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Human rights and corporate contracts

Whose country?

By Ben Schiller in London

Campaigners are calling for greater scrutiny of host government agreements as Amnesty International raises concerns over Africa's biggest-ever foreign investment

A new report from Amnesty International has once again raised the issue of state-investor agreements, shedding light on the sometimes ambiguous legal status of multinational companies operating in the developing world.

The report, which looks at the contracts underpinning the Chad-Cameroon pipeline in Central Africa, accuses a consortium of oil companies of undermining human rights by seeking exemptions from domestic legal arrangements.

According to Amnesty, host government agreements give the three companies – ExxonMobil (which leads the project), Chevron and Malaysia's Petronas – immunity from various laws, creating a project-specific legal, tax, customs and exchange control regime. Amnesty says the consortium has negotiated opt-outs from any new regulations passed over the project's lifetime – up to 70 years.

From the companies' point of view, the host government agreements are part of necessary risk management. As Amnesty says, they are designed to ensure the smooth operation of the pipeline, while reducing the financial risks by "stabilising the regulatory regime in which the investment takes place".

But while Amnesty has sympathy with the consortium, it is concerned that it has effectively created a black hole for human rights along the route of the pipeline. It says the host government agreements provide the governments with substantial disincentives, possibly running to millions of dollars, should they want to intervene on behalf of affected communities.

Under the host government agreements, the governments are liable if they upset "the economic equilibrium" of the project, in other words, if the pipeline is interrupted. In the event of a dispute over the contracts, cases are to be settled through international arbitration, for example, by the International Chamber of Commerce. Amnesty thinks it probable that the consortium would "receive favourable treatment at international arbitration irrespective of the impact on the protection of human rights". In effect, the report says, the governments are being forced to choose between the interests of the consortium and those of their populations.

Amnesty also criticises a redress mechanism set by the consortium and the World Bank, saying it lacks accountability and impartiality. So far, of 400 cases brought against the companies under the scheme, only 19 have been upheld.

Speaking at the launch of the report in September, the director of an environmental non-governmental organisation in Cameroon said local people had no way of disputing the body's decisions. Samuel Nguiffo detailed a number of cases of fishermen and farmers who have been impoverished by the pipeline and not received compensation.

Costing £2.6 billion, and running 1,070km (665 miles) from Chad's Doba oilfields to Cameroon's Atlantic coast, the pipeline is Africa's largest foreign investment to date. The World Bank has overseen the project, with funding also coming from its private lending arm, the International Finance Corporation. Other funding has come from three export credit agencies, including the US's Export-Import Bank, and France's Coface, as well as from commercial banks.

The pipeline, which could lift Chad's revenues by as much as 50%, is seen as key in reducing poverty in two of Africa's poorest states. Both countries are in the bottom quartile of the United Nation's Human Development Index – Chad occupying 167th place out of 177 countries – and each has a poor human rights record. In the 1990s, Chad's armed forces carried out counter-insurgency operations in the south of the country, where much of the country's oil is located, executing hundreds of people.

Exxon's response to the report so far has been to stress its commitment to human rights. In a statement, it emphasises what it calls an "unprecedented" Revenue Management Plan put in place by the Chad government and the World Bank to ensure oil proceeds are spent transparently.

Andrea Shemberg, Amnesty UK's legal adviser, says the group tried to engage with Exxon before the report was published – but the company refused to address Amnesty's complaints. The NGO went ahead with publication because it was unhappy with Exxon's co-operation.

Since the report's release, Exxon has disputed that it got a fair hearing. A statement reads: "ExxonMobil regrets that Amnesty International elected neither to consult with us during the report preparation nor share the report prior to its release." Shemberg disputes this.

Shemberg says Exxon's wider support of human rights is insufficient to address Amnesty's concerns. She points out that there is nothing to stop another company from stepping into the contract at a later stage. Chinese oil firms, for example – with poor human rights records in places like Sudan and Angola – are known to be scouting for oil in Chad and other African states.

In its report, Amnesty also looks at the roles of the lenders in the project. It notes that while bodies like the IFC have created social and environmental safeguard policies – policies that in turn have been taken up by the Equator banks – it has failed "to ensure that the legal framework governing these projects protects human rights".

The World Bank provided capacity-building loans to Cameroon ($5.7 million) and to Chad ($17.4 million) to manage the environmental and social impacts of the pipeline. In a statement, it says the credit has been used to improve judicial standards and encourage the civil society to be "more active and better informed about rights and procedures to protect the environment and affected peoples." It also stresses its enforcement of an Environmental Management Plan, and the Revenue Management Plan. The statement, however, fails to address the contractual issues raised by Amnesty – particularly what it sees as disincentives for the governments to act on human rights.

While the Revenue Management Plan is seen by some to be forward in efforts to improve transparency in Africa's oil industry, the plan has nonetheless been criticised by the World Bank's watchdog. In July, a World Bank Oversight Committee reported "incidents of irregularities in transfers of funds", delays in the delivery of education, health and other social services, and cases in which local authorities were unaware that services planned for their areas were their responsibility. There have also been reports that President Idriss Deby spent Chad's first tranche of oil proceeds on a large shipment of arms, despite previous commitments with the bank.

Have the goalposts been moved?

Petr Hlobil, campaigns co-ordinator at CEE Bankwatch, which monitors the work of international finance institutions (IFIs) in Central and Eastern Europe, says companies are exploiting their superior legal firepower in negotiating host government agreements. He wants the IFIs to provide technical assistance grants so governments can hire more competent lawyers, or else to offer their own lawyers.

Hlobil says the banks should also put pressure on the companies involved to make the host government agreements public. The majority of state-investor contracts are secret, or only come to light years after terms have been agreed. He says this puts governments at a disadvantage because they have no model agreements to refer to, and limits the involvement of civil society groups.

In the Chad-Cameroon case, Exxon, Chevron and Petronas refused to provide copies of the host government agreements despite repeated requests from Amnesty and other groups. Companies tend to argue that such agreements are commercially confidential, despite the obvious public interest. A number of NGOs around the world are now fighting legal battles to have such contracts made public.

Back to Baku

In 2003, Amnesty produced a similar study of the Baku-Tblisi-Ceyhan (BTC) pipeline, accusing BP, like Exxon, of effectively undermining human rights.

According to Amnesty, that host government agreement allows the consortium – which includes other US and European oil majors – to demand "unlimited protection" from Turkish security forces. It said the contract could cause Turkey to bend human rights standards as it tried to quell civil disturbances and terrorist operations. Amnesty also criticised provisions exempting the consortium from oil spill clean-up costs, and measures to ensure unlimited water supplies for the companies.

BP responded by agreeing to a legally binding "human rights undertaking" that it says fixes the problems Amnesty identified. Graham Baxter, BP's vice president for corporate responsibility, says BP has now committed to address Amnesty's concerns in future state-investor projects, though he stresses that without such agreements, oil companies would not make large-scale investments in politically unstable countries like Chad and Cameroon.

Shemberg praises BP's response to the issue but wants to see it move further. "BP has done many positive things. But in our view it's not sufficient. [The undertaking] deals with some things, but not others,"


Talk is cheap on African human rights

she says. The European Court of Human Rights is currently reviewing 38 cases in relation to the BTC pipeline project.

Because of the secrecy around state-investor agreements it is hard to know if the problems identified by Amnesty are shared widely but Shemberg says there are probably hundreds worthy of closer inspection. Certainly NGOs are beginning to push for greater scrutiny of various state-investor contracts, including production sharing agreements (in oil and gas) and power purchase agreements (in the energy sector).

International environmental charity WWF, for example, is preparing a report into Shell's Sakhalin pipeline in the north-east of Russia. James Leaton, WWF's extractive industries policy officer, says the 25-year production sharing agreement, which can be extended in increments of five years, creates an enclave for the company in Russia where "the laws don't apply".

Shell has been repeatedly criticised for endangering grey whales and taimen salmon near the pipeline, species that are protected under Russian environmental law. A leading scientist employed by Shell to oversee the project recently resigned in protest over Shell's environmental performance.

Leaton says companies like Shell have exceeded the original intention of state-investor agreements, to provide, for example, assurances on stable tax structures. "Stabilisation clauses" are now used to exempt companies from a wide range of social and environmental laws and regulations, he says.

Meanwhile, various campaigners have criticised a dam project in Belize, built by a Canadian company called Fortis. According to Friends of the Earth, the host government agreements in this case "indemnifies the company against any private action under or with respect to any and all environmental laws or regulations now existing or created here after".

The International Rivers Network has drawn attention to dam projects in Uganda (Bujagali), Laos (Nam Theun), the Philippines (San Roque), and Belize. It says power purchase agreement contracts, which like host government agreements define the rights and duties of both investors and governments, tend to be secret, and therefore are more likely to be sources of corruption, and frequently represent poor value for money for ordinary citizens. An independent review of the power purchase agreement for the World Bank-backed Bujagali dam estimated that the Ugandan government was overpaying by as much $280 million compared with a similar project in India.

In 2003, a report from UN Commission on Human Rights cautioned governments to "avoid the situation where a requirement to pay compensation might discourage states from taking action to protect human rights".

Some campaigners see state-investor agreements as resonant of an effort by the OECD in the 1990s to agree a treaty on international investment. Known as the Multilateral Agreement on Investment, it would have offered companies some of the protections seen in today's host government agreement. In the event, however, the treaty was dropped in the face of vigorous NGO opposition.

Lending an ear

Lenders say they are beginning to take account of problems raised by Amnesty in its reports in BTC and Chad-Cameroon.

David Allwood, business principles adviser at the UK's Export Credits Guarantee Department, admits that host government agreements frequently do not take human rights into account. He says the ECGD "encourages project sponsors to make public statements to clarify that their intention is not to undermine basic human rights" as BP did in the case of BTC. He notes that independent monitoring is required to ensure commitments are fully implemented.

Andre Abadie, head of the sustainable business advisory team at ABN Amro, which arranged loans from the US's Export-Import Bank and France's Coface, as well as capital for the BTC pipeline, says: "We clearly want to make sure that we get this right the next time one of these projects comes along."

The Equator banks, which include ABN Amro, Barclays, HSBC and Citigroup, are currently reviewing the Equator Principles in light of the IFC's decision to update its policies on society and the environment.

Abadie says there is a realisation among some of the banks that the principles are too vague, and open to wide interpretation. As an example, he relates a recent episode when nine banks were offering loans for a gas project in the Middle East. Because of confusion over the meaning of the Equator Principles, he says, only two banks called for compliance to an environmental management plan.

In light of the Amnesty reports, as well as other studies, it can be hoped that lenders and companies are becoming more aware of the potential hazards of host government agreements. At the time of the BTC report, in 2003, BP said, not unreasonably, that it was "shocked" by Amnesty's findings. In the wake of Amnesty's latest report, however, claims of "innocent omission" by others will soon start to wear a little thin.

With multinational corporations increasingly looking to unstable and immature countries for profits and growth, the use of host government agreements and similar legal instruments is likely to grow. That in turn is likely to motivate NGOs on the issue; Amnesty for one says it is already investigating other agreements. The interplay between the two in the coming years is likely to be intense, and companies will need to decide whether they need to address the topic as part of their reporting, and in their wider dialogue with stakeholders. ■

Useful links:
www.amnesty.org.uk
www.worldbank.org/afr/ccproj
www.exxonmobil.com/corporate

Ethicalcorp.com keyword searches:
Chad, Cameroon, ExxonMobil, Amnesty International, oil pipeline, human rights