

Attachment to Coordinator Paper: (6) Draft Outline of Guidance Note on Negotiation and Renegotiation of Contracts

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II. Executive Summary

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V. Background

Developing countries offer prospects for major extractive industry investments over the next several decades. It has been estimated that, in the energy sector alone, some \$48 trillion of investment will be needed over the next 25 years, with the bulk of that being in emerging economies. How countries attract outside investment while balancing their economic, environmental, and social needs is a major challenge, requiring careful upfront planning and priority setting. In some countries, laws are independently enacted governing the framework for investments in resources and investors must determine whether they will invest based upon those prescribed rules. In many developing countries, however, where resource development is beginning, no overall framework exists, and often a negotiated framework for development between an investor or investors and the government governs natural resource development. This note will review various issues that arise in connection with the negotiation of such contracts, and the options regarding their renegotiation as circumstances or parties involved change.

VI. Negotiation Background

1. Country perspectives

- a. Balancing investment attractiveness with obtaining resource value**
- b. Priority setting**
- c. Parties involved from country standpoint (internal and external stakeholders)**
 - i. National government representatives**
 - 1. Finance ministry/planning ministry
(including tax and customs administrations)**
 - 2. Resource (petroleum and mining) ministries**

- 3. Coordination issues and practices
 - a. Model issue notes
 - b. Negotiation team participation
 - c. Communication protocols
 - ii. Regional counterparts
 - iii. Local counterparts
 - iv. Other stakeholders and constituents
 - v. Outside advisors
 - 1. International financial and development organizations
 - a. World Bank, IMF, UN, OECD
 - b. Regional organizations
 - 2. Outside investment advisors
 - 3. Outside legal advisors
 - vi. Resources available
 - 1. Revenue forecast models
 - 2. Sample contracts
 - 3. Illustration of contract mechanics in practice
(such as allocations per unit of production)
- 2. Investor perspectives
 - a. Understanding country priorities
 - b. Fostering long term relationships
 - c. Articulation of investor needs and investor risks
 - i. Stability clauses
 - 1. General descriptions
 - 2. Good practices
 - 3. Via contract or specific legislation
 - 4. Interaction or conflict with general legislation
 - a. Ambiguity for tax administrators
 - b. Relationship with non-discrimination rules
 - ii. Transparency requirements
 - 1. Checks and balances
 - 2. In general legislation (e.g., South Africa framework where tax rates cannot exceed certain percentages)
 - d. Parties involved
 - i. One investor
 - 1. Geologists/engineers/exploration and development groups
 - 2. Finance - including Tax
 - 3. Legal
 - 4. Outside Advisors
 - ii. Multiple investors
- 3. Investment Phases
 - a. Exploration

- b. Development
- c. Production and other
- d. Operations
- e. Expansions
- f. End of project obligations

VII. Some Practical Examples of Successful Negotiations

1. Who is involved?
2. Possible negotiation checklist
3. Timelines and negotiation phases
4. Major issue listings
5. Some good/best negotiation practices
6. Contract transparency: Does it help with contract stability?

VIII. Contract Renegotiation Issues

1. Background – History of renegotiations or changes in terms
 - i. Some illustrations from recent periods
 1. When production values were rising
 2. When production values were falling
2. Flexibility in original structure
 - i. How can agreement reduce the need for renegotiations
 - ii. Interaction with stability clause provisions
3. Circumstances where renegotiation may be appropriate
 - i. Pre-set in contract
 - ii. Public announcements
4. Consequences on projects
5. (Existing or future) Consequences on other investments
6. Examples

IX. Unilateral changes

1. Examples
2. Implications

X. Conclusions

XI. Sources

Preliminary List of Sources to be Reviewed in Preparation of Guidance Note:

A data base of petroleum, mineral and land contracts:

<http://www.resourcecontracts.org/>

A brief publication on review mechanisms:

<http://ccsi.columbia.edu/files/2014/08/Periodic-review-in-natural-resource-contracts-Briefing-Note-FINAL-8.11.pdf>

G. Kahale on contract re-negotiation:

http://www.curtis.com/siteFiles/AttorneyFiles/Oxford_Energy_Forum.pdf

Good overview of reading material on legal and contractual framework of extractive industries:

http://www.eisourcebook.org/642_5PolicyLegalandContractualFramework.html

L. Sachs et al. on contract renegotiation and its impact on country attractiveness:

http://ccsi.columbia.edu/files/2013/11/Impacts_of_Fiscal_Reforms_on_country_attractiveness_Website1.pdf

NGO perspective:

<http://www.christianaid.org.uk/Images/undermining-the-poor.pdf>

This includes an example from Zambia, perhaps something to think about including in the UN work as well?

International Council on Mining and Metals perspective:

<https://www.icmm.com/document/520> (also includes some basic information)

Columbia University Prof Karl Sauvants at:

http://works.bepress.com/karl_sauvant/