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Social Justice in Food and Health

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CIVIL SOCIETY POSITION ON THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN GOVERNMENT OF UGANDA AND UGANDA VINCI COFFEE COMPANY (UVCC) LIMITED

INTRODUCTION

Uganda has undertaken various efforts to attract Foreign Direct Investments (FDIs). These include signing of bilateral investment protection and promotion treaties in addition to providing incentives, both fiscal and non-fiscal to investors. Foreign Direct Investment has a number of promises which include inter alia; Technology transfer, industrialization, skills development, job creation among others. However, as a country, we are yet to realize the benefits that accrue from FDI.

On 10th February 2022, the Government of Uganda represented by the Minister of Finance, Planning and Economic Development, Hon. Matia Kasaija signed an investment Agreement with Uganda Vinci Coffee Company Limited (UVCC) represented by Ms. Enrica Pinetti the Board chairperson of the Company. The Agreement is in respect to a project implementation Agreement dated 29th April 2015 Addendum N0.1 thereof dated 21 December 2015 and Addendum No.2 thereto dated 17 October 2017.The Agreement sets out a number of incentives for preferential treatment to the company to set up a coffee processing plant in Namanve.

The coffee industry is extremely important to both the people of Uganda and the Ugandan economy. Coffee is Uganda's second major cash crop and it is a significant earner of foreign exchange for the economy and source livelihood for many Ugandans. Latest data from Uganda Coffee Development Authority (UDCA) indicates that Uganda's Coffee exports for 12 months (February 2021-January 2022) totaled to 6.72 million bags worth US 741.03 million compared to 5.47 million bags worth US$ 511.66 million of the previous year 2020. Besides, between 1.2 and 1.7 million families in Uganda produce coffee.

CHALLENGES FACING THE COFFEE SECTOR IN UGANDA

The coffee sector and the entire agricultural sector face numerous challenges including inter alia low agricultural productivity which contributes to food insecurity and rural poverty. In Uganda less than 4 percent of the national budget is allocated to agriculture (despite the Government's commitment to the Maputo Declaration on Agriculture and Food Security and the 10% national budget allocation to agriculture development).

Additionally, market access for small scale coffee farmers is limited because of global "rules of the game": restrictions, standards and subsidies of wealthy states. With limited access to financial resources, without opportunities for value addition, small scale farmers sell their products at low cost. They live in isolated rural areas, lack negotiation skills and access to information. As a result, middle men make most of the profit in these transactions.

This Position Paper seeks to analyze the above-mentioned Agreement and to provide proposals and recommendations to government on how this Agreement can be reviewed to address the fundamental challenges faced across the coffee sub sector in Uganda.

<table>
<tr><th>CLAUSE</th><th>ISSUE</th><th>RECOMMENDATION</th></tr>
<tr><td>3. Description of the project

3.1.4 Exporting the excess green coffee beans upon satisfaction of the installed capacity of the coffee processing facility at Kampala Industrial and Business Park at Namanve.</td><td>• This clause creates unfair competition between the company and the other local investors as it gives the Vinci company liberty to export the excess green coffee beans coupled with the multiple incentives that are awarded including an advantage of priority supply hence creating an imbalance in competing for similar market with the other exporters.

• The main objective of this Agreement is to set up a processing plant so as to add value and reduce the exportation of raw beans which leaves Uganda trapped at the lower bottom of the value chain since the highest revenue collected from coffee is at the upper levels of the value chain

• With the introduction of the Parish Development Model which aims at increasing the household incomes at the parish levels and maximizing agricultural production, it is highly anticipated that many farmers intend to improve on their production and entering exportation. This Agreement will curtail this opportunity since the farmers will have to satisfy the needs of VINCI fast by virtue of clause 4.2.1.</td><td>Amend the Agreement to remove clause 3.1.4 so as to address the mischief of creating unfair competition with the other coffee value chain actors especially exporters.

In addition, the Vinci coffee company should be limited to their sole objective which is setting up a processing plant for value addition and not engage in exporting the raw beans.</td></tr>
<tr><td>Under clause 3.2.2 Identification of internationally recognized coffee roasting and preparation experts has been done.</td><td>The Agreement refers to internationally recognized experts, it is thus not clear whether the local experts were given priority in this.

It's our humble opinion that, this may curtail opportunity for local experts since the Agreement is giving waivers of employment taxes and social security under clause 4.1.3 (e) hence making employment of foreigners cheaper than Ugandan citizens

In our opinion, the above position offends tax laws on the principle of source rules since under section 17(2) (b) and section 79 of the Income Tax Act cap 340 the gross income of a non-resident person includes only income derived from sources in Uganda.</td><td>We implore the government to amend the Agreement to give priority to the local experts unless we do not have such experts

The tax waivers need be reduced and equally the 10-year period granted for tax waivers is on a high end which solely leaves the tax burden to be felt by Ugandan citizens. It should at least be reduced to a time frame of 3-5 years.</td></tr>
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3.3 It is anticipated that the company will create approximately Two Hundred and Forty-Six (246) jobs for employees and skilled laborers	The country has been struggling with Unemployment Rate in Uganda which increased to 2.44 percent in 2020 from 1.80 percent in 2019. Every coming of an investor should create an opportunity to reduce on this challenge. Whereas the clause indicates the number of jobs for employees, it does not indicate the ratio of employment of Ugandans vs the foreign staff thus leaving a vacuum. Section 12 of the Investment code of 2019 which addresses the qualifications for incentives provides that for an investor to qualify, they should be employing 60% of Ugandan citizens. Therefore, this clause in unaligned with the requirement set out in the Investment code of 2019.	The ratio of the Ugandans to be employed should be clearly stated in the Agreement and aligned with the requirement set out under s12 of the Investment Code Act 2019 since the Agreement is referring to internationally recognized experts.
4.1 Tax 4.1.2 Where no exemption from tax is allowed under the law or the exemption provided is inadequate the company with comprehensive relief from taxes or other impositions, then the GOU undertakes that it will bear the cost of all such taxes.	Government commits to except VINCI company from all taxes including those which are not exempted under the laws of Uganda. The latter connotes that where a tax is not exempt under the laws of Uganda, Government will pay the tax on behalf of the company. This exposes Uganda to a risk of losing revenue so as to pay on behalf of the company. The practices of extreme tax waiver will not only affect the countries struggling economy but also put pressure on the tax payer. Further, Section 12 of the investment code Act provides for the minimum capital investment required for a foreign investor to qualify for incentives. However, the Agreement does not provide for the capital investment amount of investment money in the Agreement, it is unclear how VINCI has qualified for all the incentives provided for under the Act	We recommend that the government amends the Agreement to cater for incentives as per the law and should not commit Ugandans to payment of tax for VINCI business. Further the fact that the GOU makes an undertaking in 4.1.2 to cater for any exemption not provided for in the law just in case it suffices this is to the economic benefit of only VINCI but not Ugandan Citizens. We thus urge GOU to limit all the exemptions it can grant to statutory provisions of tax law other than granting such leeway of loss to the tax payer

4.1.4 The Clause commits government to taking immediate steps to restore the company to the economic position it should have been in but for the change in Law or change in Tax	This clause levies bearing of risk on government and yet throughout the Agreement the government does not have any cost benefit therein. It is thus absurd that despite all the incentives given, government still has to bear cost for the losses incurred by the company. This clause gives the same implication as clause 4.1.2 above The clause also may affect future enactment of laws since the law makers will have to have consideration for such existing Agreements which may impact the government differently if a law is made contrary to the Agreement.	We recommend that the government amends the MOU to withdraws such commit that will impact badly on the economy and the tax payers at large In as much as finance laws are subject to retrospective effect it's our prayer that the same applies appropriately to avoid shifting the burden to tax payers who already created the tax base.
4.2 Coffee supply 4.2.1 GOU undertakes that it will take all reasonable measures to give priority of supply of coffee to the company before registering any contract or acknowledging any arrangement for the export of coffee beans so that the company will have ample supply of coffee to sustain its operation.	This clause is creating monopoly of VINCI to the extent that it is the sole main market before all the other already existing exporters to whom farmers have been supplying coffee beans. It can also be implied to say that VINCI will be procuring direct from the farmers hence curtailing the middle men. Important to note is that the middle men also derive sustenance from this role. This clause thus brings about uncertainty in supply to the other existing exporters which will in turn affect their capacity in exports. Important to note is that the MOU does not create any limit to how much supply VINCI should take in yet it puts a close to supply other exporters unless VINCI is satisfied. The clause also levies restriction on giving contract to people who intend to enter coffee sector and sabotages the already existing contracts since they will not be acknowledged. The clause also limits the farmers from looking for other markets other than from VINCI yet this Agreement is between the government and VINCI and thus cannot bind farmers who are not parties to this Agreement. NB: all the top 13 foreign exporters do not regulate the market but are competing with all the local exporters	The Agreement should be amended to leave determination of supply of market to the farmers. The Agreement in our view should equally set a farm gate price for farm gate value. That is to say, VINCI should be able to competitively look for market like another exporters since it is not only dealing in value addition but also exportation. The GOU should be alive to the Export Led Industrialization or Export Led Growth so as to aim at speeding up the industrialization process of a country by exporting goods for which the nation has a comparative Advantage. Coffee is one of the goods of which a farmer should be given this opportunity just as VINCI has been catered for. The Agreement should have Farmer Inclusion so as they can be privy.

4.2.2 The Company undertakes that it will pay for the priority supply of superior quality 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 Authority for a particular consignment or the prevailing International price for each respective grade of coffee whichever is lower.	This clause when read with clause 4.2.1 suggests that VINCI will have access to the superior quality before all the other exporters. Knowing that there is no limit to what surplus VINCI should obtain, this puts other exporters at the risk of acquiring poor quality. We should also remember that the principles of Business and Human Rights, lays a duty on the business to respect the right of the people. The farmers in this case have right to negotiate the best price for their products therefore the idea of leaving price to be set by VINCI violates this duty. Price Legislation is a principle duty of the state for there is a social contract between the state and its citizens for which this Agreement cannot be a waiver of this theory. Setting price by VINCI will not only put the farmers at the risk of loss but will affect their livelihood since coffee is the source of livelihood to over 12,000 households in the country. It should also be noted that other exporters in the sector do not set price for the farmers but negotiate with the farmers on the best price.	We recommend that the government amend the MOU and leave the right to decide on the price with the farmers and they should be able to sell to the exporter with the best price that suits their products. We implore GOU to take up the role of price legislation and desist from leaving this to Investors in light of Article 79(1) of the Constitution which empowers parliament to make laws for proper governance of this country.
4.3 protection of local coffee processors Government shall use all reasonable endeavors to put in place measures which protect local coffee processors in line with applicable national bilateral regional and international laws.	This clause is vague as it does not state actual protection given to the local farmers. Besides it contradicts clause 4.2 where protection is already given to VINCI thus it is unclear how local processors will be protected. The clause is also vague in the sense that it seems unenforceable i.e. without any mention of the kind of protection intended, the local processors cannot hold the government accountable on anything.	The Agreement should be amended to state clearly the protection given to the local processors to avoid issues of conflict and draw limit between VINCI and Local processors. There is need for Accountability aspect to suffice either by Agreement or Memorandum.

4.4 Electricity supply The company shall be given a subsidy so that the price it pays for electricity at the plant does not exceed USD 5 cents per unit	By September 2021: The price of electricity was 0.189 U.S. Dollar (672.875 UGX) per kWh for households and 0.148 U.S. Dollar (526.900 UGX) for businesses which includes all components of the electricity bill such as the cost of power, distribution and taxes. For comparison, the average price of electricity in the world for that period was 0.137 U.S. Dollar per kWh for households and 0.128 U.S. Dollar for businesses. This proposed 5 cent is thus way lower than what an ordinary Ugandan is paying yet will be consuming less. If the country wants to collect enough revenue then this clause should be rethought so that poor Ugandan does not pay all the price for the investors	It is thus our recommendation that the MOU be amended to show value for money for what VINCI will be consuming i.e. they should pay at least 400.900UGX for the electricity to be consumed.
4.6 water supply	This has MOU does not state the water source. Knowing that industries use a lot of water, its important such water source is gazette for the industry.	The MOU should state where VINCI will obtain its water supply to avoid conflict with the community
8. Exercise of transfer option It's stated that the company may exercise the option to sell and transfer the plant to the GOU or a third party.	This clause does not make it mandatory for the government of Uganda to take over the plant yet thought the Agreement there has been so much burden of payments and risk levied on the government and tax payer's money. It is thus unclear how the government of Uganda is benefiting from this whole Agreement.	The MOU should be amended to make it mandatory for the plant to be sold to the government if VINCI is exercising transfer options such that it acts as future economic benefit in case of loss of the investor.
9. Article 10 provides a clause for amendment	Whereas this Agreement has been entered into force upon signing by the two parties, it provides room for amendment under article 10.	We recommend that article 10 is explored to address and incorporate all the proposals suggested.
9. Absence of a termination clause	The termination clause is fundamental so as not leave any ambiguity in determining the term and obligations set out in the Agreement. Consideration of these termination clause in this Agreement will help Parties know exactly when will get terminated and what events may cause such termination Whereas an Agreement can still be terminated under common law, such termination gives rise to uncertainty and Investor state disputes. It is imperative that carefully drafted termination clauses are included in investment Agreements to give an investment and the state a degree of certainty and to limit the risks of costly litigation in the event of a dispute over whether an investment Agreement can be ended or not	The Agreement should be amended to include a termination clause o as to cater for the ambiguity in determining the terms and obligations set out in this Agreement.

10. The Investment Capital is not indicated in the Agreement	The Uganda Investment code of 2019 requires that a foreign investor qualifies for incentives where the investor makes a capital investment or an equivalent in capital goods worth at least 500,000 USD as way of capital invested. The Agreement does not indicate the amount of capital invested thus leaving it silent and ambiguous to meet that condition under the investment code	The Agreement should be amended to expressly state the capital amount of investment

We further propose immediate, medium- and long-term recommendation to be considered such that investment Agreements are concluded in adherence to the laws and practices that are favorable for everyone.

Immediate Proposal:

- We propose that the Agreement is amended subsequent to article 10 which provides room for amendment to incorporate and remove the controversial clauses that have been identified in this analysis.

- ## Medium -Term Proposals:

  1. Review the Investment Code Act 2019

In order to ensure that investments deliver on their promises, including the realization of the country's Vision 2040 and the National Development Plan iii, a pro development Investment Code is necessary. It should ensure that investments established in Uganda work for the people by fostering inclusive and sustainable development through enhanced forward and backward linkages, employment creation, skills and technological transfer; and specifically focus on strengthening and growing a competitive domestic private sector. The following should be incorporated

a. Introduce a schedule in the Investment code with activities that should be ring fenced for domestic investors. This will help to provide clarity on the sectors that are to be ring fenced for domestic enterprise development. These activities include;

1. Wholesale and retail commerce
2. Personal Service Sector
3. Public Relations business
4. Car hire services and operation of taxis/ public transport services
5. Bakeries, confectionaries and food processing for the Ugandan market only
6. Postal services
7. Crop production
8. Processing of forest products
9. Fish production
10. Paper production
11. Meat and Poultry processing

1. Governance of Tax Incentives.

b. There is need to undertake investment audits and carry out appraisals. To award the incentives, the foreign investment should have been in operation for a period of at least five years while the domestic investor should have been in operation for a period of at least three years and the foreign investment should be at least a medium or a large enterprise, employing nationals especially women in at least 50% of senior level and 70% middle level management. This should be done to ensure that for an investment to be awarded tax incentives, it fully qualifies for an incentive.

c. The tax incentives regime should be strengthened in line with the commitments made under the tax expenditure governance framework to ensure that incentives are awarded to address a problem and a critical analysis is conducted prior. This will help to promote transparency in awarding tax incentives.

1. Trade Negotiations

There are a number of ongoing trade negotiations in which the Government is involved. These include inter alia the African Continental Free Trade Area (AfCFTA); the EAC Common External Tariff; the EAC COMESA-SADC Tripartite FTA; and World Trade Organization (WTO) negotiations. There are also other Agreements which Government has concluded i.e. African Growth and Opportunity Act (AGOA); Everything But Arms (EBA) among others.

There is need for adequate funding for these negotiations in order for government to negotiate independent positions that protect and promote our interests/positions, policy space and sovereignty. This is critical in supporting a conducive policy environment for industrialization and Trade and also to ensure that we benefit from the negotiated markets.

There has been limited utilization of the acquired markets. There has also been limited involvement of stakeholders i.e. Private Sector, Civil Society Organizations, Policy Makers in these negotiations. This partly explains the limited utilization of the negotiated markets.

Therefore, we recommend that the National Trade Sector Advisory Committee which was formerly Inter-Institutional Trade Committee (IITC), an Inter-sectoral Committee with a mandate to generate Uganda's Negotiating Positions, should be adequately funded to ensure adequate consultations on the ongoing negotiations for example the 12th Ministerial Conference at the WTO which will take place from 12th – 15th June 2022.

Conclusion

For Uganda to reap the benefits of investments, whether domestic or foreign, the Investment Code Act 2019 as well as the various investment Agreements must be reviewed to include such key provisions like human rights, trade, taxation, intellectual property, competition, labour market regulation, environmental policies land rights. This will ensure the balancing of rights and obligations between the investors on the one hand and the government, citizens and environment on the other hand.

For more information, please contact:

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