



Negotiation Support for Developing Host Countries

- Meeting of the Steering Committee -

**16-17 January 2013
HUMBOLDT-VIADRINA School of Governance
Berlin, Germany**

Workshop Report

Organized by

**HUMBOLDT-VIADRINA School of Governance
and
Vale Columbia Center on Sustainable International Investment**

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1. Overview

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. In 2011, the HUMBOLDT-VIADRINA School of Governance and the Vale Columbia Center on Sustainable International Investment (VCC) initiated a process aimed at identifying the availability of expert support for developing countries in relation to large scale investment projects in order to evaluate whether and, if so, how it could usefully be expanded.¹ During two workshops in Berlin (October 2011) and New York (July 2012), broad agreement was reached that there remained important gaps² when it comes to strengthening the negotiation capacity of especially least developed host country governments when they negotiate large-scale complex projects with foreign investors.

This Steering Committee Workshop, held at the HUMBOLDT-VIADRINA School of Governance from January 16-17, 2013, brought together 19 participants, comprising members of the initiative's Steering Committee, observers, and donors. A list of participants can be found in Annex I of this report. The workshop sessions provided an update of current developments and remaining gaps in availability of negotiation support for developing countries, and then outlined options for how those remaining gaps might be filled.

2. Update on demands for and gaps in negotiation support

2.1 African Legal Support Facility (ALSF) – *Amir Shaikh*, Legal Counsel, ALSF

The ALSF activities have increased substantially since a substantive director was appointed in late 2011. The ALSF currently has funding for 2013 to cover its current budget. A relaunch of the facility's lawyer roster is planned. Currently 15 out of 19 operations are in advisory services or negotiation support among which 3 or 4 are in extractives. The Facility receives about one support request per week mainly concerning North-South investment as well as regular requests for targeted trainings. The operational preference and main goal of ALSF remains filling the legal gaps concerning negotiation support.

¹ For an extensive discussion of the issues involved in this challenge, see the Background Report for Second Workshop on Contract Negotiation Support for Developing Host Countries, July 2012, available at http://www.vcc.columbia.edu/files/vale/content/Background_Paper_for_July_18-19_Negotiation_Assistance_Workshop.pdf (accessed January 9, 2013).

² For a description of existing initiatives providing negotiation support, see Table 2 and Annex 2 of the above referenced Background Report.

The facility faces the following challenges: Moving more lawyers into the facility creates problems with donors as its administrative overhead expands (currently about 16 percent). It is difficult to measure and demonstrate ALSF's actual impact. It remains a challenge to identify the relevant contact person for contract negotiations within national governments with the legal and political support to speak on behalf of the government. This is further complicated by donor competition. Good lawyers cannot substitute functioning governance structures. The facility would need more funding for transaction advisers that become involved in the negotiation process before lawyers do. It remains a further goal to reduce the time between a request for support and its delivery to six weeks (currently it often takes months). One of the main activities of the Facility is to assist the governments in determining a common negotiating position which allows them to maximize benefits from the Facility.

2.2 World Bank: Extractive Industries Technical Advisory Facility (EI-TAF) – Christopher Sheldon, Lead Mining Specialist, World Bank

World Bank EI-TAF may support negotiations through recipient executed grants which governments may use to hire negotiation advisors. The Bank provides a no objection role in the procurement process for the selection of the advisors. However, recipient executed grants may be difficult for weak states as they have to comply with the Bank's procurement guidelines. The Bank does not finance negotiation support directly from its own funds or Bank executed grant funds. Grants typically have a size between 100,000 and one million US Dollars; the preparation of grants usually takes a couple of months. EI-TAF could possibly fund a third entity that might provide technical assistance in procuring negotiation assistance, although this has never been done so far. In January 2013, EI-TAF has provided transaction support in six or seven cases.

2.3 New World Bank Trust Fund for the legal and local development aspects and transparency of extractive industry development³ (World Bank Trust Fund) – Christopher Sheldon, Lead Mining Specialist, World Bank

The new World Bank Africa Extractive Industries Trust Fund for was launched in October 2012 under the leadership of Mr. *Makhtar Diop*, World Bank Vice President for Africa. France has provided 10 million US Dollar support and the World Bank is currently actively pursuing other donors. The envisaged size of the fund is 50 million US Dollars. The new fund has a regional focus on Africa and is meant to complement EI-TAF's global approach. Legal constraints of the World Bank concerning Bank executed financing of contract negotiation support remain (see under part 2.2). The thematic focus of the new Trust Fund will be broader than EI-TAF: “1. Legal advice to secure improved contractual terms from investments in extractive industries; 2. Technical assistance to address environmental risks; 3. Technical assistance to address social risks and 4. Advice on policies for developing backward and

³ See the World Bank Press release on the topic “World Bank Launches New Fund to Help African Countries Negotiate Best-Possible Deals for their Oil, Gas, and Minerals, October 5, 2012, available under <http://www.worldbank.org/en/news/2012/10/05/world-bank-launches-fund-african-countries-negotiate-deals-for-oil-gas-minerals> (accessed January 22, 2013).

forward linkages for extractive industries”.⁴ Both EI-TAF and the World Bank Trust Fund are focused on extractive industries including infrastructure related to extractive industries, usually defined as oil, gas and mining.

2.4 African Minerals Development Centre (AMDC) – Andrew Edge, Head, Pretoria Regional Office, Australian Aid

The AMDC is a joint initiative of the African Union Commission, United Nations Economic Commission for Africa (UNECA) and African Development Bank. The Centre will be hosted by UNECA and will be based in Addis Ababa, Ethiopia. AusAID (A\$5 million over two years) and CIDA (C\$15m over 5 years) have committed funding for the Centre. Discussions are ongoing with a number of other development agencies (DfID, World Bank, etc.) for either direct or in-kind support (e.g. aligning activities with or coordinating activities through the AMDC). According to AMD’s business plan “the Vision of the AMDC is to become the facilitator of choice to enable AU Member States realize the Africa Mining Vision”⁵ – the Centre could play an important coordination and facilitation role on negotiations support for AU Member States.

2.5 Discussion of gaps in negotiation support in light of recent developments

In light of the updates on current institutional developments regarding the ALSF, the World Bank and the AMDC, the following gaps regarding negotiation support were discussed:

- It was underlined that the speedy delivery of negotiation support remains a challenge for both the ALSF and the World Bank.
- It was further noted that only EI-TAF covers a global level while ALSF, the new World Bank Trust Fund and the AMDC focus solely on the African continent.
- Similarly, three of the organisations are focused on extractive industries, related infrastructure investments or mining. Only ALSF covers all major investment contracts.
- Legal support remains prominent among the support provided. EI-TAF might potentially fund technical assistance. The new World Bank Trust Fund has the explicit mandate to address the economic and social impacts of investments in extractive industries but is not operational yet.
- Host governments do not always know where to go for support.
- Coordination and collaboration among initiatives is slowly starting, but for the most part, there remains little coordination.
- The issue of trust was emphasized, which it was argued requires strong buy-in from Africans to provide solutions for Africa.

⁴ See Concept Note of the proposed fund from October 5, 2012, available under http://siteresources.worldbank.org/WBEUROPEEXTN/Resources/268436-1322648428296/8288771-1326107592690/8357099-1349433248176/Concept_Note_Trust_Fund_Proposal.pdf (accessed January 22, 2013).

⁵ See Business Plan for the African Minerals Development Centre, p. 5, available under <http://www.au.int/ar/sites/default/files/AMDC%20Business%20Plan%20EDITED%20Final%2017%20Sep%202012.pdf> (accessed January 22, 2013).

3. Defining the scope and objective of the new initiative

During the second half of the Steering Committee Workshop, the scope and objective of a potential new effort or facility aimed at filling gaps regarding negotiation support were discussed in light of the recent institutional developments outlined above.

3.1 Thematic focus of support: Extractive industries or all major negotiations?

The advantages and disadvantages of a more generic or issue-specific focus on extractive industries by a potential new facility or organisation were debated. On the one hand, while certain skills might be transferrable from industry to industry, justifying coverage of all sectors, it might be difficult to attract support from organizations and donors focused on one particular sector. It might also be easier or more effective to collect and deliver expertise with regard to specific sectors. On the other hand, as extractive industries receive a considerable amount of support already, it might be preferable to target all large-scale investment contracts. The focus of a new initiative would also depend on the nature of support (capacity development; concrete negotiation assistance, etc.). Some of the Steering Committee members suggested focusing on all complex commercial contracts. A potential new initiative's Steering Committee or Board could then provide guidance on the question of which contracts to prioritize. Other Steering Committee members supported starting with oil, mining and gas first. *No conclusion has so far been reached on this question.*

3.2 Nature of support: Contract negotiations or other aspects of legal and policy framework?

The participants identified gaps in support for pre-negotiation phases (the development of a policy framework, for instance) and post-negotiation phases (monitoring and implementation). The Natural Resource Charter was discussed as a reference framework for the various phases of negotiations. *It was agreed that efforts should be directed at an overall coherent policy framework while the decision on the specific tasks of a potential new initiative was postponed* (see part 3.4).

3.3 Geographic focus: Regional or global coverage?

It was briefly discussed whether a global or regional approach would be more suitable for the continuation of efforts. While the global relevance of the topic was acknowledged, the specific regional environments and challenges were underlined as well. *Suggestions were made to start with a pilot region and then gradually expand. No conclusion has so far been reached on this question.*

3.4 Institutional set-up and governance structure

Even though the workshop confirmed the high interest of the SC members in the provision of contract negotiation support for developing host countries, it also showed that opinions differed among the SC members regarding

- a) the support activities that should be provided by such an initiative, as well as

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- b) the organizational set-up of a potential new institution delivering this support (including whether any new institution is needed).

Various participants declared that a more thorough analysis and definition of the activities that would be provided by such an entity, is needed. Only when the scope of activities is defined in more concrete terms, the Steering Committee will be in a position to discuss detailed options for the organizational set-up. ***The decision about the organizational set-up for a new initiative was thus postponed.***

Furthermore, different arguments concerning civil society involvement in a potential multi-stakeholder governance structure were exchanged in light of the specific proposal about a Negotiations Support Facility for Host Developing Countries. It was generally acknowledged that civil society involvement would be important, especially since civil society is not involved in the institutions mentioned in part 2 of this report. Integrating international NGOs has the benefit of having powerful and established actors involved. Local NGOs are often perceived as government adversaries. Yet the participation of civil society organisations on the ground would increase the legitimacy of any potential endeavour. ***Again, the question of civil society involvement would depend on the type of institution to be developed.***

4. Conclusion and way forward

The meeting concluded with the identification of several tasks that will be addressed in the upcoming months by the Negotiation Support Initiative Team of HUMBOLDT-VIADRINA School of Governance and Vale Columbia Center on Sustainable International Investment (depending on funds available).

4.1 Extended gap analysis of organizations providing support

In preparation for the second Workshop (held in New York, 18-19 July, 2012), a Background Paper was prepared that describes the nature and scope of developing countries' needs for support (Section I); the existing sources of support (Section II); the missing elements and challenges to fully meet these needs (Section III); and some possible options for delivering additional support (Section IV). Table 2 and Annex II of this background paper list various organizations providing support with descriptive information regarding their support to developing countries.

In order to provide a more solid basis for the discussions of what kind of support activities are needed and in light of current developments (e.g. the new World Bank Africa Trust Fund and the set-up of the AMDC), it is proposed to conduct a more rigorous analysis of the most important organizations delivering negotiation support (maybe 15-20 organizations). Specifically, it is suggested that the matrix of current initiatives be updated and expanded to include additional criteria. This was agreed as a follow-up step and will therefore be undertaken jointly by VCC and HUMBOLDT-VIADRINA.

4.2 Development of information-sharing and coordination mechanism

The members of the Steering Committee discussed the desirability of a centralized portal for negotiation assistance as well as a mechanism for peer-to-peer sharing of information and experiences. Such a portal would not preclude the subsequent creation of a new facility; to the contrary, a collection of existing resources and tools and a mechanism to coordinate with other initiatives would support both existing and new initiatives. The outcome of the initial discussions of this task will be presented as part of the preparatory documents to the next workshop.

4.3 Possible support themes involving a new negotiation support initiative

Some members of the SC supported the creation of a new Negotiations Support Facility for Host Developing Countries, while others felt that it was premature to create a new initiative and that existing initiatives (including the VCC and HUMBOLDT-VIADRINA) could undertake some activities to support and strengthen existing sources of support.

The discussion recognized two possible support themes in order to fill gaps in contract preparation, negotiation and monitoring support: (a) a Support Centre and (b) a Rapid Advisory Unit (for more information, please refer to Annex I).

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A background paper should be established which addresses these support themes and analyses various aspects (including practical pro's and con's).

4.4 Third NSI Workshop

It was offered by *Natty Davis*, Chair of the National Investment Commission of Liberia, and accepted by the Steering Committee members, to host the third workshop of the Negotiation Support Initiative in Liberia in summer 2013. Subject to fundraising, it would provide an opportunity to a) discuss a more detailed proposal outlining the structure and tasks of a potential new initiative in light of the more extensive preparatory work and b) facilitate the exchange of information between different donors, service providers and governments as well as companies concerned, i.e. serve as a forum for stakeholders involved in large-scale negotiations. In that sense, it could assist recipient and future recipient countries in providing constructive recommendations to existing support providers to better meet the country needs. The meeting would aim to gather a larger circle of about 60 or 70 people.

5. Action items

ID	Description	Owner	Timeline
1	Approve next steps as outlined in this proposal	NSI Steering Committee	End of February 2013
2	Extend Table 2 and Annex 2 – see above under 4.1	VCC and HUMBOLDT-VIADRINA	End of June 2013
3	Assemble a working group to begin collecting existing resources and tools and conceptualizing an eventual Portal – see above under 4.2	VCC	Ongoing from February 2013
4	Provide background paper on 2 support themes – as shown above under 4.3 and Annex I of this report	HUMBOLDT-VIADRINA	End of June 2013

February 20, 2013

Annex I: Possible scenarios for a negotiation support initiative

The discussions during the NSI Steering Committee workshop in Berlin outlined two distinctive *support themes*, which require a more detailed analysis of the activities and the organizational set-ups suitable to address them. These two support themes are

- a) Support Centre
- b) Rapid Advisory Unit

It is recognized that the solution may be a combination of various support themes. However, in order to advance the discussion on activities and organizational set-ups, it is suggested to deliver a comprehensive background paper on these support themes. The background paper would provide information on: Major support functions covered; current weaknesses addressed; organizational set-up options; cost estimates; implementation timeframes; and other considerations for each of the three support themes.

a) Support Centre

The second support theme would address similar needs as the Information-sharing and coordination mechanism (described above in 4.2). In contrast to a Portal which would serve as an information platform, however, the Support Centre would offer active *interaction* between a support requester and the Centre.⁶ Accordingly, the main task of such a centre would be the facilitation of negotiation support through the provision of fast and free expert advice (e.g. through a hotline). Such a centre would act as an *information broker*, but would not become involved in the actual negotiation process. Borrowing from a classical set-up of a customer call centre, a contract negotiation support centre could follow a three-level procedure:

- **Level 1:** A stakeholder (e.g. government official in preparation for a contract negotiation) calls or writes to the Negotiation Support Centre with a question concerning upcoming and on-going contract negotiations or contract monitoring. A small staff unit of junior experts equipped with an up-to-date database on available contract negotiation support as well as an overview about contemporary research seeks to answer to the query in a defined time span. If an issue cannot be solved by the Level 1 staff, it will be transferred to Level 2.
- **Level 2:** A senior expert from the Centre seeks to find a solution/answer for the query. If the issue is still not solved and/or ongoing support will be needed, the expert will identify and recommend the most suitable organization delivering negotiation support and connect the requester with the organization.

⁶ For example, like the U4 Anti-Corruption Resource Centre which provides an “expert helpdesk” where inquiries about corruption issues are received and responded to within ten working days or, if it is urgent, 48 hours. The responses, so called “expert answers” take the form of short study papers of 5-6 pages and are publicly available. See <http://www.u4.no/helpdesk/> (accessed January 29, 2013).

- **Level 3:** This level is not covered by the support centre but by the organization which takes over the requests. Nevertheless, the support centre will monitor the on-going process with regard to its effectiveness and efficiency.

b) Rapid Advisory Unit

The third support theme seeks to address the weakness that existing organizations take too much time to respond to inquiries regarding contract negotiation support. A Rapid Advisory Unit for contract negotiation would step in when governments need timely and affordable advice which other organizations cannot provide fast enough. Thus, the Rapid Advisory Unit would actively participate in negotiations (all phases).

Obviously, each support theme requires different organizational set-ups, budgets, implementation timeframes etc. For example, establishing a Rapid Response Unit would need to address the risk of legal liabilities.

Furthermore, each of the organizational set-ups could additionally pursue the following tasks: Creating an inter-institutional network connecting providers and users of negotiation support and supporting them with information about institutional developments concerning negotiation support; organizing conferences/fora where stakeholders can exchange experiences and expertise.

Annex II: List of Workshop Participants

Name	Country/ Organisation	Position	Contact Information
Steering Committee⁷			
Bell, Joe	International Senior Lawyers Project	Founding Board Member, International Senior Lawyers Project	joseph.bell@hoganlovells.com
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⁷ The following members of the Steering Committee were not able to attend the workshop: James Bond, Kalidou Gadio, Mark Lynam, Herbet M' Cleod, and Antonio Pedro.

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