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Seeing the Whole Elephant: A Comprehensive Framework for Analyzing Resource-for-Infrastructure Contracts as Intended by the Parties *

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The current state of scientific knowledge on resource-for-infrastructure (R4I) contracting is unclear and based on inadequate empirical grounds. As a result, it is not easy to tell a R4I contract apart from other forms of international business transactions, let alone describe it in a comprehensive, accurate and meaningful way. Such state of affairs is concerning given the dramatic transformative impact of R4I contracts. This article sheds light on R4I contracts and proposes a broad framework for analyzing these multibillion-dollar deals. It looks to the contracting parties' intentions – as expressly set out in the texts of contractual and official documents – as the decisive element in getting the big and full picture of a new kind of deal that has been responsible for tremendous infrastructural development on the African continent.

1. Introduction

There is considerable confusion about resource-for-infrastructure (R4I) dealings in Africa. Are these multibillion-dollar deals swaps, barter, loans, investments or aid? Are they steeped in a 'long history of natural resource-based transaction in the oil industry' (Foster et al., 2009, p.42) or have they emerged as a phenomenon of the twenty-first century? Are they a combination or all of the above? Are they contracts at all? The situation is so complicated today that it is difficult to see the forest for the trees and to tell what is a R4I contract and what is not. Even in instances where a R4I contract has been unambiguously identified, it is a tall order to describe its terms in a systematic, accurate, comprehensive and theoretically sound manner. Moreover, assumptions that R4I contracts are not new or 'not so new' have led experts to give descriptions that do not square with contract law theory and that are wildly inconsistent with experience and the available terms of real-life R4I contracts. For example, Louis T. Wells describes the 'not-so-new' R4I contracts (2013) as 'equivalent to loans' (2014, p. 83), a 'not-so-new' assumption that obscures reality and compounds the analytic problem of identifying and characterizing R4I contracts.

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The primary purpose of this article is thus to shed light on resource-for-infrastructure contracting. To dispel the confusion about R4I contracts, this article proposes a broad framework for identifying, analyzing and negotiating the essential, salient and common terms of R4I contracts. In short, R4I contracts creatively combine a mining or oil venture and an infrastructure project in order to extract minerals or hydrocarbons and to pay for major infrastructure projects with revenues generated from those extractive activities. Under this 'ring-fenced' arrangement, the host state gets the infrastructure and the foreign investor gets the extracted resources.

'How much is known for sure about R4I contracts?' is the central question this article speaks to. The question relates to the current state of scientific knowledge on R4I contracts and to the necessity of establishing a firm knowledge base on which to rest ongoing debates over those contracts. This research article places these debates on a secure contract law foundation by relying on the intentions of the contractants to analyze R4I contracts.

2. Survey of the Existing Literature

2.1 Significance of the Inquiry

The whole purpose of surveying the existing literature on R4I contracts is to provide an overview of the recurrent problems in identifying and specifying the R4I model; the overview then serves to resolve those problems systematically and comprehensively. This crucial process culminates into the analytical framework recommended in this article. Ultimately, the true significance of the article lies in the fact that it fills a gap in the literature. It tries to bring greater clarity to the muddled theory of resource-for-infrastructure contracts and approaches that theory through the magnifying lenses of contract law.

It is imperative to gain a detailed understanding of the terms of R4I contracts, which can be an uphill task as the literature is patchy, distorting, confusing and at times contradictory. While it is not worth emphasizing each and every provision of an R4I contract, it is important to focus on essential and salient terms. Given the myriad ways R4I contracts are depicted in the literature, it becomes necessary to authoritatively describe the basic organization of R4I contracts and, appropriately, their 'essential' terms. 'Salient' terms are those that raise extensive discussion or controversy. They are, at the same time, terms over which the contracting parties are most likely to lock horns in the course of intense negotiations.

Because R4I contracts have a dramatic transformative impact on the economies of host countries, it would be irresponsible to settle for vague and incomplete accounts of R4I dealings. To be sure, Angola (4,5 billion US dollars),⁴⁰ the Democratic Republic of the Congo

⁴⁰ The initial amount was 2 billion US dollars. Subsequently, China Eximbank added 2.5 billion US dollars in two payments, bringing the total to 4.5 billion US dollars.

(DRC)(9 billion US dollars)⁴¹ and Ghana (3 billion US dollars) attracted – thanks to R4I contracts – the largest finance in a single investment since their respective independence. Rough estimates of signed R4I contracts in Africa hover around 30 billion US dollars (Halland et al., 2014, p. 5).

The literature is dominated by the contributions of journalists, political scientists, economists and development experts, among others. Scarcely any study addresses R4I contracts from a contract law vantage point. The lack of such relevant and much-needed perspectives adds to the confusion about R4I contracts. Since the first legal treatise on R4I contracts, published in 2010 (Zongwe, 2010), about two other treatises tackled the issue of R4I from a legal point of view. Research by Zongwe (2011) and Beardsworth & Schmidt (Halland et al., 2014) analyzed R4I contracts from a legal angle and employed law-and-economics perspectives. Zongwe compares R4I contracts with traditional investment contracts (2010) and puts forth R4I contracts as a model to optimize China's mining investments in Africa (2011). Beardsworth & Schmidt discuss the project finance aspects of the infrastructure component of R4I contracts. Those treatises all note the multiple names and descriptions given to R4I deals, but none takes a shot at formulating a theory that unifies the multiple descriptions of the deals. This article is an attempt to formulate such theory.

2.2 Methodology

As shown later in the article, R4I deals are best described as contracts. Methodologically, this observation implies that the intentions of the parties to the contract must be the starting point in efforts to identify and analyze R4I transactions. It is a practical method of gaining a bird's-eye view of R4I contracts and formulating a unified theory that connects and explains the individual components of the contracts under scrutiny.

Insisting on the intentions of the contracting parties is consistently and overwhelmingly supported by contract law theory. The parties' intentions are the basis of contractual liability and the decisive element in ascertaining the general structure of a contract. The sustained emphasis on the intentions of the contractants has the added advantage of avoiding the sort of misunderstandings that so pervade the literature on R4I contracts. In reading the mental states of the parties, whether a subjective or objective approach is used, misunderstandings and other evidentiary challenges can be overcome with a 'paper trail' (see Posner, 2011, p. 31). In other words, the ideal place to find the parties' intentions is in the express provisions of a *written* contract. Searching for the declared intentions of the parties in the texts of R4I contracts and official documentary evidence is the methodology that forms the backbone of the analytical framework set in this article.

⁴¹ Under pressure from the International Monetary Fund, the government in the DRC renegotiated the R4I contract and put on hold 3 billion of the initial 9 billion US dollars. The investment is now valued at 6 billion US dollars.

3. The Analytical Framework

3.1 Pure versus Disparate Types

Before going into the essentials of the R4I model, a distinction must be drawn between the pure type and the disparate type of R4I contracts. In her interesting study on R4I contracts, BreeAna Jones (2013, p. 15ff) did not draw that distinction and mistakenly included the Zambia-China Economic and Trade Cooperation Zone in Zambia and the joint venture, China-Africa Overseas Leather Products, between Ethiopia and China. As she acknowledged herself, the Sino-Ethiopian project is not a "purely" R4I investment (Jones, 2013, p. 21). In fact, none of those two Sino-African transactions are R4I investments.

The pure type is exemplified by the 2004 Angola-China R4I contract, whereas the disparate type is illustrated by the 2007 Ghana-China R4I contract, also known as the Bui Dam project. Distinguishing between the two types answers the question as to whether R4I contracts are a new way of structuring international business transactions. The pure type of R4I contract is a new contractual phenomenon whereas its disparate variation is not. Unlike pure types, disparate R4I contracts stray into contested territory: they defy classification and are easily confused with one or more traditional contractual models in international economic law. The distinction between the two types will become clear as the essential terms of R4I contracts are examined.

3.2 The Parties

One of the first things that must be looked at when analyzing a deal suspected of being – or presented as – a R4I contract is the identity of the parties to the contract. In national reconstruction projects, R4I contracts are state-to-state contractual undertakings between a resource company of a host state and a consortium of companies owned by another state investing in the host country. In smaller investments, R4I contracts may involve profit-maximizing private firms. To sum up, states or state-owned entities are parties to typical R4I contracts.

The state-to-state strategy is of incredible importance given that the direct involvement of the two states has several far-reaching implications for the effectiveness of R4I contracts. In particular, it mitigates political risks in developing countries and it drastically lessens the very high coordination costs that a consortium of private firms would incur if they joined forces to design and implement a R4I contract.

However, except for China, virtually no one among capital-exporting nations can actively engage its state-owned corporations in a R4I deal as developer-lender-contractor. Like Paul Collier pointed out (2014, p. 71), China has a 'monopoly' in the supply of such deals. In R4I contracting, investors and capital exporters would also need deep pockets, an appetite for risk or the 'animal spirits' that John Maynard Keynes invoked in his *General Theory of Employment, Interest and Money*.

3.3 The Agreement

The Chatham House report *Thirst for African Oil* (Vines et al., 2009) on 'oil-for-infrastructure' in Angola and Nigeria, reflects a flawed understanding of the nature of R4I agreements. It mistook related yet unlinked political deals (memoranda of understanding) and a group of contracts (rights of first refusal and oil block sales) for R4I contracts in Nigeria. It first indicated that there were 'no legally binding agreements' tying the development of the oil blocks to the delivery of infrastructure (Vines et al., 2009, p. 27-8). But the report made the link anyway between the deals and the contracts on the basis of President Olusegun Obasanjo's stated intentions to trade oil for infrastructure. Though the report was right to take into account the intentions of President Obasanjo, it should have paid equal attention to the terms of the written agreements.

The dominant presence of two states in R4I contracts may allow the inference that the agreements the states entered into are treaties, with all the ramifications that go along with that. Despite the heavy engagement of states and state-owned entities in R4I agreements, they are not treaties. Sticking to the methodology adopted in this article, it is evident from the text of available R4I contracts that the state parties to these agreements intend to act in a commercial capacity. This is the case notwithstanding the intrinsically and prominently political nature of these deals. Incidentally, contrary to a belief widespread in mostly Western media that 'weak African states are ruthlessly exploited by resource-hungry Asian tigers', government negotiators and leaders have in several host countries asserted a remarkable degree of autonomy at the bargaining table (see Vines et al., 2009, p. 3).

It therefore flows from the foregoing that R4I agreements are contracts. A 'contract' is conceived in this article as the terms of *economic* exchanges, usually with consequences on property rights. In this economics-inspired conception of contracts, it is assumed that the parties have expressed a firm intention to form and be bound by the R4I contract in conformity with the law of contract of the applicable legal system.

3.4 The Essential Terms

A R4I contract is an elaborate and complex network of agreements between a host state and another state investing in the host state (1) to develop and extract natural resources (minerals and/or hydrocarbons) and (2) to use the revenues generated or expected from the extraction of resources in order to pay for (3) major infrastructure projects in the host state. Stated differently, the essential terms of a R4I contract are the resource development agreement, the loan agreement and the agreement on infrastructure development. These agreements are mutually interdependent in packaged or pure types of R4I contracts whereas they are loosely associated or otherwise varied in unbundled or disparate types of R4I contracts.

a) Resource Development Agreement

The parties agree that the foreign investor will prospect for minerals or/and hydrocarbons, conduct feasibility studies, and extract and export those resources. The host state issues all the necessary licenses, which set out an implementation schedule and a clear fiscal plan that provides sufficient financial flows to fund the infrastructure projects. The resource development agreement may take the form of a production sharing agreement.

b) Loan Agreement

In exchange for the promise to grant rights to specified natural resources, the investing foreign state gives a loan, often on concessional terms (this is why it is sometimes seen as aid (see Alves, 2013, pp. 7-8)), to the host state for the construction of infrastructure to be built by contractors owned by the foreign state. The loan is directly paid out to the contractor and the developer, and never reaches state coffers. It follows that the many experts who portray R4I contracts as tantamount to loans miss the full picture; they look only at a part (the loan), however essential, instead of seeing the whole elephant (the R4I contract), of which the loan is but a part.

c) Infrastructure Development Agreement

The parties agree that the foreign investor will construct or/and rehabilitate infrastructure. The host state selects the infrastructure to be developed. In the majority of packaged R4I cases, the agreement is to build either nationwide or economy-structuring infrastructure. In the 2004 Angola-China contract, the agreement was to construct and reconstruct infrastructure nationwide, for instance, the rehabilitation of municipalities and hundreds of kilometers of water supply; and the construction of roads, railways, bridges, ditches, houses and a drainage system. In the 2008 DRC-China contract (hereinafter the 'Sicomines' deal), the agreement features the construction of economy-structuring infrastructure: roads and railways that connect different parts of the vast country, thereby boosting domestic trade. In the 2011 Ghana-China R4I contract, the agreement is to develop ambitious public works (such as a railway, a harbor and a multi-modal transportation system) with revenues coming from the drilling of oil in the Jubilee Oil Field in Ghana.

Nevertheless, R4I contracts may provide for small-scale projects, like the water supply system to be built in Kinshasa (DRC) in return for copper, as stipulated in the R4I contract between the DRC and a consortium of South Korean corporations (hereinafter the 'Musoshi' agreement). The infrastructure agreement in a R4I contract may be informed by traditional infrastructure contract models.

3.5 The Salient Terms

a) Confidentiality Clauses

Confidentiality clauses further complicate the analytic problem of distinguishing and characterizing R4I contracts since they restrict access to the terms of actual R4I contracts.

The debate over confidentiality clauses boils down to the question whether confidentiality is an inherent attribute of R4I contracts or a deliberate choice of either contracting party. Some protagonists say that R4I contracts are inherently opaque, implying that R4I contracts are bad for host countries and must therefore be shunned. Others believe that confidentiality may be 'simply a habit' (Beardsworth & Schmidt, 2014, p. 45) and that parties should be encouraged through initiatives, like the Extractive Industries Transparency Initiative (EITI), to disclose the terms of the contracts.

Demands for transparency are hard to gainsay as the benefits of sunlight clauses are self-explanatory, the prevention of corruption, white elephants as well as the rigorous evaluation of contracts being three obvious examples. This is all the more the reason, considering the integral role of the state in the deals and the massive amounts of resources at stake. On the other hand, confidentiality clauses do protect legitimate interests: trade secrets, intellectual property rights, etc.

A few host governments have partially disclosed the contents of R4I deals. The Angolan Cabinet made public a series of resolutions that listed the infrastructure projects and their costs. The government in the DRC disclosed the framework agreement of the Sicomines deal and the memorandum of agreement of the Musoshi contract. In Ghana, selected key terms of the Bui Dam and the 2011 contracts have been reproduced in official documents in the public domain.

Expecting full transparency is – in spite of its indisputable blessings – hopelessly naïve at this juncture. Even if Liberia has embraced the practice of publicly disclosing its mining contracts, strict confidentiality clauses are commonplace in the extractive industries under every contractual model.

b) Key Financial and Valuation Provisions

Compared to other contractual models, the competitive edge of the R4I model is that it provides higher, quicker and cheaper capital. Unfortunately, bounded rationality, limited computing abilities and imperfect information make it hard for both contracting sides to determine the real monetary value of the loan, the resource deal and the infrastructure project, or to price in political and financial risks correctly. It thus may be as difficult to ensure that R4I contracts offer better value for money. This is a possible explanation for the controversy that has surrounded certain provisions relating to sovereign guarantees, collateral, committal fees and internal rates of return.

A group of pundits advocate subjecting the infrastructure component of R4I contracts to competitive bidding. In principle, competitive bidding increases the probability that the host country will get value for money, but it is doubtful this auction mechanism will outdo the creative combination by a R4I contract of a resource deal and an infrastructure project.

c) Deeds of Security and Payment Clauses

A resource-as-security paradigm prevails in the literature on R4I contracts. The portrayal of R4I contracts as pledges or collateralization of natural resources is a distortion in the sense that there is hardly any evidence demonstrating such claims (Brautigam, 2009). On the contrary, the wordings of R4I contracts indicate that natural resources are intended by

the parties to serve as 'consideration of the construction' of infrastructure, a phrase explicitly used in the Musoshi agreement. In the 2011 Ghana-China R4I contract, the deed of security refers to a standby letter of credit, which by no means amounts to the collateralization of oil. The same holds for the Sicominex contract, where it is the joint venture Sicominex that functions as security. In the overall scheme of R4I contracting, natural resources are used as consideration for the loan and the development of infrastructure.

d) Local Labor Content

The general consensus of opinion is that in order to maximize the benefits of R4I contracts, host states must ensure the largest number of local workers and contractors are hired. Media reports have shaped the widely held perception that Chinese investors do not employ local workers. These reports are contradicted by the legions of local workers visible on construction sites in Angola, Kenya, Ghana, and Cameroon, to mention but a few. More often than not, foreign investment laws, labor laws and the licensing regime in the host country, though not always respected, impose various obligations on foreign investors to employ local workers and/or contractors.

e) Knowledge Transfer

Employment of local workers and contractors normally results in some measure of technology, knowledge and skills transfer, even in the absence of specific contractual stipulations. However, to make the most of R4I contracts, they must be expressly 're-characterized to facilitate technology and skills transfers' (Gathii, 2013, pp. 1-2).

f) Quality Specifications

Parties must draw up quality specifications from the outset in the negotiation process. They must also write the specifications on technical standards and may plan the post-contractual management of the infrastructure. In that regard, it may be advisable to hire third-party specialist firms to supervise and monitor the construction of infrastructure. If the parties lay down, as well they may, that external firms operate and manage the infrastructure once construction work is done, they can reap substantial efficiency gains.

g) Stabilization Clauses

Stabilization clauses aim to prevent future changes in the legislation of the host state from varying the terms of an investment contract to the detriment of an investing foreign party before the contract expires. Whether stabilization clauses are in the interest of the host state is an inquiry whose answer hinges on the wording of those clauses. Global Witness appraised the text of the stabilization clause in the Sicominex contract as 'one of the most comprehensive and uncompromising' and as undermining the host-country government's sovereign right to regulate key areas such as taxation or the conservation of the environment (2011, p. 32).

4. Common Clauses

Common clauses are not part of the analytical framework devised in this article, although a number are also salient terms. They are not indispensable to the issue at hand, but they nonetheless deserve a cursory outline. R4I deals are investment contracts and, as such, deploy the tools foreign investment law has developed and sharpened over the years to manage political and commercial risks to protect the interests of host states and foreign investors.

There are investment-specific and general contractual devices to shield foreign investors and host states from risks. The general devices endeavor to specify the parties' obligations or investment incentives in each possible state of the world and the sharing of risks, gains and losses in each state of the world. Investment-specific devices protect foreign investors from political risks by internationalizing investment contracts. These devices are stabilization, choice-of-law clauses, arbitration, damages, waiver of sovereign immunity, waiver of local remedies exhaustion requirement, currency conversion, profit repatriation, interest rates and internal rates of return, *force majeure* clauses, state interest in projects and state-as-party clauses.

5. Conclusion

The literature search and the framework conducted and created in this research are called for by the novelty of the R4I approach. Indeed, knowledge of the subject is still relatively embryonic, and a great many experts in international business transactions are unfamiliar with this new generation of investment contracts. Meanwhile, the framework presented here is broad and has modest ambitions. An in-depth analysis of the clauses of R4I contracts is beyond the scope of this article.

In this research piece, the main submission is that, in the face of a literature limited in several material respects, the texts of contractual and official documents define the extent and the limits of scientific knowledge on R4I contracts. Through its analytical framework, this article worked out what should count as good science and what should be cast aside as mere conjecture.

The framework has laid a solid theoretical foundation that would hopefully enable experts, government delegates and other stakeholders (1) to identify R4I contracts by looking for the essential terms of international contractual agreements; (2) to analyze and negotiate the contracts by perusing the salient terms; and (3) to finalize their dealings by adding the common terms of international investment transactions. This article has tried to enrich the holey R4I literature by proposing a holistic theory that should help analysts see the whole elephant.

References

Alves, A.C. (2013). "China's Economic Statecraft and African Mineral Resources: Changing Modes of Engagement." Southern African Institute of International Affairs Occasional Paper No. 131.

Beardsworth Jr., J.J. and J.A. Schmidt. (2014). "Financial Issues." In Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing, ed. H. Halland et al. Washington DC: The World Bank.

Bräutigam, D. (2009). *The Dragon's Gift: The Real Story of China in Africa*. Oxford: Oxford University Press.

Collier, P. (2014). "Comments by Paul Collier." In Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing, ed. H. Halland et al. Washington DC: The World Bank.

Foster, V. et al. (2009). *Building Bridges: China's Growing Role as Infrastructure Financier for Africa*. Washington DC: The World Bank.

Gathii, J.T. (2013). "Making Technology Transfers a Key Component of Resource Extraction and Construction Contracts in Africa." Lecture Delivered at the Institute of International Law and Justice, New York University School of Law.

Global Witness. (2011). *China and Congo: Friends in Need*. Global Witness.

Halland, H. et al. (2014). *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*. Washington DC: The World Bank.

Jones, B. (2013). *Resources for Infrastructure: The Sustainability Dynamics of Sino-Afro Trade*. SynTao.

Posner, E.A. (2011). *Contract Law and Theory*. New York: Wolters Kluwer.

Vines, A. et al. (2009). *Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola*. London: Chatham House.

Wells, L.T. (2014). "Comments by Louis T. Wells." In Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing, ed. H. Halland et al. Washington DC: The World Bank.

Wells, L.T. (2013). "Infrastructure for Ore: Benefits and Costs of a Not-so-Original Idea." Columbia FDI Perspectives No. 96.

Zongwe, D.P. (2011). "Ore for Infrastructure: A Contractual Model for the Optimization of China's Investments in the Mining Sectors of Africa". Ithaca, NY: Cornell University, PhD thesis, unpublished.

Zongwe, D.P. (2010). "The Competitive Edges of China's Resource-for-Infrastructure Investment Contracts." *Peking University Journal of Legal Studies* Vol. 2.