



CAPACITY DEVELOPMENT DIVISION (CDD)

Concept Note

Policy Dialogue on

**"Challenges Faced by African States in Mining and Petroleum Contract
Negotiations with Special Emphasis on Stabilisation Clauses"**

Douala, Cameroon, 26 – 27 October 2016

In collaboration with the African Minerals Development Centre (AMDC)

and

The African Institute for Economic Development and Planning (IDEP)

September 2016



I. Background

1. While African States are well endowed with natural resources, especially those related to mines and petroleum, their populations do not sufficiently benefit from their extraction. Foreign investors and multinational corporations are often the main beneficiaries, with countries receiving a share of revenue that may ultimately inflict long-term damage to their national economies. An important instrument through which multinational companies protect their interests is the stabilisation clause that attempts to freeze the regulatory power of the state for the duration of the contract.
2. Stabilisation clauses impose obligations on the state, typically for the exclusive benefit of the foreign investor, to maintain the law and its application unchanged for the duration of the contract. The relevant law and practice could include anything from the fiscal regime of the contract (e.g. not to raise the tax rate, the royalty rate, the export duties on the production, etc.), to the environmental regime (e.g. allocating liability for environmental damage, etc.), to the labour law regime (e.g. how many foreigners can be employed in the project, what their seniority and salary levels are going to be, their work permit in the country that determines how long they will be allowed to be in the country, etc.) etc.
3. The adverse impact of such a clause on the sovereignty of natural resources-dependent countries has grown in importance, and some countries are taking a firm stand against it. The decision of the Israeli Supreme Court to reject a deal to develop the its offshore Leviathan gasfield due to the existence of a stabilisation clause in the deal that would have prevented regulatory change in the gas industry for 10 years is only the latest manifestation of the growing backlash against such clauses in natural resources contracts.¹ In rejecting the deal, the Israeli Supreme Court ruled that “the government had no authority to bind its successors on a matter in political dispute”.
4. Regrettably, however, stabilisation clauses remain the rule in Africa’s natural resources landscape and it is long overdue that our member states appreciate the danger these clauses have long posed to their sovereignty in an often critical sector of their economies. This year’s policy dialogue on

¹ See “Israel’s supreme court blocks Leviathan gasfield deal”, *Financial Times*, 28 March 2016, available at <http://www.ft.com/cms/s/0/6dcb6a3a-f4dc-11e5-803c-d27c7117d132.html#axzz48zBarvHk>.



natural resources contract negotiations aims to pay special attention to this aspect of the contract. While the stabilisation clause will not be our exclusive focus, we aim to use it as a case study that encompasses a large number of highly sensitive issues that arise in the negotiation of natural resources contracts.

5. According to the “Africa Mining Vision” (which constitutes, since 2009, the major Charter established by the African Union to guide mining policy in African countries), this problem is only one manifestation of the poor quality of governance of the African mining sector at large, including serious deficiencies in the contract negotiations process.² These negotiations are usually extremely asymmetrical, the contracts often long term, and usually negotiated without adequate awareness of the amount of mineral in situ. Since the contracting process concludes long before the commencement of actual mineral extraction, later attempts at “renegotiation” often lead to bitter disputes between resources companies and host state authorities. It is at this stage that the stabilisation clause is brought out of the drawer to disable the state from taking measures to protect its interests.
6. It is for these reasons that a Report presented by a group of experts from the ECA, concluded on the necessity for government negotiators to clearly identify critical issues “from the onset”.³ This Policy Dialogue on the challenges faced by African States in the negotiation of petroleum and mining contracts, with a focus on stabilisation clauses, thus aims to contribute to this goal by bringing together African experts and negotiators so as to allow them to exchange expertise and experience for the benefit of the continent.

II. Rationale of this policy dialogue

7. Past results show that in Africa, petroleum and mining contract negotiations are essentially restricted to technical experts (e.g. geologists and engineers), or to small groups of negotiators who are not adequately skilled to represent the negotiating parties, and are designated on the basis of purely political and partisan considerations. The result has been a

² African Union, Africa Mining Vision, February 2009, p. 17.

³ ECA/AU, “Minerals and Africa’s Development – The International Study Group Report on Africa’s Mineral Regimes”, Addis-Ababa, 2012, pp.150-151.



- history of long-term and one-sided contracts, effectively imposed on Africa, that further entrench the continent's position as supplier of raw materials with little opportunity for domestic value addition or other form of integration with the rest of the national economy of the producing country. Indeed, we have ample empirical evidence that the natural resources sector in general, and the mining and extractive industries in particular, contribute the lion's share of illicit financial flows out of Africa, leading the UNECA High Level Panel on Illicit Financial Flows to conclude: "the extractive sector is a primary source of IFFs in Africa."⁴ It is disconcerting to note that an overwhelming majority of this illicit transfer from the continent's extractive industries takes the form of "transfer mispricing, secret and poorly negotiated contracts, overly generous tax incentives and under-invoicing [practices]."⁵
8. The capacity to set the right policy and regulatory framework for natural resources, to negotiate complex contracts with foreign multinationals, and to monitor and enforce compliance with the legal and contractual requirements by those MNCs are therefore critical preconditions in Africa's efforts to put its natural resources to the benefit of its citizens. That is why Africa's priorities in this field must be capacity building – capacity to determine and quantify the volume of its resource endowments, to develop and institutionalise credible, transparent and operationally effective policy and regulatory frameworks, to negotiate technically complex contracts with sophisticated, highly-resourced and highly experienced foreign companies, and to monitor and enforce compliance with the underlying legal and contractual commitments and requirements.
 9. A national negotiating team, made up of experts with the right mix of skills and working under the right political environment and regulatory framework, is likely to better represent the national interest, ensure a country's natural resources serve its citizens rather than foreign interests, and maximise the chances that those exhaustible natural resources are used to launch broad-based, inclusive and sustainable national development. That is why the skill set of our contract negotiators is a critical prerequisite in order for Africa to translate its resource-based

⁴ UNECA, *Illicit Financial Flow, Track it, Stop It, Get It! Report of the High Level Panel on Illicit Financial Flows from Africa* (Addis Ababa, January 2015), p. 82; see also pp. 31, 56, 58 and 60.

⁵ See *Id.* p. 67.



industrialisation and development strategy into reality. This Dialogue is an important step in that direction.

10. Through this Dialogue, we aim to identify the various critical challenges and obstacles confronting our member States across the continent, from lack of trained and experienced negotiators to institutional weaknesses and abuse of power for personal gain, and seek to facilitate the exchange of ideas and the search for solutions through engagement in an open-minded but informed dialogue with and amongst national negotiators and invited facilitators.
11. The Dialogue aims to provide the forum a special opportunity to discuss the unique and multidimensional challenges presented by the very nature of the natural resources contract and its consequences for different stakeholders – including local communities, the environment, women, children and young people, and so on. The extent to which these stakeholders are represented at the negotiating table, whether they are given the necessary training and support to effectively engage in new income generating activities throughout the natural resources value chain, whether compensation for damage caused as a result of natural resources exploration and exploitation contracts is conceived of in terms of loss of livelihood, etc. are key issues that need to form part of the background to this Dialogue.⁶
12. It is also critical that we engage in these negotiations with our eyes wide open towards the global landscape and initiatives that focus on Africa's natural resources. If cession, conquest and occupation served as means of acquiring Africa's natural resources by powerful nations during the colonial days, contracts have been the instrument of choice since independence – and they have been nearly as effective in their mission of maintaining Africa's resources in the hands, and for the service, of foreign interests. The stabilisation clause in the contract is the most effective tool in the contractual arsenal. Africa has never shied away from taking the political initiative to redress this injustice, assert control over its own resources, and freely determine the terms of engagement; not only did Africa play a central role in the lead up to the 1962 UN General Assembly Resolution 1803 on Permanent Sovereignty of Natural Resources (PSNR)

⁶ For analysis of issues specific to women in mining, see UN Women and Publish What You Pay, *Extracting Equality: A Guide* (2014), <http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2014/extracting%20equality%20-%20a%20guide-final-30%20october.pdf>.



and the New International Economic Order (NIEO) in the 1970s, it also persisted in its quest for a just world to this day, as demonstrated in one of its latest decisions to launch the AMV and translate it into detailed regional and national action plans through, e.g., Country Mining Visions (CMVs).

13. Yet, persistence is not Africa's gift alone; others also exhibit the same trait. If the PSNR dream of the 1960s and the commodity-boom of the 1970s were finally reversed and replaced with the debt crisis and the liberalization and privatization drives of the 1980s and 1990s, the current initiatives are also facing threats that emanate from those same old corners of the world. At a time when Africa is working hard to build its institutional capacity in the natural resources sectors – from the ALSF to the AMDC – the natural resources sharks are once again circling over Africa's skies – often in the name of charitable-sounding initiatives “to help Africa negotiate better contracts” with MNCs. That these “charitable” initiatives originate from the same countries as those MNCs with which the Africans are to negotiate does not seem to matter much. This Dialogue can achieve its intended purposes only if we appreciate and reflect on this complex and dynamic global political-economy environment within which Africa's natural resources negotiations are likely to take place today and in the near future.
14. In order to address these challenges, the ECA has developed close working relationships with the African Union Commission, the regional economic commissions and the member States. This dialogue in particular is a result of the combined and complementary roles of three UNECA departments:
 - a. the African Minerals Development Centre (AMDC), which provides strategic operational support for the AMV and its Action Plan;
 - b. the African Institute for Economic Development and Planning (IDEP), the veteran institution created in 1962 in order to support African countries build their human resource capacities as a necessary prerequisite for sustaining independence and promoting socio-economic development; and



- c. the Capacity Development Division (CDD), which serves as the UNECA's capacity development hub responsible for knowledge delivery.⁷

III. Specific Objectives of this international meeting

15. In organizing this “Policy Dialogue”, the specific objectives pursued by the CDD and its partners include the following:

- a. help participants appreciate the changing global political-economy and regulatory context within which Africa negotiates contracts in the natural resources sectors;
- b. Identify and examine the challenges peculiar to the negotiation of contracts in the natural resources sectors in general and their African manifestations in particular;
- c. Appreciate the detrimental role of stabilisation clauses and the steps that can be taken to extricate Africa from their jaw;
- d. serve as a forum for the exchange of views and experiences amongst national experts and officials with responsibilities for contract negotiations in the natural resources sectors;
- e. in dialogue with the resource persons, develop best practice guidelines and strategies on the bases of those national experiences; and
- f. help consolidate the continental network of experts and practitioners in contract negotiations in the natural resources sectors that was established during the first policy dialogue in 2015, with a view to encourage and facilitate the adoption of comprehensive negotiation strategies, guidelines and codes of practice designed to maximise the interest of African States and their citizens in their negotiations with MNCs.

IV. Expected Specific Results after this international meeting

⁷ See UNECA, Capacity Development Strategy, available at http://www.unece.org/sites/default/files/publications/eca_capacity_development_strategy_final.pdf.



16. an issues paper produced by a technical expert focusing on stabilisation clauses in natural resources contracts;
17. The consolidation of the continental framework for experience sharing in the form of a “Network of African Experts and practitioners in the negotiation of mining and petroleum contracts” which was created during the first Policy Dialogue on the subject in May 2015;
18. A better understanding on how to align the existing set of legal and regulatory instruments in Africa with the AMV”.
19. The development through this “Network”, and in as short a period as possible, of a practical tool clearly establishing fundamental rules to be respected in the framework of contract negotiations, for example in the form of a Guide, a Handbook or a Compendium, and intended to be used by African negotiators in the field of petroleum and mining;
20. Finally, the progressive development, through the same Network, of “model contracts” that may be used by African States in the process of mining and petroleum contract negotiations, in a dynamic of balanced relationships leading to “win-win” partnerships, and taking into account both international legal rules and specific requirements established by the “African Mining Vision”.

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