Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Contract Analysis Exercise using OpenLandContracts.org

Exercise questions

The exercises below are intended to provide some practical experience with contract analysis using contracts available on Open Land Contracts (www.openlandcontracts.org).

1. Identifying the Parties, and Ownership of Investment-Related Assets

Locate the Addax Bioenergy Sierra Leone Ltd, Memorandum of Understanding and Agreement from Sierra Leone.

- **a. Who are the parties to this contract?**
- **b. Is the investor company affiliated with any foreign entity?**
- **c. Are there any protections against expropriation of the investment?**

2. Work Obligations

Locate the LIBINC contract from 2007. Find the part of the contract that discusses the conduct of operations and investment commitments.

- **a. How much money must LIBINC invest in the first four years of operation?**
- **b. What obligations does LIBINC have with regards to the amount of acres it must clear and plant every year?**
- **c. What happens if LIBINC fails to clear and replant the required amount of acres in a given year?**

3. Programs to support local farmers

Locate the Heng Yue contract from Cambodia and the Sime Darby Plantation contract from Liberia.

- **a. Does either contract establish a program to assist local farmers, such as an outgrowers' program?**
- **b. Does the government have to provide additional land for these programs?**
- **c. What happens to the crops produced under these programs?**

4. Water Use

Compare the provisions regarding water use in the Sime Darby Plantation contract and the Firestone Liberia contract.

- **a. What rights does each company have regarding water use?**
- **b. What protections are in place for other water users? Who are these water users?**

5. Stabilization clause

Locate the stabilization provisions in the Golden Veroleum contract from Liberia and the SG Sustainable Oils Cameroon contract from Cameroon. *Note: the provisions relevant to stabilization may be included in more than one clause. There may be references to additional clauses in the clause summary.*

- **a. Compare the stabilization provisions. What sorts of laws are stabilized by each provision?**
- **b. Which provides greater certainty to the company?**

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Answers

Exercise questions

The exercises below are intended to provide some practical experience with contract analysis using contracts available on Open Land Contracts (www.openlandcontracts.org).

1. Identifying the Parties, and Ownership of Investment-Related Assets

Locate the Addax Bioenergy Sierra Leone Ltd, Memorandum of Understanding and Agreement from Sierra Leone.

- *Search "Addax," or*
- *Advance search Country=Sierra Leone Company name=Addax Bioenergy Sierra Leone Ltd, or*

a. Who are the parties to this contract?

- *Find: "Signatories, State" annotation category*
- *Find: "Name of company executing document"*
  i. Government of Sierra Leone (acting by the Ministry of Agriculture, Forestry ad Food Security; the Ministry of Energy and Water Resources; the Ministry of Finance and Economic Development; and the Ministry of Trade and Industry) (p. 13)
  ii. Addax Bioenergy Sierra Leone Ltd (Preamble, p. 13)
  iii. Addax & Oryx Holdings BV (p. 13)
  iv. Not any nearby communities / small holders.

b. Is the investor company affiliated with any foreign entity?

i. Addax & Oryx Holdings BV
ii. Nationality is not listed in contract, but go to Metadata / Open Corporates Link – we see that it is registered in the Netherlands.

c. Are there any protections against expropriation of the investment?

- *Text search "expropriate" or*
- *Find 'expropriation or nationalization' annotation category using ctrl+F or via 'Other'*

i. Annex, Art. 14: The Government will not nationalize, expropriate, or confiscate Addax Bioenergy Sierra Leone's or its contractors' assets without full compensation, including loss of profit.

2. Work Obligations

Locate the LIBINC contract from 2007. Find the part of the contract that discusses the conduct of operations and investment commitments.

- *Find "Work and investment commitments" annotation category using ctrl+F or by scrolling down.*

  a. **How much money must LIBINC invest in the first four years of operation?**
     i. $5.245mil (Art. 6.1.)
     ii. [After 4 years, it depends on development plan, Art. 6.1 refers us to Art. 19.2 for the plan – annual rolling 5-year development plan; refers us to Sch. B for what is included in plan, which includes "capital expenditure program".]

  b. **What obligations does LIBINC have with regards to the amount of acres it must clear and plant every year?**
     i. Art. 6.7: at least 1,000 acres per year for first 10 years. 2,000 acres per year thereafter. Objective: clear and plant entire area.
     ii. The discrepancy between money spent (focusing on the first four years) and the amount of land to be cleared and planted (steady for first ten yeas and then increasing) could be for several reasons:
        1. Could be another means of ensuring that the project progresses despite price or profit fluctuations
        2. Maybe it would be undesirable to require the company to invest a certain amount over 10 years.
        3. Maybe the government wants that amount invested more quickly, but realizes that it's not feasible to clear/plant the entire concession area in the same amount of time.
        4. Allows the government to measure the progress of the project using multiple types of data (money spent and acres cleared/planted). Although they could still do that if spending and work obligations were both for 4 or 10 years.

  c. **What happens if LIBINC fails to clear and replant the required amount of acres in a given year?**

- *Keep reading Article 6 to find any relevant provisions, or find "Work and investment commitments" annotation.*
     i. Art. 6.8: Default; forfeit uncleared land; and grounds for termination.

- *Look for "cancellation or termination" annotation category*
     ii. Art. 22.3: default automatically terminates contract if not remedied within 60 days of notice from government.

3. <u>Programs to support local farmers</u>

Locate the Heng Yue contract from Cambodia and the Sime Darby Plantation contract from Liberia.

- *Search for annotation category = "Outgrowers Program" and company = "Heng Yue (Cambodia) International Company Limited" and "Sime Darby Plantation". You can then click on the page ref, which takes you to the annotation entry.*
- *Alternatively, locate each contract and then find the "Outgrowers Program" annotation.*

a. Does either contract establish a program to assist local farmers, such as an outgrowers' program?

i. Heng Yue – the investor has some obligations. Heng Yue must ensure that people living in the investment zone benefit from the project, including the use of infrastructure, roads, schools, health centers and the creation of job opportunities linked to the project, which shall include the integration of household farmers' production (Art. 6.2, half way down p. 6)

ii. Sime Darby – Yes. The investor is to establish an outgrowers' program within 3 years of the contract coming into force (Art. 15.2).

b. Does the government have to provide additional land for these programs?

i. Heng Yue – Not mentioned, so probably not.

ii. Sime Darby – yes. The government must provide 44,000 acres of land outside concession area, but within the gross concession area (Art. 15.2(a)). Government likely retains ownership of this land, and the company will develop and manage the land for the outgrowers.

c. What happens to the crops produced under these programs?

i. Heng Yue – local farmers' production is to be "integrated" into the project, but no more detail is given.

ii. Sime Darby – company must purchase products (Art. 15.2(b)(iv)).

4. <u>Water Use</u>

Compare the provisions regarding water use in the Sime Darby Plantation contract and the Firestone Liberia contract.

- *Search for annotation category = "Water use" and company = "Sime Darby Plantation" and "Firestone Liberia Inc". You can then click on the page ref, which takes you to the annotation entry.*
- *Alternatively, locate each contract and then find the "Water use" annotation.*

a. What rights does each company have regarding water use?

- *Search for annotations category = Water use; or search free text "water"*

i. Similar rights but Firestone puts them in different places.

ii. Sime Darby (Art. 4.4(e), 7.2):

1. right to use water in concession/additional areas for free (with restrictions).
2. right to dam (with government consent).
3. the right to provide water to any buildings / facilities on concession / acquired land.

4. the right to sell excess water to government / public (if no agreement on price).

iii. Firestone:

1. Right to use water within production area (Art. 4.3(a)(v)).
2. Right to sell (only with government approval) (Art. 4.3(a)(v)).
3. Right to continue to construct wells or other water sources for houses on concession area (Art. 8.3).
4. (Exclusive) Right to build a water way, with prior government approval. (Art. 4.3(a)(i)).

b. What protections are in place for other water users? Who are these water users?

i. Sime Darby can only take / use water (Art. 4.4(e)):

1. only in concession / acquired areas.
2. only "water that it considers necessary or useful for its activities" (with written approval of government, which can't be unreasonably withheld and which be given by default if government doesn't respond w/in 60 days).
3. such water use must not "interfere with the rights of third parties or with use by the Liberian government".
4. must not "use amounts of water that could materially interfere with the activities of farmers or residents" (as of the effective date of contract).
5. No protections regarding contamination or pollution from chemical run-off – perhaps this is included in national environmental laws, referred to in Art. 16.

ii. Firestone:

1. Anyone living on the concession area (presumably with permission of Firestone) will benefit from Firestone's obligation to build wells or provide other sources of potable water (Art. 8.3). But these need not be completed until end of rehabilitation period (Art. 8.3).
2. Firestone's production is subject to environmental protections in Art. 15: (a) no unreasonable risks to public health or damage to environment, (b) must comply with EMP. Production here presumably includes water use: Art. 1.31 defines 'Production' as including "all other operations of Firestone Liberia incidental to" the "care of rubber trees".
3. Art. 15 also refers to protections in Environmental laws.

5. <u>Stabilization clause</u>

Locate the stabilization provisions in the Golden Veroleum contract from Liberia and the SG Sustainable Oils Cameroon contract from Cameroon. *<u>Note</u>: the provisions relevant to stabilization may be included in more than one clause. There may be references to additional clauses in the clause summary.*

- *Search for annotation category = "Stabilization clause" and company = "Golden Veroleum Liberia Inc." and "SG Sustainable Oils Cameroon PLC". You can then click on the page ref, which takes you to the annotation entry.*
- *Alternatively, locate each contract and then find the "Stabilization clause" annotation.*
- *Free text less useful, as it often won't be called "Stabilization clause"*

a. Compare the stabilization provisions. What sorts of laws are stabilized by each provision?

i. Stabilization provisions included in Arts. 31.1 and 19.5 of the Golden Veroleum contract and Art. 20.4(a) of the SGSOC contract

ii. Types of laws stabilized:

1. Golden Veroleum: laws in direct conflict & adjustment of tax liability (Art. 19.5 - quasi-freezes tax treatment as of the effective date of the contract (limited to 120%), regardless of any changes in law).
2. SGSOC: amendments that reflect changes in standards generally applicable in relation to the protection of the environment, safety, employment, training, social impact or security in the oil palm industry internationally are not stabilized.

b. Which provides greater certainty to the company?

i. Certainty:

3. Golden Veroleum's is more certain: Art 31.1 – contractual rights can only be changed or limited by constitution, but company will be bound by new law that does not conflict with any term of the contract.
4. SGSOC clause has a DR procedure that will delay, and many exceptions – Art. 20.4(a) requires company to give notice to government within one year of the change, and then allows 90 days for negotiation. AND the government need not resolve the dispute or compensate the company if the change in law reflects a change in standards generally applicable in relation to the protection of the environment, safety, employment, training, social impact or security in the oil palm industry internationally.