

Chapter 2

Lessons Learned from
Contracts and Models

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In order to understand the current state of practice of drafting sustainable development focused clauses in investment contracts, and to draw lessons and recommendations for this Resource, this project analysed investment contracts in various sectors. The overall lesson that can be drawn from this exercise is that investment contracts from developing countries do show many good practice examples. However, they are usually drafted to address just some but not all the environmental, social and economic development dimensions. Another major observation is that there is a significant variance in practice between sectors.

Altogether, about 120 contracts and a few national model contracts for certain project activities were identified and analysed. Contracts were obtained from two contract databases managed by CCSI – one dedicated to the extractives sector (oil, gas, mining, etc.),¹ and the other dedicated to contracts for land, agriculture and forestry (agribusiness) projects.² In addition, the law firm of Foley Hoag LLP provided access to its collection of publicly available infrastructure project contracts, infrastructure policy documents, bidding document templates, and model contracts for certain infrastructure projects, all from developing countries. These contracts reflected projects (or expected projects) from 29 countries, many of which are common law jurisdictions.

To identify the relevant contractual clauses efficiently, the project developed a set of key words to search contracts for clauses that addressed environmental, social and economic development issues: ‘climate change’, ‘human rights’, ‘disputes resolution’, ‘change in law’ and ‘stabilisation’. These key words were applied to the collection of contracts and model contracts provided by Foley Hoag. In the case of CCSI databases, they are set up to be searchable by specific criteria provided in a drop-down menu of the database; as a result, the appropriate criteria that corresponded to the key words described above were used to search clauses. The search selected only contracts in the English language, signed between 2010 and 2018. Using these criteria, 60 contracts out of 2,286 contracts in the CCSI extractives contracts database and 50 contracts out of 866

agribusiness contracts in the CCSI agribusiness database were identified as contracts containing one or more clauses relevant for this Resource.

The notable findings from the analysis are as follows:

Most contracts attempted to address at least one aspect of sustainability issues perceived to be material, frequently of an environmental nature.

- **Contracts from emerging market countries show many good practice examples.** Most contracts attempted to address at least one aspect of sustainability issues perceived to be material, frequently of an environmental nature, such as compliance with national environmental laws and permits, and an obligation to conduct an environmental impact assessment under national law. A handful of these clauses were detailed and well crafted to create meaningful and enforceable obligations. Some contracts in relation to agricultural or forestry projects stood out for containing detailed provisions that protect project workers and their families and communities. A fair number of contracts overall contained obligations of some kind to procure local labour and materials.
- **Unique features in relation to environmental, social and economic development issues exist,** in some cases driven by national priorities or sectoral practice. As an example, the model contract for Sao Paulo's Metrorail project³ is notable for the detailed mention of the project's social protection and societal obligations, reflecting the country's priorities and social system. These include payment of taxes, social security and other employment benefits, compliance with labour, health and safety, workers' compensation insurance laws, and the law providing for priority service for vulnerable groups of people. It also includes the establishment of ombudsman services for rail users, and requires a performance bond for environmental, civil, tax and labour liabilities incurred. Some projects commit to adherence to certification standards for particular commodities, such as the Forest Stewardship Council's certification standard for sustainably sourced wood, and the Roundtable on Responsible Palm Oil's certification standard for sustainable palm oil. These clauses reflect the

Box 2.1 Example of positive economic and social development text

Some positive economic and social development text is found in the contract between Heng Yue (Cambodia) International Company Limited, Concession (Cambodia 2011):

'Heng Yue (Cambodia) International Company 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.'

Source: Heng Yue (Cambodia) International Company Limited, Concession (Cambodia 2011). CCSI Online Repository of Petroleum and Mining Contracts

forestry and agribusiness sectors' public commitment to seek to obtain certifications under the respective commodity standards.

Several other unique or innovative features on environmental, social and economic development issues are noteworthy. One hydroelectric model contract required a minimum flow commitment in order to ensure that sufficient water is released downstream of the dam at all times. Another metro project, from India, explicitly required accommodations for persons with disabilities. Some even contained very progressive obligations, such as mandating improved living standards for resettled people (rather than a status quo), a right for those resettled to purchase equity in the project company, and electrification and free energy for communities (hydropower,⁴ or positive project benefits for the adjacent communities (agribusiness – see Box 2.1).

- Generally speaking, **extractives and agribusiness contracts do a better job than infrastructure contracts** when it comes to sustainable development provisions. The drafting of the former tends to be more comprehensive and refers to wide-ranging issues that concern stakeholders, such as community development and funding obligations for it, grievance mechanisms, project monitoring, and so on, and have more sophisticated approaches to them, such as a separate contractual arrangement for community development

to ensure that commitments to communities that are not part of the investment contract are memorialised and honoured. Of the 60 extractives contracts selected from the CCSI extractives database, 19 had separate community development agreements, in addition to obligations in the investment contracts to promote local employment and procurement of materials. Of the 50 agricultural contracts selected from the CCSI agribusiness database, 34 had ‘social contracts’. In contrast, only one of the infrastructure contracts reviewed for this project referred to a separate community development agreement.

No contract appears to have addressed all potentially relevant environmental, social and economic development issues.

Notwithstanding these notable examples, no signed contract appears to have managed to address all the potentially relevant environmental, social and economic development issues. The existence of environmental clauses was no indication that social clauses also existed. Some of the provisions mentioned above appeared in isolation. And some requirements appeared too cursory to be meaningful in implementation. For example, many contracts required the project to carry out a process of environmental and social impact assessment (ESIA) but fell short on the subsequent steps. The contract must specify what flows from the ESIA in the correct sequence, and it must specify processes to help meet all the relevant requirements specified in each stage. (Concrete guidance on this point can be found in Chapter 4.) This patchy state of practice underscores the urgent need for contracts to integrate all three dimensions of sustainable development in an even and systematic manner.

- **References to climate change and human rights are conspicuously absent.** On climate change, one model contract in the hydropower sector states that the carbon credits generated from the project will split evenly between the contracting authority and the private operator. But mention of climate risk assessment, mitigation and adaptation measures, issues related to the use of technology in the future, insurance, and disputes related to climate events is altogether absent from contracts in all sectors, with the

exception of one oil and gas contract, from the United States, which expressly tackles climate mitigation issues, as discussed in detail in Section 4.5.

On human rights, the contracts do not explicitly include the words 'human rights', though they obviously address environmental, social and economic development issues, all of which support human rights. As mentioned above, the two metro rail project documents mention accommodations for disabilities, and one of them explicitly prohibits advertisements that refer to 'any kind of injury, discrimination or prejudice of any order, including prejudices against race, color, creed, gender, sexuality, social or a xenophobic nature'. This statement is supportive of a number of human rights. Nonetheless, it was surprising that extractive and agribusiness contracts do not require at the least the private operator to respect human rights, abide by the UN Guiding Principles on Business and Human Rights (UNGPs),⁵ or to carry out human rights due diligence, since it is almost standard practice these days for companies in these sectors to have corporate policies on human rights. The absence of meaningful obligations related to human rights and climate change is likely due to a lack of familiarity with risks that these issues can pose to the project, people and the environment, and how to turn these issues into legal obligations that can be enforced.

- **The approach taken to stabilising laws and disputes resolution varied widely** among the contracts reviewed. With respect to stabilisation, some demonstrated good practice, such as excluding environmental, labour, health and safety and similar laws from the scope of stabilised laws, while others used traditional language exempting projects from having to comply with new laws. Similarly, dispute resolution clauses ranged from national courts to in-country arbitration using national arbitration rules to arbitration in foreign venues using the United Nations Commission on International Trade Law (UNCITRAL) Rules of Arbitration or other rules. This indicates that the usage of change-in-law clauses is in a state of flux and that government lawyers need to be

well aware of the general direction in which the public policy discourse on this topic is moving when drafting or negotiating such a clause.

- Finally, there is conspicuous disparity between sectors when it comes to transparency of contracts. **Investment contracts for infrastructure projects are not readily accessible.** There is no centralised database⁶ that is comparable to those created and managed by CCSI and there has been no concerted NGO advocacy for transparency of infrastructure project contracts, unlike the massive transparency drive that pressured the extractive industries in the 1990s, and the later campaign against land grabs that influenced agribusiness contracts. As a result, contracts for infrastructure are not systematically made public.⁷ To some extent they become publicly available through different channels, including through national open government, e-government or transparency initiatives, multilateral development banks that finance projects, and international arbitration, but availability is haphazard at best. Even in the extractives sector, where contract transparency is much more accepted as best practice, not all contracts are publicly available.

All in all, the reviewed contracts give assurance that investment contracts for projects in emerging economies are evolving to support some aspects of sustainable development. This trend, seen also in the context of countries steadily improving their laws in order to protect the environment and people, consistent with their international obligations, and in support of the SDGs, is encouraging. The key now is to systematise this good practice and to ensure that all environmental, social and economic dimensions of sustainability are consistently captured in contracts for better project outcomes.

Notes

- 1 CCSI, *An Online Repository of Petroleum and Mining Contracts*, available at: <https://www.resourcecontracts.org/>
- 2 CCSI, *An Online Repository of Open Land Contracts*, available at: <https://www.openlandcontracts.org/>
- 3 Brazil, STM PROCEDURE No. 000770/2015 – CONCESSION OF LINES 5 LILAC AND 17 GOLD Draft of the CONCESSION AGREEMENT No. /2017.

- 4 Government of Nepal, Model Project Development Agreement (for Hydropower Projects with installed capacity less than 500MW), available at: <https://moewri.gov.np/storage/listies/May2020/proposed-draft-pda.pdf>
- 5 UN (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
- 6 An ongoing initiative of the Open Contracting Partnership is focusing on infrastructure transparency that is more data-driven than documents-driven, and making some country data platforms available, e.g., in Honduras. See: Fenz, Bernadine (2019), The #OC4IDS: A new standard for infrastructure transparency, Open Contracting Partnership, available at: <https://www.open-contracting.org/2019/04/17/the-oc4ids-a-new-standard-for-infrastructure-transparency/>
- 7 This point can be illustrated by the sector-specific disclosure requirements in the Sustainability Policy of the International Finance Corporation (IFC), the private sector arm of the World Bank Group. While it mandates the disclosure of principal contracts with governments in the case of extractive industry projects, it only ‘encourages’ the disclosure of ‘information relating to household tariffs and tariff adjustment mechanisms, service standards, investment obligations, the form and extent of any ongoing government support’ in the case of projects involving the final delivery of essential services to the general public under monopoly conditions (paras 50 & 53). However, there are notable exceptions to the non-disclosure practice. Nigeria’s Infrastructure Concession Regulatory Commission has made it a government policy to disclose all of its PPP contracts, in an effort to promote transparency of projects, which in turn is expected to attract additional investors. See Box 5.3.

