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Do Companies Have Personalities and Why Does It Matter?

Interview with Joe Bell

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***Joseph Bell is** Pro Bono Senior Counsel at Hogan Lovells. His focus since 2004 has been on natural resource issues, working for both governments and companies. Working principally in Africa and Asia, he has represented governments in mining and agricultural concession negotiations and has advised regarding tax and royalty policies, stabilization agreements, and other economic issues related to large concessions. He has also advised with respect to the establishment of natural resource management funds and general issues of transparency and governance. He was one of the authors of the initial draft of the Natural Resource Charter. He is the former Chair of the International Senior Lawyers Project, a founding director of the Polish American Freedom Foundation, and a member of the Council on Foreign Relations. In 2010 he received the American Lawyer Life Time Achievement Award.*

Joe, how do companies' personalities differ in negotiations?

I am not sure that "personality" is the right word, but I believe that the quality of the counterparty is key when evaluating any investment-state agreement. A quality counterparty is more likely to keep its commitments, comply with regulatory requirements, act in an ethical manner, and "cope" with the inevitable bumps in the road.

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How can Governments determine that their counterparty is of "quality"?

Well, there are a few basic rules of thumbs regarding the determination of "quality"; companies with the following features are generally of "quality."

Companies with deep financial resources and strong technical capacities. To start with, negotiations should be limited to companies which have the necessary technology and financial capacity. Strong companies will be tough negotiators but are also far more likely to actually perform, and they have the resources to carry them through market cycles and to manage when unusual or unexpected events happen. A quality partner will take every negotiating point very seriously because whatever they agree, they know, they will be held accountable for it.

A quality partner will also be apparent in times of deep crisis. Take, for instance, the Ebola crisis in Liberia. During this time, companies behaved differently; some stuck around and some left. This shed light on those that had a long term commitment to the country versus those that were just speculators.

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Companies which do not have the necessary financial or technical resources are more likely to try to flip or resell the project to someone who does, capturing in the process "rents" which the government could have earned. They may also contract with persons whose operational standards or ethics are not at-par, creating risks the government may eventually have to bear given the inability to get financial recourse of the original contractor/investor. And, of course, they are much more likely to fail. One actual experience comes to mind where a government (over the advice of counsel and the Minister of Justice) gave an Israeli real estate adviser a mining concession. He then sold it to an Indian company which did have the technical resources, pocketing in the process more than $100 million--which should have been collected by the government.

Companies subject to tight home country regulations. Because low capacity governments have less ability to enforce contracts or to oversee operations, home country regulations and oversight can act, in some ways, as a surrogate. Indeed, a company's management often subjects all of its operations to the international standards applicable in its home country or other advanced jurisdiction where it operates. This indirectly creates higher standards and gives meaning to clauses requiring contractors to apply "international standards." Of course, this is only true if the home jurisdiction itself (or the other advanced jurisdiction where it operates) applies high standards.

Could you specify the type of home country regulations you are referring to?

It can be the social and environmental regulations, the anti-bribery laws or the stock exchange listing requirements.

Companies subject to tight environmental and social regulations elsewhere are more likely to have standards and internal compliance programs in place. Moreover, such companies are likely to have "sustainable development" platforms. Companies, having the qualities listed above, are, among other matters, concerned about their reputations and are susceptible to name-and-shame campaigns both in the host and home companies if commitments or standards are not upheld.

Then there are the **companies subject to strong anti-bribery regimes.** The United States with the Foreign Corrupt Practices Act , the United Kingdom with the UK Anti-Bribery Act, and a growing number of other countries have in place strong provisions regarding the bribery of foreign government officials. All OECD countries are supposed to have such standards and many have legislation on their books, but what is important is whether the standards are enforced. Historically, the United States was the only country enforcing its law strongly, but now the UK, France (very recent), Indonesia, the Netherlands, Singapore, Switzerland and Brazil have engaged in active enforcement. It is important to recognize that such acts may extend beyond persons and entities organized in the applicable jurisdiction.[1]

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Companies subject to active enforcement take the requirements quite seriously, and enforcement acts as an important constraint on their behavior in the host country. Such companies also often have serious internal compliance programs, in part, because they may mitigate penalties, acting as a further prophylactic. Of course, a government should require representations regarding no corrupt payments having been made but the deterrent effect of such representations is much less than the threat of criminal or civil action by a home country with an active anti-corruption program. Last, public companies are regulated by the exchange where they are listed. Companies listed on major exchanges such as New York, Toronto, London, Australia, and Hong Kong are subject to strong disclosure requirements and other regulations. This in turn encourages more regular behavior and also provides considerable public information on the companies' intentions as well as their proposed projects all to the benefit of the host government. On the other hand, listing on junior exchanges with weaker requirements such as the AIM[2] should be a red flag. Companies listed there are often highly speculative entities with weak capitalization and management. AIM has been the home of a number of fraudulent, failed or highly exploitive mining ventures.[3]

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In addition to home countries' regulations, it is also worth mentioning the influence of industry associations promoting good practices such as the International Council of Mining and Minerals (ICMM) or the Mining Association of Canada. Membership in the ICMM or MAC is a plus (but of course no guarantee).

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[1] For instance, the FCPA in the United States applies to all US persons, but its reaches certain issuers of securities or to persons committing acts within the territory of the US in furtherance of a corrupt payment. Further, any company registered on a US stock exchange is subject to certain accounting regulations. For a detailed explanation of the FCPA jurisdictional reach, check here: https://www.quarles.com/publications/jurisdictional-victory-for-foreign-national-in-fcpa-case . For an explanation of the UK Anti Bribery Act jurisdictional reach, check here: https://www.transparency.org.uk/our-work/business-integrity/bribery-act/.

[2] https://www.londonstockexchange.com/companies-and-advisors/aim/aim/aim.htm

[3] https://www.ft.com/content/ea2bd724-140c-11e5-abda-00144feabdc0 ; https://www.desmog.co.uk/2018/05/09/taking-aim-london-s-wild-west-stock-market

Joe, what are the legal safeguards to put in place to protect the country against low quality partners?

I don't believe that it is that hard to determine whether the investor is a serious and qualified counterparty. Typically, Government should beware **the Highly Generous Bidder.** Such bids often hide a strategy to overbid and then to renegotiate. A perfect example is the Aynak deal in Afghanistan.[4] A soft negotiator can also be a sign that the company is not serious nor committed to a long term arrangement, that there is a problem in the background (e.g., lack of other required permissions), that they are speculators with limited financial and technical capacity, or that they want to flip the license or a combination of all of this. Cancelling an award granted to a weak bidder can be difficult, expensive and delay the exploitation of the deposit at issue.

You can, of course, try to protect yourself contractually by clearly defining obligations and rights including termination, getting appropriate representations (including representations regarding payments and beneficial ownership) and requiring financial and contractual guarantees by a credit worthy party. Even then you may be left with difficult legal challenges and the loss of time if the concessionaire does not perform or performs poorly.

Of course, contracts with quality investors should be just as rigorous. The advantage of a quality investor is that you are less likely to have to actively enforce those provisions, and, if you do, a quality investor is more likely to have the resources and will to remedy any deficiency.

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[4] https://thediplomat.com/2017/01/the-story-behind-chinas-long-stalled-mine-in-afghanistan/