



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

Contract Negotiation Support for Developing Host Countries

**3-4 October 2011
HUMBOLDT-VIADRINA School of Governance
Berlin, Germany**

REPORT

Organized by

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

Supported by

**African Development Bank Group, AfDB
Deutsche Investitions- und Entwicklungsgesellschaft mbH, DEG
Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ
KfW Entwicklungsbank
Norwegian Agency for Development Cooperation, NORAD
VALE
The World Bank**

About the Organizers:

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

The **Vale Columbia Center on Sustainable International Investment** is a leading forum for discussion by scholars, policy makers, development advocates, practitioners, and other stakeholders of issues related to foreign direct investment in the global economy, paying special attention to the impact of such investment on sustainable development. The VCC bridges education, scholarship and practice in the field of sustainable investment, focusing on creating a framework for extractive industries and sustainable development; analyzing trends in investment law and policy, especially as they contribute to sustainable development; and examining the rise of emerging market multinational enterprises. The VCC regularly collaborates with other Earth Institute centers and faculty, as well as other institutions, on multi-disciplinary advisory and other projects, integrating expertise in law and investment with other fields of sustainable development. www.vcc.columbia.edu

The Sponsors:

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/>

The **DEG - Deutsche Investitions- und Entwicklungsgesellschaft mbH** is a member of KfW Bankengruppe, finances investments of private companies in developing and transition countries. As one of Europe's largest development finance institutions, it promotes private business structures to contribute to sustainable economic growth and improved living conditions. <http://www.deginvest.de/>

The **Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH** is a federal enterprise that supports the German Government in achieving its objectives in the field of international cooperation for sustainable development. We are also engaged in international education work around the globe. www.giz.de

The **KfW Entwicklungsbank** is a promotional bank committed to the common good. We employ our experience and expertise to reduce poverty, protect the climate, secure peace and shape globalisation in a manner that benefits people in poorer regions of the world. We promote reforms and give impetus to development in our partner countries. <http://www.kfw.de/>

The **Norwegian Agency for Development Cooperation (NORAD)** is a directorate under the Norwegian Ministry of Foreign Affairs (MFA). The **Oil for Development (OfD)** programme provides assistance to developing countries, upon their request, in their efforts to manage petroleum resources. <http://www.norad.no/en/Thematic+areas/Energy/Oil+for+Development>

Vale is a global company headquartered in Brazil, operating in five continents through its mining operations, mineral surveying, steel production, energy production, logistics and commercial offices. For Vale, sustainable development is achieved when its activities add value to its shareholders and other stakeholders. Vale's principle is to leave a positive social, economic and environmental legacy in the areas where it operates, through strong social and environmental policies and partnerships with other stakeholders. www.vale.com

The **World Bank Group** is a vital source of financial and technical assistance to developing countries around the world. Its mission is to fight poverty with passion and professionalism for lasting results and to help people help themselves and their environment. <http://www.worldbank.org/>

Why discuss contract negotiations?

On 4 October 2011, the HUMBOLDT-VIADRINA School of Governance and the Vale Columbia Center on Sustainable International Investment convened a gathering of academics, lawyers, economists, geologists, and government officials from the developed and developing world to discuss whether and how developing countries might be assisted in investment contract negotiations. Such contracts are, for many countries, the most viable means of generating funds for the state budget and drive economic growth and prosperity more generally. When these resources are nonrenewable, such as oil, gas, and mining, the need to get a good deal for these resources is that much higher.

There is a persistent belief – rightly or wrongly – that countries are insufficiently able to negotiate good investment contracts. Some governments – especially those of the least developed countries – do not have the capacity to negotiate complex contracts that require a wide range of in-depth knowledge of international commercial law, engineering, financial analyses and economic modeling, while large investors (and their negotiating teams) typically do. This situation would not appear to be conducive to efficient negotiations.

Finally, these negotiations have tended to occur behind closed doors, beyond the view of citizens and global society. This secrecy creates the suspicion that there is something to hide and that the deal must not be good, given the significant asymmetry between the parties. One of the assumptions is that increasing openness, potentially through a multi-stakeholder process as pioneered by the EITI, could also help create more sustainable and durable long-term contracts.

The discussion was intended to discuss contract negotiations in all sectors and to be global in its coverage of the topic. In fact, while investment into host countries can take many forms -- and all were up for discussion at the roundtable -- the discussion centered largely on oil, gas and mining or “extractive industry” contracts. Since such investments are quite common in developing countries, it was not a surprising outcome. The organizers hope that other natural resource contracts (agriculture and timber, for example) and perhaps other foreign investment contracts (telecommunications, infrastructure, etc) remain on the table as an area for discussion in future conversations. Other sectors may not be as significant in terms of amount of investment and may be renewable, therefore garnering less attention; they may still require significant negotiation assistance. The discussion also tended to focus on assistance to African countries, perhaps also because most of the current efforts of assistance have occurred in this region.

The discussion among the 37 participants is summarized below. There are no attributions, as the Roundtable was according to Chatham House rules to encourage a frank conversation. The program of the event and the list of participants are attached.

What is being done in contract negotiations and legal assistance for governments?

This was the topic of the first session. Throughout the course of the morning, several efforts to support negotiations and other legal issues governments may face were summarized and discussed. Most efforts underway that were brought to the attention of the group focus on the natural resource sector only.

The efforts underway mentioned at the Roundtable were:

- The members of the African Development Bank have created the **African Legal Support Facility (ALSF)**, which has begun to operate under an interim director and with initial funding by the AfDB in 2010. It mobilizes funding for negotiation assistance and has provided other forms of legal assistance, such as protecting governments against vulture fund litigation. It supports only African governments. Consistent and sufficient funding has been a challenge thus far. A training component is underway through funding a program of the **Pan-African Lawyers Union**, that trains lawyers with 10 or more years of experience on a wide-range of legal issues, including complex commercial transactions, extractive industries, large infrastructure projects, dispute resolution, and arbitration. ALSF has funded legal support in five African countries so far.
- The **World Bank** has created an integrated approach to the value chain of extractive industries, including upstream and downstream from EITI's area of focus, with systematic efforts to optimize extractive industry (EI) development for the benefit of the people; this includes the **EI Technical Assistance Facility (EITAF)**, consisting of two parts: research and negotiations assistance. While negotiations were the original idea, the assistance has been much broader and deployment of direct negotiation assistance has been avoided. Nonetheless, there has been significant demand by governments, and the trust fund (in the order of \$ 10 million USD initially) has already been fully committed. The primary donor to this multi-donor trust fund is the IFC, through profits from its investments; the Bank maintains a firewall vis-à-vis the IFC to avoid a conflict of interest (for example, the Bank still provides financial assistance to the DRC while the IFC is involved in a direct investment). Because of potential institutional conflict of interest as an investor through the IFC and reputational risk issues, the Bank does not participate directly in negotiations. It prefers to provide its funds to finance either a negotiating team (like in Guinea), or training to build local capacity (like in Pakistan). While the Bank is not keen to be involved in renegotiations, it has demonstrated its willingness to do so when a Government is seeking it and when other Bank branches are invested (i.e. providing financial assistance to the DRC). Finally, the EITAF is focused on oil, gas, and mining, though the Bank does provide technical assistance in other areas that overlap with foreign direct investment (infrastructure, PPPs, etc).
- Among the bilateral sources of support in the area of hydrocarbons, the Norwegian **Oil for Development (OfD)** initiative stands out: it provides regular support to developing host countries in oil and gas development. As part of NORAD, it has its own funding. The main limiting factor for this assistance is that OfD does not get involved in contract negotiations, as it would threaten its impartiality. Demand is there though: OfD has been invited to assist on a number of occasions and has always had to decline.
- **The Revenue Watch Institute (RWI)** has provided negotiation and legal and fiscal reform process assistance to civil society, parliaments, and governments of resource rich countries. Some of the work has been carried out in partnership with the **African Center for Transformation (ACET)** in Ghana, an African "think tank," primarily staffed by African professionals. Among other activities ACET provides advisory services regarding extractives to a number of African governments under a variety of funding arrangements.

- The **International Senior Lawyers Project (ISLP)** provides pro bono services of highly skilled and experienced lawyers. As part of its activities, the group has provided assistance to governments in approximately 35 contract negotiations, including renegotiations (it also advises civil society groups and parliaments). Some projects have involved multi-year negotiating commitments and others have been more limited reviews. ISLP has also conducted a number of workshops for government officials on contract negotiations, especially in the natural resources area. As a matter of policy, ISLP limits its assistance to the least developed countries and works only at the request of the government. The group has developed very close working relationships with particular governments, working with them over extended periods which are critical for trust, quality of advice and indirect capacity-building over time. ISLP only makes legal expertise available and looks to others to provide financial analysis and other support. It often works with Revenue Watch in this regard.
- **Ad hoc consultancies** have been provided by IFC, the World Bank and the Commonwealth Secretariat. Limitations for ad hoc assistance include lack of predictability as to the availability of assistance when it is needed; placing a huge burden on the local government lawyers due to translation issues; insufficient knowledge of the local law and context; and/or occasional difficulties by consultants to get the work fully done, given the length of the process.

To summarize, to date, contract negotiation assistance has been provided, but not in a globally coherent, systematic and coordinated way. While there was agreement that it would be useful to strengthen the negotiation capacity of host governments of developing countries when they negotiate complex projects with foreign investors (mostly in the oil and gas, mining and infrastructure sectors), exactly how and who should provide more comprehensive assistance is less clear.

What could be done?

In the afternoon of the Roundtable, a number of ideas for improved assistance were suggested:

- Establishment of a multi-stakeholder initiative/facility to provide information on the availability of various efforts aimed at supporting developing countries in the negotiation of large-scale contracts and provide multi-disciplinary assistance when existing efforts are not in a position to do so
- Building long-term relationships with governments to develop and improve the broader legal framework and enforcement capacity
- Assisting early in the process, e.g. before the exploration phase (important when the mining license is bundled to the exploration license) or before a privatization is undertaken
- Assisting in setting competitive bidding processes
- Encouraging regional practice-sharing and helping to disseminate regional lessons learned
- Providing a blue-print/compendium/tool-kit/handbook/options/best-practice for each sector

- Giving training that is long enough to cover the full process, including building negotiating skills and not only technical skills
- Assisting in strengthening legal education in local universities
- Establish a strategy to retain highly technical qualified workers within the government institutions.

It was recognized that there might be other areas in which assistance would be desirable, that there is the question of the boundary line for any assistance and that priorities need to be established.

Funding options for such assistance could include a (revolving) trust fund and a multi-stakeholder fund to which companies could contribute, thereby avoiding conflict of interest issues if structured appropriately. Any model should allow the provision of assistance that is not only pro-bono but whose cost and rate is affordable by host governments.

Next steps

The Roundtable established the desirability of further assistance as regards contract negotiations by developing countries in large-scale projects, especially for least developed countries. This should involve lawyers, geologists, mining engineers, financial analysts and economists. At the same time, there are many issues that were raised during the meeting but which the conveners feel need to be discussed much more fully. This suggests the need for a deeper analysis of the strengths and weaknesses of the various initiatives currently addressing contract negotiations in multiple sectors. Furthermore, a historical look at previous efforts would be beneficial, for example, the International Legal Center financed by the Ford Foundation with a similar mission to groups currently in existence working in this area and those suggested. Also, alternative financing mechanisms would need to be explored further in any future discussions.

While several groups are attempting to remedy the negotiating imbalance, the single day of discussion did not allow for a full understanding of the current state of assistance and experience sharing; assessing how knowledge and experience can be further harnessed and institutionalized; and discussing the feasibility of how current initiatives can be supported and, if need be, complemented.

For this purpose, it was suggested to launch a process of 2-3 meetings during which these issues could be further examined. The participants were informed about informal invitation received from the Prime Minister of Namibia and the Vale Columbia Center on Sustainable International Investment to hold future meetings in Windhoek and New York, respectively.

10 November 2011