



VALE COLUMBIA CENTER
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HUMBOLDT-VIADRINA
School of Governance

Second Workshop on Contract Negotiation Support for Developing Host Countries

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Workshop Report

Organized by

**Vale Columbia Center on Sustainable International Investment
and
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Background

For many developing countries, large scale projects carried out by foreign investors, for example, in extractive industries or infrastructure, are the most important means of generating funds to drive economic growth, development and prosperity. While these deals are of critical importance, many developing host country governments do not have in place strong regulatory frameworks, a strategic vision or the necessary resources to negotiate the deals, meaning that they are losing the opportunity to maximize the benefits of these major projects for their country. Poorly conceived and negotiated deals for such projects, which often last for decades and sometimes sit outside the legislative framework the country puts in place, not only prevent a country from enjoying the full long term benefits of its resources, but help to entrench poverty, corruption and even conflicts, particularly when governance systems are inadequate. Similarly, from the company's perspective, bad deals can lead to adverse business outcomes, such as reduced security of titles or concessions, increased prospects for disrupted operations from civil protests and greater risks of revisions of tax and other conditions.

In light of this, the Vale Columbia Center on Sustainable International Investment and the HUMBOLDT-VIADRINA School of Governance initiated a process to see whether and, if so, how the availability of expert support in relation to these large scale projects could usefully be expanded globally. This [workshop](#), held at Columbia University on July 18-19, 2012, was the second in the process and brought together 61 participants involved in or with knowledge of developing country negotiations, including government officials, investors, lawyers, representatives of existing initiatives, members of civil society, donors, multilateral organizations and academics.

A [background paper](#) was prepared which outlined, for the purpose of guiding the discussions, the nature and scope of developing countries' needs for support, the existing sources of support, the missing elements and the challenges to address to fully meet these needs, and some possible options, including tools and innovative resources, for making comprehensive support available.

The discussions at the workshop followed the structure of the background paper and participants dealt with the questions which arose out of it. This workshop report should be read in conjunction with the background paper, which outlines the matters that were adopted in and provoked the discussions.

Session 1: What support is needed, and what is sought?

The discussion made it clear that there is a significant need and demand for comprehensive support for host country governments in relation to complex projects, during each of the phases of negotiation from formulating strategic policies and regulatory frameworks, to preparing for and carrying out negotiations in relation to particular projects, to monitoring and enforcing contracts (outlined in detail in the background paper). This demand for support is increasing and urgent as more countries make commercially viable discoveries.

It was emphasized that it is important to support governments in creating a strong legislative framework, so as to leave less room for discretionary elements in contracts and decrease the scope of negotiations. This may be particularly true in the hydrocarbon sector, where experts suggested that most elements of the deal could be in the legislation. Government representatives from different countries indicated that needs may differ

among countries – some see support during contract negotiations as a priority while others need assistance in earlier phases such as developing a regulatory framework.

In addition, participants discussed the importance for governments to have in place a national strategic vision before negotiating large contracts, in which to frame the terms of these projects in a broader development context. Advisors could then seek to ensure that negotiations for particular deals addressed the national plans and priorities. The need for integrated teams of experts was also highlighted, and these teams should include experts with industry experience. Participants, particularly the recipients of support, stressed the need for rapid response and deployment of experts in response to requests for support. Finally, it was mentioned that developing host countries need “an honest ear” to which they can turn in order to receive advice in the face of the intense pressure to conclude a deal.

Investors agreed that from their perspective, increased support to host governments would be desirable. The investors seek stronger negotiating partners so as to facilitate the negotiation process, legitimize their deals and ensure that contracts are more robust.

Participants agreed that there is a need to increase the sharing of information and experiences, as well as coordination, between host country governments.

Finally, it was discussed that not all governments are equally receptive to negotiation support and that governance and politics play a role in ensuring good outcomes. A number of barriers, including corruption, lack of coordination, lack of resources, distrust, internal discord and other factors could make some governments reject, or not seek, external support. Politicians are often under pressure to achieve results while in office for short periods of time. It was therefore noted that support could also usefully be provided to the sources of checks and balances - to strengthen parliament and civil society, in order for them to hold government accountable for negotiated deals.

Session 2: What support is available?

Representatives from many of the initiatives listed in Part II of the background paper, as well as some of those listed in Annex II, discussed the strengths and limitations of those initiatives. Participants suggested that the matrix contained in Table II of the report could be enhanced so as to be a useful tool in itself, providing more information to governments about potentially available sources of support. The organizers will seek support to develop that resource.

It was observed generally that while some of the initiatives have partnered on various occasions, increased coordination among the existing initiatives would be beneficial. Participants commented that the UNDP’s “Regional Project for Capacity Development for Negotiation and Regulation of Investment Contracts,” which was based in Dakar, Senegal, played an effective coordination role while it was operational. The Project was able to bring in expertise from a number of initiatives in order to provide an integrated team to assist with countries’ needs related to negotiations in different phases, including the pre-negotiation process, support for negotiations and capacity building. The Project was terminated due to a lack of funding and institutional support. Participants also recalled the support for contract negotiations which was perceived to have been very effectively provided by the Commonwealth Secretariat and the UNCTC. Both coordinated high level, international advisers who were available to support governments in their contract negotiations. It was agreed that it is key to obtain the trust of the government, in order to determine the government’s need and deliver the right type of support. Regional presence may be important in this regard.

Session 3: What support is missing: gap analysis?

The gaps identified in the background paper were reiterated during Session III.

The discussions highlighted the important contributions that individual initiatives have made so far to deal with this problematique. At the same time, the limitations of most of these initiatives to provide a rapid response to requests for assistance was pointed out, as was the absence of comprehensive support. Due to procurement or approval processes, a number of the available sources of support were said to be slow to provide assistance after a request is made. In addition, the gap in the availability of long term support was also raised.

Once again, the lack of platforms and forums for the sharing of information and experience was discussed. In addition, the gap in availability of experts with industry knowledge was emphasized. It was observed that most experienced experts had gained their competence in the service of industry itself; therefore the confidence in their independence and integrity, and hence their partisanship with the interest of host countries was limited. Nevertheless, participants observed that the presence of someone with knowledge of the industry (and, ideally, of the specific company involved in the negotiations) increases confidence in the team of negotiators and strengthens their ability to analyze and question the positions put forward by the company. In this regard, increased access to data and comparative examples would assist in removing the information asymmetry between government and investor.

Finally, some participants noted that there is a lack of support in relation to strengthening the regulatory framework (legislation, regulations) and highlighted the desirability of having in place a strong framework so as to limit the scope of negotiations.

Session 4: How to ensure comprehensive support for the negotiation of contracts?

A number of suggestions were made for potential mechanisms, tools and innovative solutions that could expand the availability of comprehensive support to enable developing country governments to secure the best possible deals. Potential beneficiaries, in particular, agreed that it would be useful to increase coordination of existing initiatives, to provide additional tools and resources that developing country governments could draw on, and to create a rapid response capacity.

The proposals made were as follows.

1. Updated and expanded matrix of available initiatives providing support (based on Table II of the background paper)

This expanded matrix could include additional information such as contact information, average response time for a request, and other useful indicators. Governments could have the matrix available as a resource when considering reaching out for support. This tool may also help facilitate coordination among existing initiatives.

2. 'Roadmap' of the negotiation process and phases

This 'roadmap' could help countries visualize the stages of preparing for, negotiating and monitoring complex contracts, indicating key considerations to be made at each stage, the types of expertise that might be necessary, as well as the available support at each stage.

3. Online forum for discussion and sharing of information

An online forum could enable information-sharing and idea-exchange among governments, initiatives and other key stakeholders. This forum could be used to aggregate and disseminate resources and tools, and to solicit and exchange ideas and information.

4. Overarching initiative to field requests, coordinate existing initiatives, monitor support services and fill gaps

An overarching initiative could:

- a) connect government requests for support (for all phases of the process, including in relation to the regulatory framework) with the relevant initiative(s) that provide the type of support needed;
- b) in response to any particular request, supplement the existing initiatives where there are important gaps (for instance, calling on a network of experts when the type of support needed is not available);
- c) monitor and evaluate the successes and gaps in terms of service delivery for 6-12 months, noting where there were lags in response time, capacity or funding constraints of existing initiatives, gaps in expertise, etc;
- d) build a global network among regional support facilities and initiatives to enable the development of resources, tools, databanks, shared resources, and mutual learning;
- e) facilitate peer to peer exchange and knowledge sharing among governments seeking to negotiate good deals on pitfalls to avoid and ways to ensure good outcomes, for example by convening forums (regional and online) among stakeholders from different countries; and
- f) support the governments and initiatives in creating a coherent policy framework for resource-based development,

among other possibilities.

5. A pilot country to document the experience in seeking support

It was suggested that a pilot country could be selected to document in more depth the demand and availability of support at all stages in the process of preparing for and concluding complex deals, including with respect to the development of a strategic vision in which to frame the projects in the broader development agenda. The country's needs could be mapped and then existing initiatives could be sought to provide support in response to those needs. The gaps in available support, the response times and the outcomes could be monitored.

The issue of institutional set up and governance of any new initiative was discussed at a preliminary level. For example, there was suggestion that it is important for such an initiative to be independent, rather than tied to any single multilateral organization so that it is not limited by institutional pressures or bureaucracy. Participants discussed how a multi-stakeholder structure – such as the multi-stakeholder governance of EITI

-- could further limit undue influence (perceived or real) and increase the legitimacy of any new initiative. In addition, it was discussed that a regional presence was important.

The question of funding was also raised at a preliminary level. The feasibility of mobilizing funding from the World Bank or the Regional Development Banks (like the African Legal Support Facility) and from donors would have to be explored. While the reluctance of the World Bank to fund actual negotiations was recognized, the issue of raising funds through trust funds or otherwise – such as is the case of EI TAF – could possibly be reopened, if the funding was channeled through an independent, multi-stakeholder controlled facility.

There was discussion about whether companies themselves would be willing to fund support for governments for their negotiations and, if so, how those funds could be managed. It appeared that there was a willingness on the part of some companies to fund support for governments, and this has been done on occasion on an ad hoc basis; in one country, the creation of a fund by a number of companies to support a government's review and renegotiations of a number of contracts is being explored more formally. There were concerns, however, over how such funds would be managed, in order to avoid misuse of the funds and to avoid the perception of corruption or bias. It was also noted that such a fund might only be possible on a country-specific basis where companies have commercial interests, meaning that such a fund may not work at an overarching level.

It was agreed that a further workshop, likely to be held in early 2013, would be convened to take forward these discussions. The discussions at the this next workshop will focus on proposals, for a way forward, outlined in a preparatory paper and taking into account the suggestions made at the New York workshop. The issues of institutional set-up, governance and funding will be explored in more detail at that workshop, in light of the proposals.