

Renegotiate Guyana-ExxonMobil Petroleum Agreement? Lessons for the Future.

Guyana, a former British colony, is a common law nation. It has a long-standing border dispute with its superior military neighbour, Venezuela. Venezuela is claiming two-thirds of Guyana's territory, including the maritime zone with Guyana's oil reserves. It has not hesitated to use aggressive military force against Guyana's attempts to explore its oil resources in the disputed area. Against this backdrop and a new government anxious to act after being out of Government for 23 years signed the petroleum agreement in secrecy.

Unfair Deal

There is a general consensus that the terms of the Agreement represent an unfair deal for Guyana. Guyana received a meagre \$18m signing bonus compared to neighbouring Brazil's \$2.1b for less known reserves. It agreed to a 2% royalty compared to an average 12.5% for the industry. The Agreement stipulated that "Profit Oil" after Contract Costs shall be shared: Contractor fifty per cent (50%) and Minister fifty per cent (50%). Guyana has no control over the determination and valuation of the costs, including pre-contract costs, intellectual property appropriations, and transfer-pricing mechanism.

Given the unfair and inequitable deal from this Agreement, this begs the answer to the question of whether the agreement should be renegotiated or rescinded because of its unconscionable terms.

ExxonMobil Sold 55%-Guyana got Zero

ExxonMobil negotiated the agreement with the Guyana Government and then shared out the oil blocks with other multinational corporations (MNCs), Hess Corporation (30%), CNOOC Limited (25%) and itself (45%). The MNCs incorporated three paper companies with zero assets, zero capital, and zero employees in tax havens of Cayman Islands, Barbados and Bahamas respectively. These Paper companies register three local Contracting Companies (Contractors) in Guyana. These Contractors signed the contract with Guyana. Thus, the MNCs are two levels

removed from the legal arrangement. This arrangement has two distinct advantages for the MNCs. It provides for excellent tax avoidance vehicles and excludes any direct liabilities to the MNCs. The Contractors act as a conduit for transferring costs from the MNCs and repatriating profits to them. Unless they provide indemnities for the contracting companies, they are not directly responsible for their obligations.

Who will pay for environmental disaster?

The issue of indemnity is critical for remedial work such as abandonment and decommissioning of oil projects. The Guyana-ExxonMobil Petroleum Agreement in Article 20.1(d)(iii)(hh) states that the Minister within seven days after the date of abandonment program and budget are approved shall obtain an undertaking from an Affiliated Company of each of the Parties to ensure the provision of financial and technical resources necessary to conduct the approved abandonment programme. However, the Affiliated Companies are not identified nor are any standby letter of credit as a performance bond given to secure the decommissioning and abandonment “good and faithful performance”.

Missing Bridging Deed. Who received the money?

Further, Article 26.6 refers to a Bridging Deed to facilitate the comprehensive resolution of related disputes. This Deed is a transition between the Agreement signed by the previous government in 1999 and the Agreement signed by the current government in 2016. The Minister has not provided an answer as to whether the Deed exists and whether it will be made available for examination. This can become a significant issue when wells are abandoned or decommissioned and for post-contractual costs, including environmental degradation. The Contractors would have repatriated all their profits to their holding companies up-line and have no assets to bear. Guyana would have to seek the Arbitrators’ consent to bring in the original parties with assets, namely, Exxon Mobil Corporation, Hess Corporation, and CNOOC Limited

as parties to the dispute. It will then have to prove that they were in principle and fact, the alter egos of the contracting companies. This will involve a lengthy and costly process that Guyana cannot afford.

The Bridging Deed would be useful to shed light on what financial arrangements were made for the transition from 1999 when little or no oil reserves were known to 2016 when large know oil reserves were confirmed. There is no indication that Guyana gained any financial benefit from this new information when the Agreement was signed in 2016. Furthermore, Exxon Mobil Corporation sold off 55% of its oil blocks to other MNCs but Guyana did not receive any direct or indirect financial benefit from this transaction. The profits made by Exxon Mobil Corporation on this sale completely avoided any taxation by the Guyana Government.

ExxonMobil will pay no tax whatsoever

The taxation of MNCs is a serious concern as these companies are adept at shifting their tax bases to minimize tax liability. However, the Guyana-ExxonMobil Petroleum Agreement has added egregious features to this phenomenon. The Agreement provides for the Contractors to pay no tax, value-added tax, charge or other imposts. The agreement makes provision for the Minister of the Government of Guyana to pay the tax on behalf of the Contractors and for the Commissioner-General of Guyana Revenue Authority to issue tax certificates to Contractors evidence of payment. This arrangement raises serious local and international concerns. Guyana is deprived of a major source of income. At the same time, it raises concerns about international tax evasion. The Contractors are provided with tax receipts for which no tax was paid but may be presented to other tax jurisdictions to avoid double taxation.

Secrecy, Corruption and lack of transparency

The Agreement was negotiated and held in great secrecy. The contents of the Agreement were disclosed nineteen months later after the persistent clamour for information from the Parliamentary Opposition, the Press, and Transparency activists. The Government first denied receiving a signing bonus then refused to account for the funds through the Consolidated Fund. It took over two years, the passing of a vote of a no-confidence motion against the Government, and the threat of legal action at the High Court before the funds were transferred to the Consolidated Fund. During the whole episode, the Contractors and their parent companies did not venture to clear the air on the matter.

Guyana is a constitutional democracy, but many of its institutions are weak, and politicians are using them to their advantage. The President unilaterally appointed the Chairman of the national and regional Elections Commission despite provisions in the Constitution prohibiting this. The matter was adjudicated at the Caribbean Court of Justice (CCJ) that the President breached the Constitution by this unilateral action. More recently, the CCJ ruled that the Government failed to abide by a no-confidence motion that was validly passed by a majority of 33 members of Parliament for the motion to 32 against the motion. The Guyana Court Appeal had earlier ruled that the motion was not validly passed as they had interpreted that 32 no votes was larger than 33 yes votes.

Many institutions, including the Chancellor and the Chief Justice of the judiciary, are not given security of tenure or are starved of operating funds. The Chancellors and the Chief Justices have been in acting positions for the past 18 years. It is well understood that the judiciary's security of tenure is an essential condition of maintaining the independence and freedom of those services

from political or partisan control. The Integrity Commission has publicly declared that it has no funds to carry out essential functions. Guyana occupies the position of being perceived as More Corrupt on the Corruption Perception Index.

Weak democratic institutions are less able to control corruption which in turn undermines democratic institutions. With Guyana's likely new-found wealth from its petroleum reserves, democratic institutions need to be even more vigilant against corruption.

Gave up Guyana sovereign immunity

A case could be made for the proposition that Guyana has a grossly unfair deal in the Guyana-Exxon Petroleum Agreement and would, therefore, wish to rescind or favourably amend the terms of the Agreement. Article 26.1 states that the Parties shall make reasonable efforts to resolve amicably all disputes by negotiation. However, a careful reading of the Stability of Agreement clause freezes the legal situation at the time of signing the contract. It provides no room for flexibility or an economic equilibrium in favour of Guyana. It states: Except as may be expressly provided herein, the Government shall not amend, modify, rescind, terminate, declare invalid or unenforceable, require renegotiation of, compel replacement or substitution, or otherwise seek to avoid, alter, or limit this Agreement without the prior consent of the Contractor. This will suggest that negotiation would cover matters relating to the performance of the contract only rather than the terms of the contract.

Bleak prospect of arbitration success in America

The Agreement provides for the Parties to submit any dispute to the International Centre for Settlement of Investment Disputes (ICSID) for arbitration before three (3) arbitrators. In the event, the ICSID refuses to register a request for arbitration any Party may submit the Dispute to

the American Arbitration Association (AAA). The AAA shall administer the arbitration pursuant to the rules of United Nations Commission on International Trade Law (UNCITRAL), including appointing three arbitrators. The seat of the arbitration shall be in Washington DC, USA and the proceeding conducted in English. The Government of Guyana will not be in a position to plead sovereign immunity. Article 26.3 of the Agreement states: The Government hereby irrevocably waives any claim to immunity for itself, its agencies, its enterprises, and any of its assets with regard to any arbitration.

The Agreement makes no mention of an *ex aequo et bono* provision, which would have given the arbitrators the flexibility and freedom to avoid the rigidities of the law and permit considerations of equity, justice and fairness.

The prognosis for renegotiating the terms of the Agreement is very bleak. The water-tight freezing stability clause, the waiving of sovereign immunity, absence of an *ex aequo et bono* provision, and the commencement of the performance of the contract (the contract is in its executed/performance stage rather than at an executory stage), all weigh heavily against Guyana being successful at an Arbitration to rescind or modify the Agreement. Without a strong case, Guyana will be ill-advised to spend its scarce dollars and legal resources over a protracted period with little chance of a favourable outcome. Guyana would be better advised to seek a good faith and conscionable review for fair and equitable terms as a goodwill gesture from the multinational corporations.

International commercial contracts can involve complex business and legal issues, especially when they deal with large engineering and natural resource industries over a protracted period. Developing host countries are vulnerable when contracting with mega multinational corporations because of their inherent weak bargaining position. It is incumbent upon their governments to

take all necessary measures to ensure that they secure the best possible contractual terms and the performance of the contract.

The Guyana-ExxonMobil Petroleum Agreement represents a classic case of the Government's missteps where a developing host country failed to negotiate and secure the best possible contract for its citizens. It contracted with the Multinationals' paper companies with no asset and obtained no firm financial security for the performance of the contract and the abandonment and decommissioning of the project. It authorized the Contracting companies to pay no tax of any sort during the entire term of the agreement but will command its tax authorities to provide evidentiary receipts that the Contractors did pay assessed income tax. The Government waived its sovereign immunity while agreeing to the most draconian freezing stability clause that denies any renegotiation or modification of the signed contract. The only income from the project is 2% royalty of oil sales and 50% of the oil profit after costs which the Government has no control over.

Lessons for the future

Many lessons can be learnt from the Guyana-ExxonMobil Petroleum Agreement. But, perhaps, the most important is that Governments need to act responsibly within a robust legal framework by seeking proper professional business and legal advice and be held accountable for their actions through democratic institutions and processes. There cannot be any room for secrecy and actual or perceived corruption.

The Multinational Corporations also need to pay heed to the UN and the Organization of Economic Cooperation and Development Guidelines recommending that they conduct their operations in harmony with the national policies of the host countries and contribute to the

economic and social development of the countries in which they operate. Ultimately, are the host Government and its citizens getting a fair and equitable deal and are the investments of the multinational corporations protected?

Yours truly

Tameshwar N. Lilmohan

