject to international human rights standards. This can be done, for example, by incorporating the Voluntary Principles on Security and Human Rights into contract provisions—holding both the state and the company responsible for ensuring that they are adhered to: that adequate vetting, training and reporting takes place.

Let me draw these remarks to a close. The negotiation process between a host state and a business investor offers a unique opportunity to optimize the full range of benefits to be drawn from the investment while ensuring that the potential negative impacts on people are avoided or mitigated. To help achieve that equilibrium, investor/state contracts need to reflect the guidance that the international community has now provided on business and human rights. This is necessary for the sake of human dignity, the social sustainability of large-scale projects –and, indeed, the international investment regime as we know it. They all hang in the balance.

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