Introduction to extractive industry contracts, governance and human rights

UN Principles for Responsible Contracts

9 October 2012

Andrea Shemberg
Legal Advisor on Business & Human Rights

Keith Myers
Consultant and Member Advisory Board Revenue Watch

AGENDA / Ordre du jour

- Why are we here?
  - Principles for Responsible Contracts
- Introduction to good governance and the role of license agreements
- UN Principles for Responsible Contracts
- Workshop – aligning contracts with the Principles for Responsible Contracts

Intro to good governance and the role of license agreements /

Intro à la bonne gouvernance et le rôle des accords de licence

Keith Myers

Consultant and Member Advisory Board Revenue Watch

The oil and gas sector has a significant role in national development / Le secteur du pétrole et du gaz a un rôle important dans le développement national

Fiscal
- Government Revenue
- Price Volatility

Procurement
- Supply Chain
- Labour
- Capital
- Equipment

Energy and Feedstock
- Energy Pricing
- Petrochemicals

Social, Environmental, Political & Cultural
- Impact on local communities
- Environment
- Geopolitics
- Instability & Conflict

Chatham House Good Governance of the Petroleum Sector Principles / Bonne gouvernance « Chatham House » des Principes du secteur pétrolier

1	Clarity of Goals, Roles and Responsibilities Clarté des objectifs, rôles et responsabilités
2	Sustainable development for the benefit of future generations Le développement durable au profit des générations futures
3	Institutions enabled to carry out the role assigned Institutions habilitées à remplir le rôle assigné
4	Accountability of decision-making and performance Responsabilisation de la prise de décision et la performance
5	Transparency and accuracy of information Transparence et exactitude des informations

Policies, laws and regulations are required in two main aspects of the extractive sector / Politiques, lois et règlements sont nécessaires dans deux principaux aspects du secteur des industries extractives

Revenue Generation

Design and Management of Extractive Operations

- Licensing
- Exploration
- Development
- Production
- Fiscal Regime

Revenue Utilisation

Management of Revenues

FOCUS OF TODAY/ OBJET DE NOTRE ATTENTION AUJOURD'HUI

The Regulatory Framework/ Cadre réglementaire

	Constitution / Constitution	What guidance does the constitution provide on Extractive Sector Governance?
EXECUTIVE	**Clear and Coherent Policies / Politiques claires et cohérentes**	Are Government policies clear and coherent across ministries and tiers of Government?
PARLIA-MENT	**Enabling Laws / Lois d'habilitation**	Are the necessary laws in place to enable policy objectives to be achieved?
REGULATORY AGENCIES	**Enacting Regulations / Réglementation**	Has the law been enacted into effective regulation?
REGULATORY AGENCIES	**License Agreements / Contrats de licences**	Are individual license agreements enforceable and consistent with policy, law and regulations?

Example: Ghana Legislative Framework / Exemple: le cadre législatif du Ghana

Constitution

Government Policy

GNPC Act 1983

Petroleum (E&P) Bill 2010

Petroleum Revenue Bill 2010

Petroleum Income Tax Law 1987

Inland Revenue Act 2000

Environmental Protection Agency Act 1994

Technical Regulations and Instruments

Petroleum Licence

Petroleum Licence

Petroleum Licence

Petroleum Licence

Petroleum Licence

Petroleum Licence

Judiciary, Regulatory Agencies

Scope of policies and laws / Champs d'application des politiques et des lois

In scope / champs d'application

Institutions

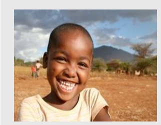
Environment / Environnement

Transparency / Transparence

Licensing / Licences

Production & Development / Production et développement

Health & Safety / Santé & sécurité



Social Impacts / Impacts sociaux

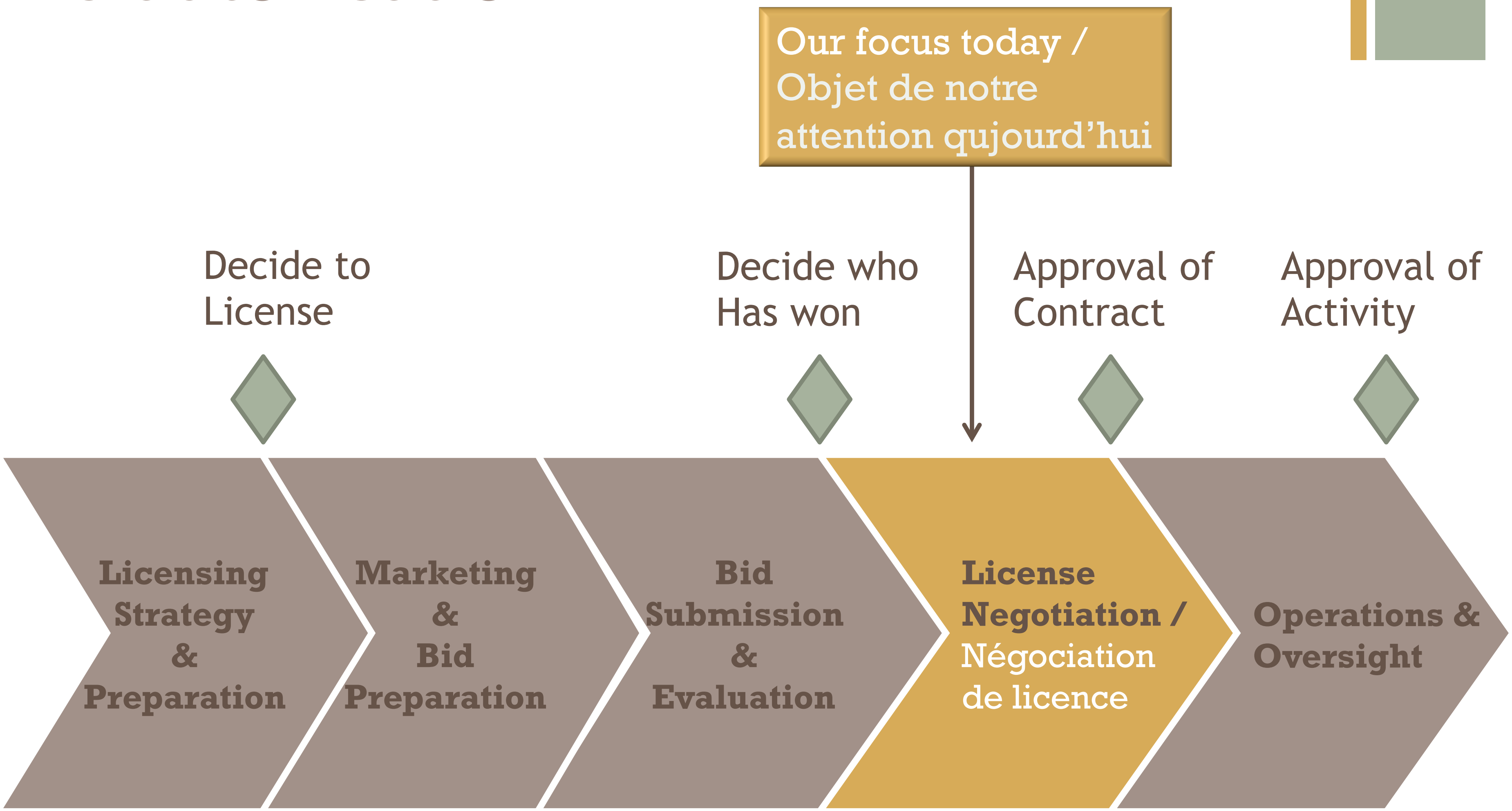
State participation and setup of NOC / Participation de l'Etat et mise en place de NOC

Local content requirements / Exigences de contenu local

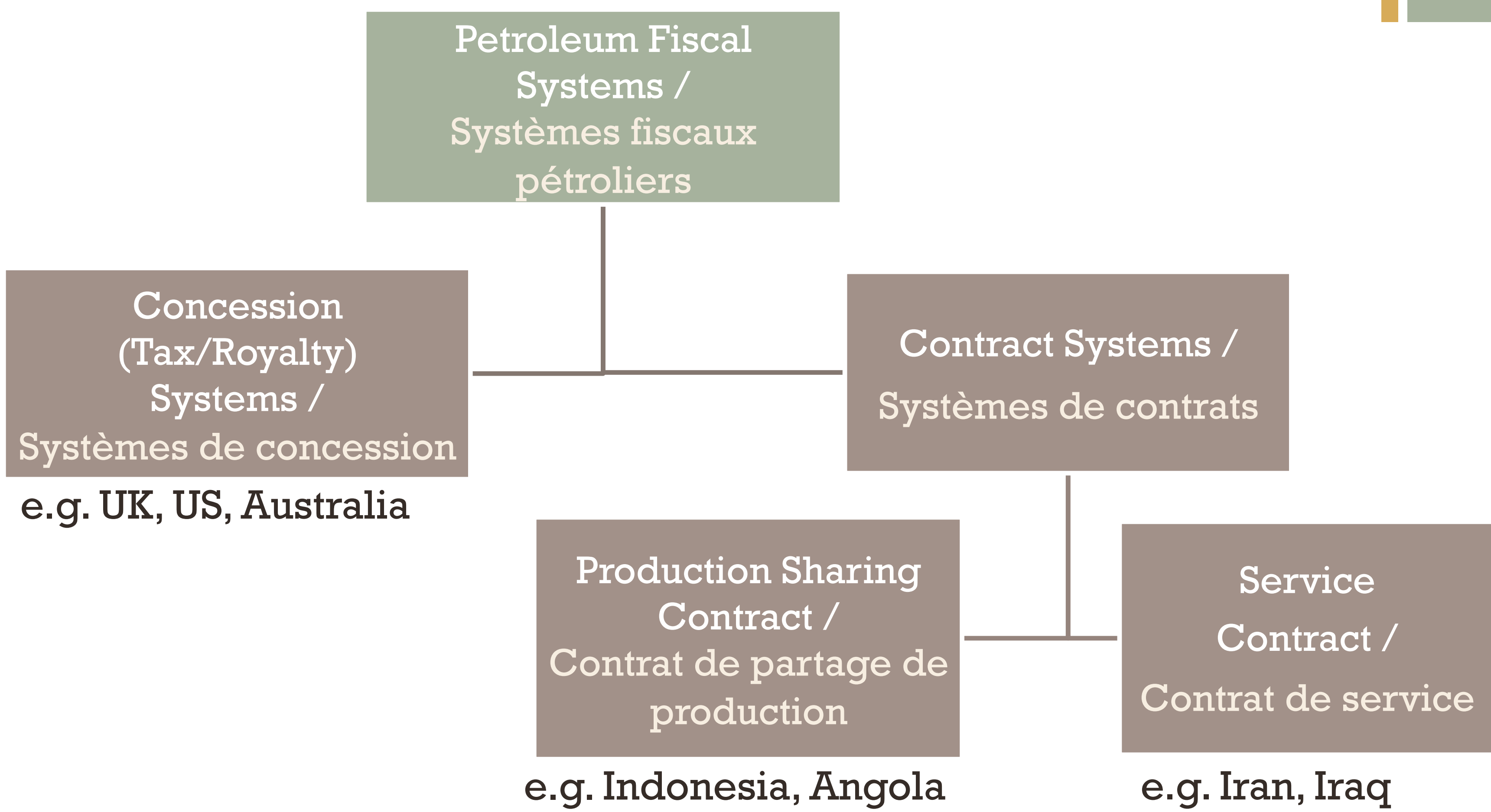
Fiscal Regime / Régime fiscal

Offences / Infractions

Licensing Process / Processus d'autorisation



Types of Contracts / Types de contrats



Parties to a petroleum agreement / Les parties à un accord pétrolier

- The responsible State ministry/ Le ministère d'Etat responsable
- National oil company/ Compagnie pétrolière nationale

- Investor/ Investisseur

Types of Agreement / Types d'accord

- **Concession**
  - Right to produce and sell
  - Royalty payments
  - Tax on profit
- **Production Sharing Contract / Contrat de partage de production**
  - Right to produce and sell to recover costs and "profit oil"
  - Government can lift and sell its own share of production
- **Service Contract / Contrat de service**
  - Fixed fee per barrel to cover costs and an agreed margin

The purpose of an extractive investment contract / Le but d'un contrat d'investissement extractif

An *extractive investment agreement* is the instrument by which the State grants the right to exploit resources and codifies the rights and responsibilities of the parties to the agreement.

+ Extractive License Agreements: some common relevant elements / Contrats de licence d'extraction: quelques éléments communs

- Duration and extensions
- Work programme obligations
- Contract area and relinquishments
- Contractor rights, obligations and liabilities
- Discovery and appraisal
- Development and production
- Cost recovery, fiscal terms
- Measurement and valuation of resource
- Management of operations
- Approval of work programmes
- Confidentiality
- Change of ownership
- Termination
- Governing law and arbitration
- Stabilisation sometimes
- Environmental protection and safety
- Training
- Local content
- Abandonment
- Accounting procedures
- Company Guarantees

Good practice = include as much as possible in statutory regulation that apply across all licenses

UN Principles for Responsible Contracts / Principles des Nations Unies pour les contrats responsables

Andrea Shemberg

Legal Advisor on Business & Human Rights

Integrating Human Rights Risks into Negotiations / L'intégration des risques des droits de l'homme dans les négociations

Is the project directly and significantly relevant to human rights?

Some Questions to Ask

Does the project present significant social, economic or environmental risks or opportunities?

Does the project involve the significant depletion of renewable or non-renewable resources?

YES to 1 or both

Integrating the management of human rights risk is an essential consideration at the negotiation stage.

Principle 1:

Project negotiations preparation and planning

The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations.

Préparez à l'avance!

Principle 2:

Management of potential adverse human rights impacts

Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contact is finalized.

Principle 3:

Project operating standards

The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the lifecycle of the project.

Principle 4:

Stabilization clauses

Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's *bona fide* efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.

Principle 5:

"Additional goods or service provision "

Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.

Principle 6:

Physical security for the project

Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.

compatible avec les normes des droits de l'homme

Principle 7:

Community engagement

The project should have an effective community engagement plan through its life-cycle, starting at the earliest stages of the project.

participation de la communauté dès le début du projet

Principle 8:

Project monitoring and compliance

The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing necessary assurances for business investors against against arbitrary interference in the project.

capacité à suveiller

Principle 9:

Grievance mechanisms for non-contractual harms to third parties

Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

Un mécanisme efficace de gestion non judiciaire des plaintes

Principle 10:

Transparency/ Disclosure of contract terms

The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

transparence du contrat

Conclusion

- Investment agreements are part of the legal and regulatory framework governing extractive projects.

- The *UN Principles for Responsible Contracts* offers a framework to enable you to analyze the human rights aspects of contracts and the regulatory framework governing the extractive sector in your country.

Contracts Workshop / Atelier sur les contrats

Stabilization clauses / Clauses de stabilisation

"The terms of this Authorisation are binding on the Government for the duration of this Project and the Government undertakes not to modify the Authorisation unilaterally, or otherwise to act in such way as to affect the terms and conditions granted for the implementation and operation o the Project. *The Government undertakes that new legislation, regulations or determinations of the Government (including new taxes that may be adopted) shall not be applicable to the [investment] Project.* The provisions of this clause will be extended to [company's] Investors, Financiers, Employees, Contractors and Sub-Contractors in relation to their activities pertaining to the Project."

(Africa, downstream minerals)

Questions

1. What kinds of laws, regulations and policies are included in the stabilization clause?

2. Are exemptions given or some other form of compensation, mitigation?

3. Is there a time limit to the applicability of the Stabilization clause?

4. This contract has a duration of 50 years + 50 years. What new laws over the potentially next 100 years will not apply to the project?

+ Stabilization clauses / Clauses de stabilisation

"...[Investor will]not assert or advance, in any claim...against an interpretation of any Project Agreement [that] confirm[s] that the HSE [health, safety and environmental] and human rights standards for the ***Project are dynamic, will evolve when and as standards under domestic law in the relevant State, EU Standards, and applicable international treaty standards evolve, and thus require conduct of the Project's human rights and HSE activities in accordance with such evolving domestic law from time to time*** provided it is no more stringent than the highest of EU Standards, those World Bank Group standards referred to in the Project Agreements, and standards under applicable international labor and human rights treaties…

[Investor]…not seek compensation under the —economic equilibrium clause or other similar provisions of the HGAS or any other Project Agreement ... in connection with...any action or inaction by the relevant Host Government that is ***reasonably required to fulfil the obligations of that Host Government under any international treaty on human rights (including the European Convention on Human Rights), labor or HSE in force in the relevant Project State from time to time*** to which such Project State is then a party."

(Caspian region, Petroleum)

Questions

1. According to this clause are laws and operating standards applying to the project fixed in time or dynamic?

2. Will the Host State have to compensate the investor for new laws, such as health, safety, environmental or labor laws?

3. Does this clause give Host Governments some security when they implement new laws to protect people and the environment?

Physical security for the project / La sécurité physique du projet

"10.3 Security. Government, acting through the Ministry of Justice and by the lawful authority granted the Ministry of Justice to act for and on behalf of Government, hereby authorizes Investor directly or under contract with other Persons of its choosing, to establish, manage and maintain its own asset and employee security protection services (a "Plant Protection Department") in accordance with a written plan approved by the Minister of Justice (the "Security Plan") for the purpose of maintaining law, order and security in the Production Area and in other areas where Investor has or maintains property and assets and to do so always being subject to Law (including all Laws relating to apprehension and detention and human rights). The Parties also agree to subscribe to and adhere to the principles contained in the Voluntary Principles on Security and Human Rights (as of May 2008 located at: http://www.voluntaryprinciples.org)."

(The Republic of Liberia, rubber)

Project operating standards / Normes de fonctionnement du projet

Where to look:

- Social and Environmental standards
- Impact assessments and management plans
- Resettlement, Land use
- Building of infrastructure
- Additional Goods/Services
- Water use
- Land use
- Health, Safety, Security

Additional goods or service provision / Autres biens ou prestations de services

"1. Party B shall contribute to the rural development (villages and district) annually as following

- Constructing the roads with value [X dollars]
- Connecting the electric grids line to villages with value [X dollars]
- Constructing and Maintaining school with value [X dollars]
- Constructing the village's center, sanitary water and other with value [X dollars] as well as other activities that were stated in the Feasibility Study dated [date] approved by [Responsible Ministry]."

Thank you and Merci

Questions?

Contact information:
Andrea Shemberg, shemberg@database.it
Keith Myers, keith.myers@btinternet.com