

Addax Bioenergy sugarcane ethanol project in Makeni, Sierra Leone: A legal and human rights audit

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1. Background

In January 2009, local newspapers reported the launch of a multi-million dollar bio energy project for Sierra Leone. At the official launch of the project at Lungi Acre, Makari Gbanti, the president of Sierra Leone hailed the project as a demonstration of his government's growing ability to attract huge economic investments to the country.

At the same time, the president reportedly paid tribute to the land owners thus: "this project would never have materialised but for the friendliness and hospitality of the host community. Let us never forget that they and they alone offered this land and thus provided the basic requirement that made it possible for a commercial investment of this magnitude". It is touted as the biggest agriculture project in the history of the country valued at around 200 million euros and will employ about 200 people directly. The project will require 10,000 hectares of land on which sugar cane will be grown and converted to ethanol for export into the EU. A by-product of the project will be the generation of 15 MW of electricity which will be sold to the national grid. The company at the centre of the project is Addax Bioenergy Sierra Leone Ltd, a local affiliate of the Swiss-based energy corporation Addax & Oryx Group (AOG). AOG has more than 20 years experience investing in Africa.

Civil society groups like the Council of Churches Sierra Leone (CCSL) and Mankind's Activities for Development Accreditation Movement (MADAM) appear less than enthusiastic about this mega investment in a country where hunger is a 'major problem'. In a post titled 'Advocacy campaign against land grabbing in Sierra Leone' dated 7 June 2010, they report about feelings of 'disillusionment and hopelessness' of community members within the project area. One Pa Brima Serry was quoted as saying that "Addax has taken our arable lands. They have asked for dry land. Now they have simply taken our land". They also report that during a visit to the affected communities, several people expressed dissatisfaction about their experiences with Addax. They claimed Addax had destroyed their fields and they could no longer grow rice or cassava to feed their children. They also claimed the company had failed to fulfil its promises to provide secure jobs, improvement to agriculture and additional farmland for the people. Only very few, they allege have been hired to work on the plantation, most of them as casual workers and many particularly women have been underpaid. Despite these experiences, CCSL and MADAM report that communities remain hopeful.

Apparently, Addax has taken steps to comply with the legal and regulatory framework for doing business in Sierra Leone. Chief among these is the acquisition by lease of several thousand hectares of land in Makeni, northern Sierra Leone for the purpose of growing and processing sugarcane to produce ethanol. These lands have been leased from traditional landowners for a period of 50 years in accordance with the relevant law. While Addax, in respect of this transaction was represented by the law firm Basma & Macauley, it says the landowners and chieftdom councils were 'assisted' by the law firm Franklyn Kargbo & Co 'in order to make sure their rights are secured'.

The thrust of this article is to examine the extent to which, in the acquisition of land, Addax has complied with the legal and human rights framework of the country and in its dealings with the communities involved. It should be pointed out that the legal framework is not only limited to statutes, but also includes principles of common law and principles of equity.

2. Key aspects of the leasing process

2.1 Legal representation of chiefdom council and traditional landowners

It is not clear whether traditional land owners and chiefdom councils had access to effective legal advice in the preparation of the lease. The lease was drafted by Addax's lawyers who obviously will seek to protect and promote the interest of their client. Considering the scale of the project and the complexity of the issues one would have expected that the traditional landowners would have benefitted from legal advice at least on a scale comparable to Addax. According to its literature AOG has had more than 20 years experience investing in Africa, including Sierra Leone (see Q&A) and given that the government 'has played no role' in the lease process and that traditional landowners have had no experience in leasing their property at such a scale, the need for effective legal representation to both protect and promote their interest was needful. Addax claims that the land owners were 'assisted' by a law firm to ensure that their rights are secured. How effective was the assistance? Was it on a scale comparable to what Addax got?

2.2 Consideration/Rent/Compensation

Addax claims that government has played no role in the lease process other than making sure that law and procedures are complied with. However, on the most important issue of rent, addax has adopted the land lease price recommended by the government for agricultural lands. This suggests that landowners did not have any say whatsoever on the issue of rent- whether they thought the amount recommended was suitable or not is not clear. This runs counter to the contractual principle of 'freedom to contract'.

3. Key provisions of the lease

3.1 Permitted uses of the demised premises- clause 2.2(a)

In its literature, Addax has described the nature of its project in Sierra Leone: 'Addax Bioenergy intends to develop a plantation of about 10,000 hectares of sugarcane close to the town of Makeni in central Sierra Leone' (Q&A).

However, in clause 2.2(a) Addax has reserved for itself the right to plant, cultivate and harvest 'sugarcane or other crop or crops and vegetation of whatever nature and ancillary agricultural activities including relating to the preparation, fertilisation and irrigation of soil, as in each case determined by the company'. This provision is too broad and allows Addax to for instance introduce and cultivate non-indigenous crops which may have serious implications for water use.

Also, by this clause, Addax could cultivate food crops like rice and cassava for ethanol production. This clause ought to be amended to reflect what Addax has portrayed and what the people have understood this project to be about-the cultivation of sugar cane.

3.2 Quality control- clause 2.2(b)-(d)

The above sub-clauses allow Addax to design, construct, commission and operate several facilities on the leased land, such as an ethanol plant, a power plant, and waste products storage facilities as determined by the company. The lease however does not contain any provision stipulating minimum quality requirements for the design and construction of such facilities to ensure that the risk of industrial accidents in the future is minimised. The lease needs to contain such a clause and additionally allows for the chiefdom council with support from any relevant professional body to verify both the design and construction.

3.3 Forfeiture through breach of covenants- clause 2.5

This clause deals with the circumstances under which the chiefdom council may bring the lease to an end for non-payment of rent or require compensation from Addax for breach of other covenants of the lease. Paragraph (b) of the said clause provides in part as follows: ‘... In the event the company notifies the chiefdom council it is willing to pay compensation on such basis but the chiefdom council cannot demonstrate that it has suffered any such losses then this lease shall not be subject to forfeiture’. The question then is to whom does the chiefdom council demonstrate that it has suffered any such loss and what is the standard required? If it is to addax, then the company would become a judge in its own cause. Such issues should be determined by a neutral third party- probably a person nominated for that purpose for instance by the President of the Bar Association.

3.4 Covenants of the chiefdom council- clause 3

According to Addax, ‘most land owners have already indicated which parts of their lands they are ready to lease out to the project and which parts they want to keep for their use’ (Q&A). Clause 3.2 states that the chiefdom council has full power and title to grant this lease and that this lease is granted to the company free from any right or interest of any third party provided that the company shall permit persons in occupation as at the date of this lease (permitted third parties) to continue in occupation thereon as licencees subject to the remaining provisions of this lease’. The implication of this clause is that the people leased their lands and dwellings to the company and on execution of the lease where now occupying their dwellings at the pleasure of the company. The clause undermines the security of tenure of the inhabitants by reducing them to mere licencees with no real rights and who could be evicted at will. Addax should ensure that the lease does not extend to the dwellings of the inhabitants within the project area.

3.5 Surrender of unsuitable land – clause 3.5

Under this clause, Addax may surrender any portion of land at any time before the expiration of 5 years from the date of the lease. If this is done, liability for rent would automatically cease. However, the clause retains for Addax several rights set out in the 2nd schedule of the lease in respect of surrendered land. These rights include the right of way, the right of passage, the right

to construct, lay, retain, maintain, repair and renew facilities, conduits services, equipment and other items and the right to enter and remain. It is submitted that if Addax surrenders land but continues to make substantial use of it in one or all of the manners listed, then it ought to pay rent for such use.

3.6 Addax's entitlements- clause 4.4 & 4.6

Clauses 4.4 and 4.6 enumerate several entitlements of Addax under the lease. Clause 4.4 states that the company is entitled to among others, stop or alter the course of any water course. Clause 4.6 further states that the company shall be entitled to have exclusive possession over villages, rivers, forests and other forms of the environment. It also reserves to Addax, the right to designate areas of shared use and areas of exclusive use. Both clauses are quite sweeping and may well contravene existing law. The Water (Control and Supply) Act 1963 which governs the use of water in rural areas confers on every person the right to use for domestic purposes any water flowing from or contained in any natural water supply at any place to which access may lawfully be had. The act defines domestic purposes as drinking, washing, cooking and sanitary purposes. The conferring of a right on Addax to stop or alter a water course or restrict access to a water course may constitute an interference with the right to access water for domestic uses of those within or near the project area.

3.7 Right to evict- clause 4.6

Addax has within this clause reserved the right to evict what the lease refers to as permitted third parties, in exceptional circumstances subject to the payment of compensation. However, the lease does not outline such exceptional circumstances.

3.8 Referral of disputes- clause 5

The lease is to be governed by the laws of Sierra Leone, but clause 5 suggests that disputes may be resolved by arbitration outside Sierra Leone. The clause also eliminates any right of appeal against an arbitration decision. A dispute settlement forum outside Sierra Leone may be too costly for the chiefdom councils. Besides, such a clause suggests a distrust of in-country dispute settlement mechanisms. Also, elimination of the right of appeal might make commercial sense in some respects, but it is however a curtailment of due process. In a project of this magnitude and duration, decisions arising from disputes ought to be tested.

4. Human rights implications of the lease

Several provisions of the lease have serious implications for the rights of inhabitants within or near the project area. The company's right to exclusive possession over all the natural resources and dwellings within the project area can seriously affect the ability of the inhabitants to live a dignified life. For rural populations access to natural water sources for their personal and domestic use is very crucial, so also is access to forest areas vital for their daily sustenance. The exercise by Addax of the rather extensive entitlements in the lease will adversely affect the lives of those living within or near the project area and could amount to violations of basic rights guaranteed under the laws of Sierra Leone as well as by international instruments.

It is therefore recommended, in light of the issues raised, that the lease be reviewed to ensure that the provisions conform to the laws of Sierra Leone, take into account the fundamental rights of the people and embody basic principles of fairness.

5. Going forward

The acquisition of land by Addax is just an aspect of the company's interaction with the local communities. Over the ensuing 50 years of the project, Addax will in addition to being lessee, also become an employer of the people attracting different rights and obligations. There have been rather unpleasant experiences for local people with previous sugarcane projects like the Magbass sugar project. It is hoped that the past will inform the present. Local and international civil society organisations should be prepared to engage with the project from its inception to ensure that the basic rights of the people are respected and that laws and principles of fairness are complied with. Community education, advocacy and exceptionally, litigation could be some of the many useful tools to protect the rights and interests of the people.