



**VIEWS AND OPINIONS PRESENTED TO THE SECTORAL
COMMITTEE ON TOURISM, TRADE & INDUSTRY
REGARDING THE UNFAIR TERMS OF THE MOU BETWEEN
THE GOVERNMENT OF UGANDA AND UGANDA VINCI
COFFEE COMPANY LTD**

PARLIAMENT OF UGANDA

25th April 2022

1.0 INTRODUCTION

The Uganda Law society is established by Act of Parliament and its primary role is to assist Government and the Courts of Law in all matters affecting legislation, the administration and practice of law in Uganda and the protection of the general public in all matters touching, ancillary and/or incidental to the law. It is in this regard that we now render our opinion and advice on the terms of the Agreement between the Government of Uganda and Uganda Vinci Coffee Company Ltd.

The Uganda Law Society operates in specialized practice clusters and relies on them to carry out its mandate to advise the government and the public on matters incidental to the law and good governance.

Uganda Law Society appreciates the Parliamentary Committee's invitation and has put down its opinion as below.

2.0 GENERAL OBSERVATIONS OF THE MOU BETWEEN THE GOVERNMENT OF UGANDA AND UGANDA VINCI COFFEE COMPANY LTD

The Leadership and Membership of Uganda Law Society (ULS) have appraised itself of an Agreement that was concluded between the Government of Uganda and Uganda Vinci Coffee Company Limited.

At the core of the Agreements the ring fencing of Uganda's coffee value and supply chains, whose net effect is the creation of an oligopoly for the aforesaid company.

Vinci Coffee Company has been granted a cocktail of tax cuts and concessions, including land and the latitude to determine the price of its produce.

In giving this opinion we have taken into consideration the laws, regulations international instruments, trade protocols, the **National Coffee Policy** and the **National Development Plan III**.

We have studied the

- original Project Implementation Agreement signed 29th April 2015 (Hereinafter referred to as Agreement Zero),
- Addendum No.1 to the Agreement signed on 21st December 2015
- Addendum No.2 signed on 17th October 2017
- The Deed of Amendment and Reinstatement (hereinafter referred to as the Deed) dated February 2022

As a watchdog and public spirited body, the ULS would like to draw the attention of relevant institutions of state to these issues which fall under the realms of administrative law, separation of powers, and the Rule of Law.

3.0 SPECIFIC LEGAL ISSUES AND RECOMMENDATIONS

3.1 TRANSPARENCY AND ACCOUNTABILITY

It is a settled principle of public policy that contracts, tenders, and related dealings be conducted in a fashion that upholds transparency and accountability. The Agreement in question is shrouded in a great deal of stealth that does not augur well for the reputation of the contracting parties. Such a monumental undertaking should have been subjected to the highest level of openness as opposed to the secrecy in which it appears to have been conducted. Rather than documents being surreptitiously circulated on electronic social platforms, the line ministries should have come out ahead of everyone and availed the documents to the public. The opacity around the deal has created a wholly avoidable PR disaster from which the entire arrangement is unlikely to recover.

There is no evidence that this Agreement was subjected to either parliament or the solicitor general for approval especially since it creates tax obligations on citizens in **Clause 4.1 of the Deed** and its subsections on tax.

There is no evidence that the Coffee Development Authority was consulted or the ministry of agriculture or any other stake holders mentioned in the agreements. Evidence of this is on Page 10 of Agreement Zero the last paragraph where in reference to the tax incentives the Agreement then states "...such measures shall include bringing the existence of this Agreement to the attention of the revenue or tax collection agencies.", clearly demonstrating that even the tax body was unaware of the tax commitments being made in the agreements.

Preamble A to Agreement Zero on Page 2 states that

"Whereas the GOU.... Has agreed to support the project..."

Such a Clause should refer to appended decisions by said government the absence of which when read in context with the secrecy with which this Agreement seems to have been procured would clearly show an intension to mislead and a clear lack of transparency.

Legal Authority

Public officials must at all time exhibit a high degree of candor as is required by **Article 42 of the Constitution of Uganda** that gives Ugandans the right to "just and fair treatment" in administrative decisions.

Under the Public service standing orders, a public officer is employed in public trust and is required to implement government policy without fear or favor to ensure economy, efficiency, transparency and effectiveness in utilization of public resources. This should be the test to examine the compliance of these agreements with the said standing orders.

Recommendations

This Agreement should once again be reviewed holistically, with the input of the requisite and necessary stakeholders. Of particular note is the involvement of the Uganda Coffee Development Authority in the drafting of this Agreement as a key stakeholder, as opposed to leaving this process to just the Ministry of Finance and Economic Development which should ideally be limited to only the revenue aspects of this agreement. We believe that this ensures accountability and transparency is undertaken to the full extent of the law.

3.2 PRUDENT AND COHERENT MACROECONOMIC POLICY

Successive ministerial policy statements have continuously indicated that the Government of Uganda follows sound fiscal and monetary policies that are designed to ensure a fair balance of payments position, safeguard public funds from wastage, preserve the value and stability of the Uganda shilling and keep inflation in check.

National Coffee Policy 2013

The Agreements defeat the vision of the **National Coffee Policy 2013** and **National the Coffee Act 2021** which is to create a competitive, equitable, commercialized, liberalized and sustainable coffee industry. Agreement Zero Clause 2.1(b) states that

“The project shall consist of the production from green coffee beans...”

The Deed in Clause 4.2.1 states that

“The GOU...will take all reasonable measures to give priority of supply of coffee to the company before registering any contract or acknowledging any arrangements for the export of coffee beans...”

This basically means that the export of coffee beans even in their raw form is being ring-fenced for this company and yet various justifications have been that it shall add value and export processed coffee. This contradiction with government regulation and policy and disregard of the social economic rights of the Ugandan People enshrined in Chapter Four of the Uganda Constitution renders these agreements illegal.

The impugned Deed of Amendment and Restatement of the Project Implementation in its entirety violates the guiding principles of creating a competitive, equitable, commercialized, liberalized and sustainable coffee sector contrary to the **National Coffee Policy of 2013** and the **National Coffee Act of 2021**

Legal Issues

The provisions of this Agreement directly contradict and run afoul of the above stated policy positions of government. Not only is it a departure from the notion of the competition that free markets create; it undercuts the ability of other players in the coffee industry, which is Uganda’s primary commodity export.

Furthermore, it should also be noted that Coffee is not a natural resource that the Government holds in trust for the people of Uganda. The Primary producers are the owners and in the free market economy we operate, the government has no control over the coffee farmers who have a right to sell their products in accordance with the dictates of the market as willing buyer and willing seller.

The question also arises as to whether the signatories that signed on behalf of the Government have any authority to bind the Government under the Agreement given that there is no evidence of the requisite authorization.

Recommendations

We encourage the relevant office holders to steer clear from policy interventions that have the effect of derailing existing policy and legislation on economic governance.

3.3 PROTECTION OF SOCIOECONOMIC AND CULTURAL RIGHTS

Protection of socioeconomic and cultural rights

As explained in the preceding point, the nature and structure of the coffee industry Agreement will lead to the disenfranchisement of smallholder farmers, individuals who have been providing forward and backward linkages to the coffee subsector, the land rights and attendant livelihoods of affected communities. We are also concerned about the deleterious effect that the deal will have on the socio-cultural significance of coffee in numerous Ugandan communities.

We also note that the Agreement does not have a termination clause, is restrictive and offers no benefit to the coffee farmers.

In **Clause 4.2.2 of the Deed,**

“The Company undertakes to pay for priority supply of superior coffee beans at a premium price to be determined by the company but in any case not lower than the price approved by the relevant authorities for a particular consignment or the prevailing international price for each respective grade of coffee whichever is lower.”

This Clause means that the company will determine the premium price as opposed to the normal market forces, the CDA, or international market pricing. It also restricts itself in the second half of the Clause to the specific pricing of a particular consignment by the relevant authority meaning that given the wide birth of operational space and favor that has been granted to this company they might also be able to request special prices: and it is to this that they restrict themselves. It is then that the prevailing international prices mentioned and the conditions that it must even be lower than the others before it can apply.

This is clearly an attempt to create a monopoly that even dictates price and has control over all competition.

Clause 3.3 of the Deed on job creation does not specify or categorize the kind of employment that will be created in each category.

The Agreement does not have any technology transfer Clauses or training undertakings but rather has an open license in **Clause 2.2(e) of Agreement Zero** to use the land for any purpose it deems fit.

Given that there are no termination Clauses that are clear and given that **Clause 3.1(g) of Agreement Zero** commits government to manage and finance the company’s risks or losses in the event of force majeure and given the plethora of benefits, tax exemptions, incentives, subsidies and even infrastructural commitments, this Agreement is so deeply steeped in favor of the company that one can confidently state that it is unpatriotic and directly infringes on the social-economic rights of Ugandans.

Legal Authority

Article 40 of the Constitution of Uganda underscores the importance of and the obligation of the state in protecting and advancing the economic rights of Ugandans.

Recommendations

Government authorities should steer clear of actions and decisions that will suppress the constitutionally protected socioeconomic and cultural rights of citizens.

3.4 DUE PROCESS

Legal Issues

The Coffee Agreement is shrouded in secrecy right from the very onset. But perhaps most vital is the question around the identity and registration of the company in question—Uganda Vinci Coffee Company Limited. Was due process undertaken during the signing of the Agreement between the Government of Uganda and Uganda Vinci Coffee Company Limited? Were the Laws of Uganda concerning agriculture and coffee in particular, taken into consideration? Was ample diligence taken in ensuring that the company in question fulfilled all the considerations that are required of a coffee value chain actor as is highlighted in **Section 33 of the National Coffee Act, 2021**? Were all the necessary steps taken in ensuring that the company in question was worthy of being issued a license? The above mentioned questions are key leaking points in the coffee Agreement in discussion, which need to be considered and further analyzed.

We have been informed that the company sought leave and obtained approvals from UIA to mortgage the land that was given to them for investment. This was done despite the fact that there is a requirement for an investor to have developed 20% of the land before such consent can be given.

Given that there is no development on the land; questions arise as to how this decision was reached. We are also aware that the lease was renewed without any developments which is also highly irregular as extension or renewal of public leases is usually premised on progress of developments on the land.

We are concerned and inquisitive as to what basis the Uganda Vinci Coffee Company Limited was given exclusive rights to buy all Uganda's Coffee, in addition to being entitled to all tax exemptions available under the laws of Uganda. But perhaps, even more concerning here is the fact that this Agreement commits Ugandan taxpayers to provide the company relief from tax payers.

Under Clause 5.3 of the Deed, commits that the company shall remain in perpetual ownership of plant factory and all other assets as shall all other consents (which are not stipulated or annexed hereto). This Clause seeks to unjustly enrich a foreign investor at the expense of the government, tax payers and the Ugandan economy at large.

When taken in context of the fact that the agreements do not show any obligations on the company or penalties for default on the company's side, it is very clear that it would be in the best interest of Ugandans to have such a contract terminated.

3.5 ANTI-COMPETITIVE

Legal Issues

The Agreement more or less creates a monopoly. The government undertakes under Clause 4.2.1 of the Agreement to provide what is termed as "priority of supply" to Vinci Coffee and further gives the company the discretion to determine its own "premium price" for the priority of supply.

It is also our position that the government is creating an oligopoly over a product it does not own in a free market economy like Uganda. Why weren't the primary producers being the coffee farmers involved in the negotiations of this agreement?

Uganda does not have a Competition domestic law currently. However, as a member of the East African Community and the Common Market for Eastern and Southern Africa, it is bound by the Competition legal regimes there under and unfortunately this Agreement may not pass the test.

Legal Authorities

The EAC Competition Act 2006

S.5 (1) of the EAC Competition Act prohibits anti competitive concerted practices and more so if such practices have or are intended to have an anti competitive effect in the relevant market, as the case is in the present scenario with the terms in this agreement.

The Deed in Clause 4.2.1 states that

“The GOU...will take all reasonable measures to give priority of supply of coffee to the company before registering any contract or acknowledging any arrangements for the export of coffee beans...”

This is in direct contravention of the above law.

S.5 (2) (e) of the Act in its strongest terms prohibits any person from barring competitors from access to the market or from access to an association or arrangement which is essential for competition and there was no exemption that was sought from the EA Community regarding this agreement.

This section renders the Deed illegal ab-initio because of the various anti completion **Clauses in 4.2** and the electricity subsidy in **Clause 4.4** which could lead to Uganda’s coffee meeting compliance and legal challenges on the international market.

COMESA Competition Regulations

Article 16 (1) (a) & (b) of the COMESA Competition Regulations prohibits,

- (a) Agreements that may affect trade between member states and (b) those that have their object or effect the prevention, restriction or distortion of competition within the Common Market.

Article 28(1) Prohibits unconscionable conduct or contract whose nature is determined in the subsequent close (2)

Unconscionable agreements have been defined in common law as those “...that no man in his senses and not under delusion could make on the one hand and as no honest or fair man would take on the other.”

3.6 DOCTRINE OF UNCONSCIONABILITY.

Clause 4.2 of the Deed as above is grossly unfair to coffee farmers in Uganda, as it defeats the doctrine of freedom of contract. This Agreement decisively favors the Company that it has become oppressive to the small scale Ugandan coffee farmer as bargaining power is relinquished to the Company making it unconscionable. An unconscionable contract is one that is so one-sided that it is unfair to one party and therefore unenforceable under law. It is a type of contract that leaves one party with no real, meaningful choice.

Not only does the Deed provide a blanket tax exemption, it also obliges government in **Clause 4.1** to

- pay taxes on behalf of the company,
- pay interest on loans that the company takes (please note that they intend to take a mortgage on land that they have not paid premium for)

- to bear the cost of all taxes that the company may be exposed to should the legal exemptions not suffice.
- cooperate income tax and impositions(exemption)
- to indemnify the company in for majeure events (Deed Clause 7)
- to ring fence coffee pricing and export for the company (Deed Clause 4.2.1)
- to provide electricity subsidy (Deed Clause 4.4)
- to guarantee uninterrupted power supply (Deed Clause 4.4)
- to relocate, extend, construct infrastructure (Deed Clause 4.5 to 4.7)
- to ensure that all necessary consents are expedited and that the company's applications are prioritized by all institutions (Deed Clause 4.8)
- to protect the company from any revocation of such rights "without just cause" (who should determine this?) (Deed Clause 4.8)
- to transfer or sell the plant to the GOU or a third party at their discretion (Deed Clause 8)
- to own in perpetuity the assets /property/consents should the Agreement terminate (Deed Clause 5.3)

In English Law in a claim or dispute, where the court finds a contract to be unconscionable, they will typically declare the contract to be void. No damages award or specific performance will be issued, but instead the parties will be released from their contract obligations. In **Fry v Lane (1888) 40 Ch D 312**, it was held that where a purchase is made from a poor and ignorant person at a considerable undervalue, the vendor having had no independent advice, the court has an equitable jurisdiction to set the contract aside.

It is our position as the Uganda Law Society that the freedom of contract is being abused by this Agreement seeing as relational inequality and transactional imbalance exists, one which almost speaks for its self that there has been unconscionability in this agreement.

This contract in our opinion is marred by illegalities and unfair terms and conditions.

3.7 TAX

The Agreement attempts to create a number of tax exemptions for Vinci Coffee. The signatory to the Agreement is the Minister of Finance who according to Article 152 of the Constitution does not have power to make tax law since only Parliament has that power. This position has been reiterated in **Heritage Oil V URA** where it was clearly held that:

"tax obligations are created by Acts of Parliament and not by agreements"

The said parties to the Agreement did not seek approval or consult the relevant authorities in regard to the tax waivers in favor of the second respondent as demonstrated earlier in this submission. This Agreement usurps the powers of the Local Government provided for in the **Local Government (Amendment)(No.2) Act of 2008**, by providing such tax waivers and yet the Local Government is mandated to provide for additional taxes to be levied in order to provide new sources of revenue for local governments.

Exempting Vinci Coffee Company from all related employee taxes such as PAYE is in its sense an illegality since its Employees' money.

The intention of tax relief or incentives to investors is premised on the basis that they are committing large sums of money into the economy and will need a period of relief to recover the investments costs

and break even. To give such reliefs to a company that intends to mortgage even the assets availed by the government would be presumptuous, irregular, risky and questionable. This Agreement does just that.

3.8 AGREEMENT HAS NO TERMINATION CLAUSE

The Agreement is murky on its instances of termination and instead seems to give Vinci Coffee what it terms as "Continuing Rights" like its ownership of the properties/assets envisaged under the agreement.

Instances of termination would for example be in case of a fundamental breach of and/or default under the agreement. It should state penalties etc for default.

3.9 AGREEMENT SHOULD PRESCRIBE TIMELINES FOR PERFORMANCE

Performance guarantees are also needed hereunder.

3.10 THE ARBITRATION CLAUSE IS NOT WELL DRAFTED

Under the rules of Arbitration, the parties intention to arbitrate must be clear; the number of arbitrators should be stated, the language of arbitration must be provided for and the seat and place of arbitration.

3.11 ELECTRICITY SUBSIDY

Illegal subsidies and/or overly broad subsidies that provide a huge advantage to a domestic industry are prohibited under international trade. **Clause 4.4** of the Deed is an overly broad subsidy and could be interpreted as illegal and a distortion of international trade which will lead our coffee exports to being subjected to Trade Remedies and/or even barred from entering certain markets.

4.0 CONCLUSION AND RECOMANDATION.

The ULS notes that it has become habitual for government ministries, authorities, and departments to enter into unconscionable agreements with (often shadowy) investors whose behavior and ineptitude often cause financial loss for the taxpayer, encourages rights violations, and stifles Uganda's economic progress.

Cumulatively, this trend is antithetical to our collective development agenda that is well articulated by the **National Development Plan III**.

We urge all state institutions and office holders to observe and protect the interests of the citizens of Uganda, on whose behalf they hold and exercise the mandates they possess.

In the same breath, the ULS wishes to encourage the general public, media, and the agricultural community to keep up the civic awareness and interest they have displayed regarding this issue. Citizen agency and public participation are essential for the success of any democratization process.

With all that has been said, the Uganda Law Society therefore concludes that the Agreement is illegal and needs to be terminated and the relationship with the company regularized through proper due diligence, due process and proper stake holder vetting before any further business can proceed.



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