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Legal Advice
Guyana Petroleum Resources Governance and Management Project
(Guyana Project) P166730;
Project Appraisal Document (PAD) 3022

Introduction

1. I have been asked to provide legal advice on the Guyana Project. In preparing this advice I have reviewed or considered (i) project documents, (ii) IDA's Articles of Association, (iii) World Bank Procurement Regulations and (iv) applicable international law. This note sets out three key areas that should be investigated immediately.

Preliminary Findings

2. Based on the above documents and publicly available information my preliminary findings are:
 - (i) **There is no legitimate Borrower;**
 - (ii) **IDA repeatedly breached the duty of good faith under international law by proceeding with the Guyana Project;**
 - (iii) **There have been breaches of the World Bank Procurement Regulations: 3:16 and 3:17**
3. These issues should be investigated immediately by an independent body.

Recommendations to the World Bank

4. The following recommendations should be made to the World Bank:
 - (i) There should be a full independent and immediate investigation of the Guyana Project and the issues raised in this note;
 - (i) The Guyana Project should be halted immediately – there should be no further work or disbursements;

- (ii) The *de facto* administration in Guyana should be informed immediately that the Guyana Project has been halted.

The Guyana Project

- 5. The Guyana Project consists of a loan of US\$20,000,000 ¹ from IDA to Guyana for technical assistance to alter legal, regulatory and institutional frameworks for oil and gas development.² The PAD asserts that the Guyana Project will ‘enhance’ these frameworks. ‘Enhance’ is an ambiguous term. The content of the PAD suggests that the Guyana Project will benefit oil and gas companies, not the people of Guyana.
- 6. In 2017, an IMF paper stressed that countries should move away from fossil fuels: *“The transition away from oil has deep implications..... To prepare for such a future, diversification away from oil should be the most crucial policy item on policymakers’ agenda in oil-exporting economies. Investment in sectors such as renewableswould be natural hedges against the fall in oil prices”*³. In view of the collapse in oil prices the Guyana Project is probably no longer viable.
- 7. The Guyana Project could increase poverty by burdening the people of Guyana with (i) additional debt and (ii) the economic risks of converting to an oil and gas economy contrary to prevailing economic wisdom⁴ and contrary the financial and energy markets which are moving away from fossil fuels. The Institute for Energy Economics and Financial Analysis has advocated cutting oil production and warned that new energy demand will be met by non-fossil fuels sources.⁵
- 8. The Project Team are:

Regional Vice President	Axel van Trotsenburg
Country Director	Tahseen Sayed Khan
Senior Global Practice Director	Riccardo Puliti
Practice Manager	Christopher Gilbert Sheldon
Task Team Leader	Susana Moreira

¹ G\$4,162,000,000 at the Project rate of 208.1

² IDA has also provided US\$35M in budget support. <https://urgewald.org/medien/world-bank-paves-way-carbon-bomb-drilling-project-guyana>

³ IMF Working Paper: Riding the Energy Transition p30-31

⁴ See for example statements by Mark Carney former Governor of the Bank of England; Dieter Helm; the divestment from fossil fuels;

⁵ https://ieefa.org/ieefa-u-s-ieefa-director-of-finance-urges-oil-production-cuts-at-texas-commission-hearing/?utm_source=Daily+IEEFA+Newsletter&utm_campaign=fb0dfe2985-IEEFA_DailyDigest&utm_medium=email&utm_term=0_e793f87bcc-fb0dfe2985-128740201

No legitimate 'Borrower'

9. On 21st December 2018, Guyana's National Assembly passed a motion of no-confidence in the APNUAFC government. There were immediately 2 constitutional changes⁶:
 - a. The resignation of the president and ministers by operation of law; and
 - b. The 'government' left in place was reduced to 'caretaker' status.
10. **By operation of law there was no minister of finance on 11th April 2019, when Winston Jordan, purported to sign the Financing Agreement (Credit 6382-GY) as 'Minister of Finance'.**
11. A 'caretaker' government' has limited powers. It must act with restraint. When the government was reduced to 'caretaker' status it lost the authority to make decisions about policy or spending in relation to the petroleum sector. Although APNUAFC challenged the no-confidence motion in court, filing a court challenge does not overrule the Constitution.
12. **IDA had a responsibility to put the Guyana Project on hold in December 2018 and wait for a democratically elected government to approve or reject the Guyana Project.**
13. **The Project Team should be asked to provide a written explanation why they did not on 21st December 2018, or as soon as possible thereafter, put on hold**
 - (i) the Project Preparation Advance No. V2160 signed on July 18, 2018 for oil and gas capacity building;
 - (ii) the proposed Guyana Project;
 - (iii) discussions on the Guyana Project; and
 - (iv) the Financing Agreement
14. On 18th June 2019 the Caribbean Court of Justice, the highest court of appeal, upheld the no-confidence motion.
15. **Having failed to put the Guyana Project on hold in December 2018 IDA had a clear responsibility to put it on hold on 18th June 2019 until a new government was democratically elected.**
16. **The Project Team should be asked to provide a written explanation why they did not put the Guyana Project on hold immediately after the court's decision on 18th June 2019.**
17. The 'caretaker' government were legally required to hold elections by 18th September

⁶ As held by the Caribbean Court of Justice and the Chief Justice of Guyana; See Appendix 1

2019; they did not. From midnight on 18th September 2019 the caretaker government became an illegitimate unconstitutional *de facto* administration. Even in the face of such blatant illegal behaviour and undermining of the Constitution IDA did not halt the Guyana Project.

18. **The Project Team should be asked to provide a written explanation why**
 - (i) **they did not halt the Guyana Project on 18th September 2019; and**
 - (ii) **they continued to act as if there had been no constitutional change.**
19. On 2nd March 2020 Guyana held elections. In 9 out of the 10 electoral regions, the results show that APNU-AFC coalition party got 100,871 votes and the PPPC party got 152,400 votes. These figures are accepted by all as valid. In the final region (region 4) the returning officer has declared false results. There have been attempts to declare APNU-AFC as the winners of the elections using these false results. The international community has rejected those results as 'not credible' and insisted on a transparent and credible process that respects the sovereign right of the Guyanese people to elect their government. The USA and other states have said there will be 'serious consequences' if APNUAFC attempt to swear in their candidate as president based on these results.
20. Even in the face of blatant attempts to perpetrate electoral fraud and despite the condemnation by the USA, UK, Canada, EU, Commonwealth, OAS, ACP, Caricom and UN of the undermining of democracy in Guyana, the Project Team has not put the Guyana Project on hold.
21. **The Project Team should be asked to provide a written explanation why they still have not halted the Guyana Project but continue to provide technical assistance to an illegitimate, unconstitutional *de facto* administration.**

Breach of the 'good faith' obligation

22. IDA is an international organisation. Article 5 of the Vienna Convention on the Law of Treaties ("VCLT") applies the VCLT to the constituent instruments of an international organisation i.e. IDA's Articles of Agreement (Articles).
23. Article 26 of the VCLT states that, "*Every treaty in force is binding upon the parties to it and must be carried out by them in good faith.*"
24. If it is not clear whether an action is permitted by IDA's Articles, the good faith obligation would require the Project Team to make some attempt to find out. The PAD claims that the Guyana Project will support good governance. Good faith requires IDA not to undermine Guyana's Constitution and the rule of law through the Guyana Project.
25. To continue with the Guyana Project from 21st December 2018 despite the no-

confidence motion, court decision, illegitimate unconstitutional *de facto* administration, attempts at electoral fraud and the condemnation of the international community of that attempted fraud, is clearly contrary to the legal duty to act in good faith.

26. **IDA should consider what disciplinary action to take because the Project Team:**
- (i) failed to halt the Guyana Project on 21st December 2018 when the no-confidence motion resulted in a caretaker government and the resignation of the President and all ministers;
 - (ii) failed to inform the Executive Directors in the PAD that the president and ministers had resigned by operation of law on 21st December 2018;
 - (iii) signed the Financing Agreement on 11th April 2019 even though there was no Minister of Finance;
 - (iv) failed to halt the Guyana Project following the decision of the Caribbean Court of Justice on 18th June 2019 upholding the no-confidence motion;
 - (v) failed to halt the Guyana Project on 18th September 2019 following the transition from caretaker government to illegitimate, unconstitutional *de facto* administration;
 - (vi) failed to halt the Guyana Project despite blatant attempts at electoral fraud to enable the APNU AFC to form a new government and despite the widespread condemnation of the international community of the situation in Guyana.
27. It is possible that the Project Team were ignorant of the constitutional impact of the no-confidence motion and events from 21st December 2018 onwards. If so, such ignorance confirms that IDA did not have the knowledge base necessary to do the Guyana Project or indeed any other project for Guyana.

Breach of World Bank Procurement Regulations

Regulation 3.17: conflict of interest

28. The World Bank Procurement Regulations 3.17 say, “Consultants shall not be hired for any assignment that would be in conflict with their prior or current obligations to other clients, or that may place them in a position of being unable to carry out the assignment in the best interests of the Borrower.”
29. Any consultant (whether foreign or local) who is currently working for or advising oil and gas companies that are in Guyana or have associated/affiliated companies in Guyana should be ineligible to work on the Guyana Project.
30. There appear to be at least 2 examples of conflict of interest – the hiring of Hunton Andrews Kurth and the hiring of Michael Warner.

31. Hunton Andrews Kurth⁷ (HAK) has been selected as the legal consultant. According to the PAD the deliverables are a Petroleum Commission Act, a local content law and regulations, taxation regulations, occupational health and safety regulations, and environmental regulations. The cost is US\$2,194,440.⁸
32. HAK has acted for ExxonMobil for about 40 years.⁹
33. ExxonMobil's subsidiary Esso Exploration and Production Guyana Ltd (Esso) is extracting petroleum in Guyana. Esso is the holder of two environmental permits which have been granted in breach of environmental regulations in Guyana. Esso is the holder of a petroleum production licence that has been the subject of on-going litigation in Guyana since 2018. Esso is an offshore company and is filing what it calls 'branch accounts' in breach of Guyana's company law.
34. According to an independent expert opinion submitted to the EPA, Esso's most recent environmental impact assessment (EIA) does not meet the legal requirement in the Environmental Protection Act Cap 20:05 (the EP Act) for Esso to state the impact of its activities on the climate (i.e. their direct and indirect greenhouse gas emissions).¹⁰
35. The EP Act requires developers to state the impact on the marine environment. In one EIA¹¹ Esso claimed that discharging 4,000 barrels of treated sewage into the ocean every day would 'benefit' marine life. This EIA used a fish list from 1962 and stated that the most commonly observed fish was "the unidentified flying fish." This EIA does not meet the requirements of Guyana's EP Act.
36. HAK appears to have a clear conflict of interest between (i) strengthening Guyana's laws to protect Guyana (the people and environment), from the threats posed by new petroleum production e.g. well blowouts, tanker collisions, greenhouse gas emissions etc. and (ii) dismantling environmental protection to assist Esso a subsidiary of their established client ExxonMobil.
37. The petroleum agreement is so favourable to Esso that the IMF has recommended that Guyana rewrites its tax laws.¹²
38. HAK would appear to have a conflict of interest between (i) drafting tax laws to increase

⁷ <https://www.huntonak.com/en/about/overview/firm-history.html> In 2018, Hunton & Williams and Andrews Kurth Kenyon merged to become Hunton Andrews Kurth LLP. The combined firm now consists of nearly 1,000 lawyers with offices in 14 US and five international cities.

⁸ Over G\$437,000,000 at the Project rate of 208.1

⁹ <https://www.theguardian.com/business/2020/mar/08/world-bank-accused-over-exxonmobil-plans-to-tap-guyana-oil-rush>

¹⁰ Carbon Footprint Assessment of Proposed Esso Exploration and Production Guyana Ltd Activities in Guyana: Dr Mark Chernaik. The assessment excludes Esso's previous EIAs

¹¹ Liza Phase 1 EIA

¹² <https://www.worldoil.com/news/2018/4/9/exxonmobil-sparks-imf-concern-with-weighty-returns-in-guyana>

tax revenue to Guyana from oil companies and (ii) protecting Esso (a subsidiary of their established client ExxonMobil) from increased taxation.

39. Dr Michael Warner was hired to draft a local content policy for Guyana. Dr Warner was also the person hired and paid by ExxonMobil/Esso to run Esso's Local Content Centre in Guyana. This appears to be a clear conflict of interest.
40. **There should be an independent investigation into whether there has been a breach of regulation 3.17 in relation to the contracts awarded to HAK or Dr Warner.**
41. **As ExxonMobil is a longstanding client of HAK, all legislation produced by HAK should be discarded to avoid any appearance of conflict of interest under the Guyana Project.**
42. **The local content policy produced by Dr Warner should be discarded to avoid any appearance of conflict of interest.**
43. **The Project Team should be asked to provide a full explanation of how they dealt with these apparent conflicts of interest involving HAK and Dr Warner.**
44. **There should be an independent investigation into all other contracts awarded in the Guyana Project in order to identify any other actual or potential conflicts of interest that may have been overlooked or approved by the Project Team.**

Regulation 3.16

45. Regulation 3.16 states:
"The Bank requires that Consultants:
 - a. provide professional, objective and impartial advice;*
 - b. at all times hold the Borrower's interests paramount, without any consideration of future work; and*
 - c. in providing advice they avoid conflicts with other assignments and their own corporate interests."*

Prima facie breach of paragraph a. "provide professional, objective and impartial advice"

46. Paragraph a. indicates that a consultant must give advice that is free from any bias. The appearance of bias would be a *prima facie* breach.
47. HAK's blog of 6th April 2020, "Eroding Investor Protections: Managing CSR and Political Risk in the Sustainable Brave New World"¹³ appears to be pro-investor:
"Protecting investor and lender expectations is particularly important for capital-

¹³ <https://www.huntonnickelreportblog.com/2020/04/eroding-investor-protections-managing-csr-and-political-risk-in-the-sustainable-brave-new-world/#more-2065>

intensive projects with long investment horizons, such as those typical in the extractive industries and large infrastructure projects.”

48. Elsewhere HAK’s website suggests bias towards oil and gas companies¹⁴.
49. **There should be an independent investigation into whether there has been a breach of paragraph a.**
50. **There should be full and public disclosure of**
 - (i) **all legislation drafted by HAK to facilitate oil and gas development under IDA projects; and**
 - (ii) **(ii) HAK’s role in defending/protecting the oil and gas sector against developing countries****before HAK is permitted to bid for future projects in Guyana.**
51. **All legislation drafted by HAK should be discarded to allay suspicions that Guyana’s laws are being altered to favour of the oil and gas industry.**
52. The PAD provides the justification for the Guyana Project but it contains serious errors about Guyana’s laws. The PAD claims *“the Environmental Protection Agency (EPA) is beleaguered by the complex and outdated environmental licensing and permitting process.”* This statement is wrong. Guyana’s environmental law is set out simply and logically, step by step and the process for granting an environmental permit is extremely simple.
53. The PAD claims, *“The World Bank conducted a governance review of Guyana’s O&G sector in April 2017, which concluded that i) the legal and regulatory frameworks in Guyana are underdeveloped and in some cases outdated, requiring update to be in line with international good practice”*.¹⁵ Despite repeated requests, the Project Team have refused to provide a copy of this governance review. It is impossible to see how IDA reached the biased and erroneous conclusions set out in the PAD.
54. Guyana’s EP Act reflects international best practice and was used to inform the drafting of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean¹⁶. The EP Act provides for full public participation including public access to information, public participation in screening projects and in scoping the terms of reference for an environmental impact

¹⁴ For example: defence of multi-media civil and criminal allegations involving virtually every major federal environmental program including claims brought pursuant to the CAA, CERCLA, CWA, EPCRA, SDWA/UIC, RCRA and related state law involving numerous petroleum refineries, terminals, upstream oil and gas exploration & production operations, mining, mineral processing and chemical manufacturing facilities.
<https://www.huntonak.com/en/people/scott-burton.html>

¹⁵ Footnote 16 of the PAD

¹⁶ The Escazu Agreement signed by 22 countries; the author used the EP Act in discussions on the text.

assessment, public rights to submit information and recommendations on the environmental impact assessment and public rights to challenge decisions.

55. The EP Act applies modern legal principles including the precautionary principle, the polluter pays principle, the strict liability principle etc. It gives the EPA power to impose conditions on oil companies to ensure Guyana meets its international obligations.
56. Every consultant will have to work within the erroneous and biased framework set by the PAD. If the errors and bias are replaced by objective statements much of the rationale for the Guyana Project disappears including existing consultancies. The PAD's errors and bias make it difficult, if not impossible, for all consultants including HAK to carry out the assignment in Guyana's best interests.
57. **The governance review should be publicly disclosed.**
58. **All erroneous statements in the PAD should be corrected and all bias removed.**

Prima facie breach of paragraph b. hold the Borrower's interests paramount, without any consideration of future work

59. There appears to be a long-standing relationship between HAK and the WB. According to HAK:
"The London-based journal Legal Week concluded that "[w]hen The World Bank seeks international legal advice for African governments, it most often turns to the US firm "Hunton & Williams." That reputation still stands."¹⁷
60. There is a potential conflict of interest between HAK's obligation to "at all times hold the Borrower's interests paramount, without any consideration of future work" and HAK's apparent desire to be, and be seen to be, the World Bank's preferred choice of law firm.
61. **There should be an immediate and independent investigation into whether there has been a breach of paragraph b.**
62. **All legislation drafted by HAK should be discarded to counter the suspicion that it reflects IDA's ideological stand rather than the political objectives of a democratically elected government of Guyana.**
63. **There should be full and public disclosure of**
 - (i) **HAK's previous work on or in connection with World Bank projects; and**
 - (ii) **their long term relationship with the World Bank****before HAK are permitted to bid for future projects in Guyana.**

¹⁷ <https://www.huntonak.com/en/regions/africa.html>

Appendix 1

Guyana does not have a democratically elected government

- (1) Guyana is a constitutional democracy. The legitimacy of government flows from its ability to command the confidence of the National Assembly. On 21st December 2018 the APNU AFC Coalition Government lost a no-confidence motion in the National Assembly. Article 106(6) of the Constitution of Guyana states:

“The Cabinet including the President shall resign if the Government is defeated by a vote of the majority of all the elected members of the National Assembly on a vote of confidence.”

- (2) The Caribbean Court of Justice held: *“Upon the passage of this motion of no confidence in the Government, the clear provisions of Article 106 immediately became engaged.”*¹⁸
- (3) Therefore from 21st December 2018 Guyana did not have a President or any ministers. **There was no Minister of Finance on 11th April 2019 when Winston Jordan purported to sign the Financing Agreement as the Minister of Finance.**
- (4) The government that remained in place was a ‘caretaker government’ with limited power. The Court of Appeal held:
*“...The government continues in office as a caretaker government or an interim government until the next elections ensue and a President is appointed (or reappointed) depending on the results of that election.”*¹⁹
- (5) The Caribbean Court of Justice stated:
“By convention, the government is expected to behave during this interim period as a caretaker and so restrain the exercise of its legal authority.”
- (6) A ‘caretaker government’ can only deal with matters that are routine, or reversible, or urgent and in the public interest, or non-controversial.
- (7) Guyana’s proposed petroleum development is not routine; it is new. Petroleum development is not reversible. It is not possible to put the petroleum back into the reserve 2 miles below the ocean floor. Developing a petroleum sector is not urgent. It can and should wait for a democratically elected government.
- (8) It is not in the public interest to transform Guyana from one of the world’s few carbon sinks to a carbon emitter. There are solid legal grounds for arguing that petroleum exploration and production is breaching national law, including the Constitution and putting Guyana in breach of its obligations under various treaties. This is contrary to the

¹⁸ Ram et al v Attorney-General et al [2019] CCJ 14 (AJ) [9](f)

¹⁹ Ram et al v Attorney-General et al Guyana Court of Appeal.

public interest.

- (9) Petroleum development in Guyana is not ‘non-controversial’; it is highly controversial. There is on-going litigation²⁰. There appear to be many illegalities including terms that are unsupported by legal authority.²¹ Transparency Institute Guyana Inc. has accused the government of “grand incompetence or grand corruption.”²² Civil society condemned the government for refusing to release the Petroleum Agreement with the off-shore subsidiaries of ExxonMobil, CNOOC Nexen and Hess Corporation.²³ When the agreement was released the IMF, a sister organisation to the World Bank, criticised the government’s handling of petroleum development including the over-generous terms to the 3 subsidiaries.²⁴ The private sector and civil society have repeatedly and consistently criticised the government and government agencies for failing to comply with the laws of Guyana and have pointed out the severe financial²⁵, economic and environmental²⁶ burdens placed on the Guyanese people. There has been serious concern about the threat to Guyana, the Caribbean and the rest of the world from Guyana’s deep water drilling and the dangers of a well-blow out²⁷ or tanker accident²⁸.
- (10) The development of the petroleum sector and the Guyana Project are clearly matters that could not be dealt with by a caretaker government.
- (11) Article 106(7) says that elections must be held within 3 months. The CCJ explained that *“It is this caretaker or interim role that explains the three month deadline, in the first instance, that the Article lays down, in principle, for the holding of the fresh elections.”*
- (12) The deadline for holding elections was extended to 18th September 2019 because of the litigation challenging the no-confidence motion.²⁹ The APNU AFC caretaker government did not hold elections and did not get an extension from the National Assembly.
- (13) **Therefore from midnight on 18th September 2019 the APNU AFC caretaker government ceased to be a caretaker government within Article 106(7) and became an unconstitutional illegitimate *de facto* administration.**

²⁰ Gaskin v Minister of Natural Resources & added defendants/intervenors Esso et al

²¹ <https://www.stabroeknews.com/2020/03/29/opinion/letters/gra-cannot-accept-any-exxon-claim-for-recovery-of-pre-contract-costs-without-solid-legal-authority/>

²² <https://www.stabroeknews.com/2019/06/06/news/guyana/exxonmobil-contract-illegal-irretrievably-flawed-and-is-either-the-result-of-grand-corruption-or-grand-incompetence/>

²³ <https://www.kaieteurnews.com/2017/09/11/govt-s-secrecy-on-oil-contract-creating-dangerous-situation-for-guyana/>

²⁴ <https://www.stabroeknews.com/2017/12/24/news/guyana/oil-agreement-generous-to-exxon-imf-team/>

²⁵ ‘What will oil do for Guyana’ <https://www.youtube.com/watch?v=5OaJzvQjr2U>

²⁶ Oil and the environment https://www.youtube.com/watch?v=o1I9l_uhQi8;

²⁷ E.g. the Macondo well blow out which caused the Deep Water Horizon disaster

²⁸ E.g. the ExxonValdez

²⁹ Ram et Al v AG et Al CCJ [2019] CCJ 14 (AJ) [6]