



VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY



HUMBOLDT-VIADRINA
School of Governance

Second Workshop on Contract Negotiation Support for Developing Host Countries

**18-19 July 2012
Columbia University
New York**

PROGRAM

Organized by

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

With support from:



About us:

The **Vale Columbia Center on Sustainable International Investment (VCC)** is a leading applied research center and forum for the study, practice and discussion of sustainable international investment. The VCC focuses on analyzing important topical policy-oriented issues and constructing and implementing an investment framework that promotes sustainable development and the mutual trust needed for long-term investments that can be practically adopted by governments, companies and civil society. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. The VCC regularly collaborates with other Earth Institute centers and faculty, as well as institutions worldwide, integrating our expertise in law, economics and investment with diverse fields of sustainable development.

www.vcc.columbia.edu

The **HUMBOLDT-VIADRINA School of Governance** in Berlin was founded in 2009 by the Humboldt-Universität zu Berlin and the European University Viadrina in Frankfurt (Oder) to bring together the public and private sectors, civil society, academia, and the media. Its aim is to find practical solutions for social challenges and to contribute to sustainable democratic politics by building political consensus through multi-stakeholder cooperation. The School has a special character: it seeks to be an academically respected institution, as well as an active civil society organization that encourages public debates and long-term policy projects. www.humboldt-viadrina.org

Workshop sponsors:

AngloGold Ashanti (AGA) is the world's third largest, and Africa's largest, gold mining company with 20 operations on four continents. AGA is committed to pioneering new sustainability approaches for Africa's development in partnership with communities, governments, civil society and other stakeholders as we live our values of respecting the environment and ensuring that communities are better off for us having been there. www.anglogoldashanti.com

The objective of the **EI-TAF**—a multi-donor trust fund administered by the World Bank's Sustainable Energy, Oil, Gas and Mining Unit (SEGOM)—is to assist resource-rich, developing countries to correctly structure extractive industry transactions and related sector policies from the outset, thus reducing the risk of costly or politically difficult remediation at a later stage. The EI-TAF facilitates rapid-response advisory services and capacity building for extractive industry resource policy frameworks and transactions. EI-TAF also supports the production and dissemination of global knowledge products on extractive industry sector issues, specifically through the development of the *EI Source Book* (www.eisourcebook.com).

The **African Development Bank Group's** mission is to help reduce poverty, improve living conditions for Africans and mobilize resources for the continent's economic and social development. <http://www.afdb.org/en/>

Background

*“The more an agreement is perceived as fair by both parties—and disinterested third parties—the more likely it is to endure and weather the ups and downs of the future [...] Any exploitation of highly superior bargaining power at a point in time is likely to lead to a hostile reaction when this superiority is waning.”*¹

At some point, nearly every developing country negotiates (or re-negotiates) complex contracts for large scale projects, for example, for extractive industries or infrastructure projects. Such contracts are, for many countries, the most important means of generating funds to drive economic growth, development and prosperity and in many cases the contracts last for decades. Poorly conceived and negotiated contracts 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, poorly negotiated contracts are a recipe for 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.

While the terms of these contracts are of critical importance, many developing host country governments do not have the necessary resources to negotiate them, while companies typically do. This means that governments are losing the opportunity to maximize the benefits of these major projects, and the companies are negotiating unstable and risky contracts. Contracts that are fair, transparent and responsive to changing circumstances are more likely to be stable in the long term and less likely to lead to disputes. It is therefore in the interests of both governments and investors/contractors that both sides in complex contract negotiations have sufficient resources to negotiate the best possible outcomes.

In light of this, the VCC and the HUMBOLDT-VIADRINA School of Governance initiated a process to see whether and, if so, how the availability of expert support for these complex negotiations could usefully be expanded globally. An initial workshop was convened in Berlin in October 2011 to begin to explore this question. At that workshop, there was a clear consensus among the participants (which included representatives from developing countries, from the existing initiatives, from the private sector, from law firms, and others) about the need for contract negotiation support (CNS) for developing countries in their contract negotiations.

The objective of this workshop is therefore to undertake a gap analysis between the existing sources of support for developing countries in relation to complex contracts and the countries’ needs for such support. Based on that analysis, this workshop will explore, at a preliminary level, potential mechanisms by which to make comprehensive support available to governments. It is intended that, depending on the outcome of this workshop, a subsequent workshop later this year might take forward these exploratory discussions and formulate proposals for a mechanism to fill any gaps.

A background report will be circulated to participants in advance of this workshop.

¹ Thomas W. Waelde. (1982). *Contract Stability: Adaptation and Conflict Resolution. Legal and Institutional Arrangements In Minerals Development*. Mining Journal Books. London. pp. 53-67, London.
July 18, 2012

Wednesday, 18 July 2012

08:30 – 09:00 **Arrival of participants, Breakfast**

09:00 – 09:15 **Welcome and Introduction**

Lisa Sachs, Director, Vale Columbia Center on Sustainable International Investment, Columbia University

Peter Eigen, Founder and Chairman Advisory Council Transparency International; Advisory Council, HUMBOLDT-VIADRINA School of Governance

09:15 – 09:45 **Opening Remarks**

Jeffrey D. Sachs, Director, The Earth Institute at Columbia University

09:45 – 12:30 **Session 1: What support is needed, and what is sought?**

Moderator: Peter Eigen, Founder and Chairman Advisory Council Transparency International; Advisory Council, HUMBOLDT-VIADRINA School of Governance

Refer to Part I of the background report.

Key questions:

- For what purpose is expertise and support needed (e.g. to understand and negotiate investor-state contracts, contractor/supplier contracts, to improve power imbalances, to assess and support reforms to laws and regulations, etc.)?
- What type of support is needed (e.g. technical assistance, training, access to resources, other) and for which activities?
- What expertise is needed (e.g. legal, fiscal, geological, environmental, etc.)?
- What are the barriers to developing country governments demanding advice? What are the barriers to advice being delivered effectively?
- Is there a distinction between need and demand and if so, how can it be addressed?
- Which parts of government are more willing to seek advice and at what stages? Are there patterns that we can observe?
- Should there be attempts to provide assistance to governments that do not reach out for it? If so, how?
- Are governments willing to pay for support and at what rates? When governments pay for support, does it lead to better outcomes?

12:30 – 13:30 **Lunch**

13:30 – 17:00 **Session 2: What support is available?**

Moderator: Lou Wells, Herbert F. Johnson Professor, Emeritus, Harvard Business School

Refer to Part II of the background report.

Key questions:

- Among the existing initiatives, which are the ones that stand out as particularly effective, and why? What are the main limitations?
- Is there any particular stage in the contracting process where these initiatives need focus in particular (pre-negotiations, negotiations, monitoring etc...)?
- Where is there overlap among existing initiatives?
- What lessons can be learned from existing initiatives in relation to dealing with issues of impartiality, conflict of interest and trust?
- Based on the review of existing initiatives is it possible to say what an appropriate type of specialist support should look like? Is it possible to develop a set of criteria for 'appropriate / effective' support? What about the role of advisors and their position on certain issues?
- What are examples of countries that have received effective support? How do they manage the process of obtaining external advisors (and funding to pay for them), as well as using the advice? What it was about the support which made a difference? What types of skills were developed internally?
- What are the gaps between the identified needs of governments and the available support (start of discussion for session 3)?

17:00 – 18:00

Reception for Participants

Thursday, 19 July 2012

08:30 – 09:00 **Arrival of participants, Breakfast**

09:00 – 12:00 **Session 3: What support is missing: gap analysis?**

Moderator: Natty Davis, Chair, National Investment Commission, Republic of Liberia

Refer to Part III of the background report.

Key questions:

- What are the gaps between the identified needs of governments and the available support (continuation of discussion)?
- Specifically, where are there gaps in terms of type of expertise? Geographic focus? Type of contract? Stage in the contracting process?

12:00 – 13:00

Lunch

13:00 – 16:45

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

Moderator: Karl P. Sauvant, Resident Senior Fellow, Vale Columbia Center on Sustainable International Investment, Columbia University,

Refer to Part IV of the background report.

- How can existing initiatives be supported or expanded, or is a new initiative needed?
- Which of these gaps should this process focus on and at which stage in the contracting process (legislative drafting, pre-negotiations, negotiations, monitoring etc...)?
- Should this process cover all kinds of complex commercial contracts (e.g. investment and other commercial contracts)? Or which types of contracts should be prioritized?
- Is it feasible to combine all the types of legal/ economic/geological/industry assistance in one mechanism/initiative?
- Should this process have a global focus or is a regional focus more feasible?
- What types of tools, activities or resources could usefully be developed and made available to assist governments in negotiations? Are there other creative/innovative possibilities for providing support?
- Exploratory discussion: what types of institutional arrangements might help ensure comprehensive support? Could a few ideas be piloted to help inform the design of any larger external mechanisms?

16:45 – 17:00

Closing remarks

Lisa Sachs, Director, Vale Columbia Center on Sustainable International Investment, Columbia University

Peter Eigen, Founder and Chairman Advisory Council Transparency International; Advisory Council, HUMBOLDT-VIADRINA School of Governance