Do Companies Have Personalities and Why Does It Matter?

Interview with Lou Wells

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Lou, is there such a thing as companies' personalities and why does it matter?
First, company personalities can be related to nationalities. Although, nationality isn't a necessary determinant nor is a company's nationality always a clear concept.

We associate nationalities of companies like ExxonMobil or Firestone with the U.S., but, in fact, the concept of "nationality" on a project basis can be confused and confusing.

For instance, Exxon in Venezuela was a Dutch company in order to obtain coverage under the Dutch-Venezuela BIT (Bilateral Investment Treaty).[1] At the time of the

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[1] Agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state.

contract renegotiation with Mittal, Mittal was perceived in Liberia, where the mine was located, as an Indian company because management was mainly Indian, but the company was led by a British-based CEO, registered in Luxembourg, and the mine, at least for a time, by a Netherlands Antilles holding company. Companies will generally play with their nationalities to reap the benefits of BITs and DTAs (Double Tax Agreements).[2] Occasionally, when nationality is ambiguous, companies will insist on a contractual provision saying, "For this contract, the company will be considered having country X as nationality."

As technical advisers to a government involved in contract negotiation and renegotiation, we also take nationalities into account for another reason: it may matter in understanding whether an embassy will exert diplomatic pressure on behalf of an investor or not. If you are negotiating with a company, you may be negotiating with the local embassy. This is especially so with the Japanese, for example. The U.S. has also been known to engage in embassy assistance during negotiations. For instance, Clinton intervened for an American company trying to negotiate a gas contract in Mozambique. The U.S. does intervene, but maybe less aggressively than the Japanese.

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Are there other factors that influence companies' personalities?

Yes. As a technical advisor, there is another consideration that I look at in terms of company personality and behavior:

One country in which I was an advisor, the government wanted to review and renegotiate a range of contracts. When selecting the first candidate for renegotiation, we wanted to target companies that were less likely to take the government to arbitration when confronted with the renegotiation demands. Two of the factors that we looked at were nationalities and whether the company was vertically integrated.

The first firm we chose was selected for a number of reasons, but important were: (1) The company's nationality was unclear, leading us to believe that no embassy would step in to defend it; (2) It was using the ore in its own downstream operations, following a strategy of trying to balance ore with processing capacity. As a result, we believed that the company was likely more interested in reaching a mutually acceptable agreement that would ensure its ore supply rather than obtaining a chunk of money from arbitration.

[2] An agreement signed by two countries to avoid or alleviate territorial double taxation of the same income by the two countries.

We applied similar criteria in choosing the second candidate for renegotiation. The choice was nominally a U.S. firm, but it had been acquired by a Japanese parent. As a result, we didn't think the U.S. would step in to defend the company. Japanese collaborators had little leverage in the host country. Moreover, the choice was also following a strategy of integrating vertically.

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Knowledge of firms and industries matters for other reasons in negotiations and renegotiations. Companies that generally negotiate a deal and, perhaps, explore yet rarely develop a resource, preferring to sell the deal to another firm, require different handling from other firms. I would recommend different provisions for firms, operating in say mining, for output that has publicly quoted real prices (say, gold) than for firms in another sector (diamonds, for example). These are only examples.

In my experience, bringing in lawyers doesn't usually lead to the kind of company, industry, and nationality analyses that provide to the best outcomes for the host country. Lawyers are of course necessary, but not sufficient.

Are there other factors that play into which companies will bring government to arbitration?

Nationality matters here, as well; but it isn't determinate.

I wrote a piece on Japanese arbitration. I knew only one Japanese company that had gone to international arbitration. If there is a dispute, the embassy will step in to mediate it and will sometimes put up money to help settle it. In recent years, the Japanese government pushed to include arbitration provisions for investment in regional trade agreements so that Japan can step back from disputes. It isn't so clear that Japanese firms, however, have changed their preferences.

U.S. companies have a reputation of being litigious; however, much depends on which company we are talking about. ExxonMobil turned quickly to arbitration when there was a dispute in Venezuela in 2007, and was explicitly trying to teach other countries a lesson about confronting the company. At the same time, Chevron, another U.S. company, was willing to strike a deal in the same conflict, as did other oil companies not from the U.S.

Interestingly, countries are not always affected in negotiations or disputes by what happened elsewhere. For example, one might expect a government to be hesitant to conclude agreements with companies that have jumped to arbitration when disputes have arisen elsewhere; yet it appears that officials are often not aware of behavior elsewhere. A Harvard MBA student looked at negotiations in Ghana researching what negotiators knew about ExxonMobil's behavior elsewhere. It was zero. More knowledge about a company's behavior might be useful to an official when selecting a company for negotiation, but also in determining what kind of provisions an agreement with, say, a litigious company might include.

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Will the nationality influence how the negotiation process will be carried out?

Nationality is also linked with corruption. In my experience, Chinese firms have little hesitancy to make payments that other firms might not make. I have seen presents brought along, like computers for an investment agency. No strings attached. Negotiations with Chinese firms can be more complex because one is often negotiating with multiple parties--one party dealing with financing; another one dealing with infrastructure construction; etc. This isn't necessarily bad, but it does demand skills on the part of host countries. Moreover, agreements with Chinese investors are rarely published, making them, therefore, unavailable to scrutiny by outside parties.

In my experience, agreements with Japanese investors are much shorter than those with investors of other nationalities. At least in the past, Japanese investors have appeared to rely more on trust than on legalistic documents. This may be changing.

French firms, even state-owned enterprises, along with German enterprises have a reputation of paying bribes. With more enforcement of home-country anti-bribery laws as of late, this is probably changing. Israeli companies also have a bad track record; see, for example, published reports about the Steinmetz Group in Guinea. The Foreign Corrupt Practices Act in the U.S. has discouraged corrupt practices by U.S. companies abroad (although not eliminating it entirely, of course). Until recently, in spite of the OECD treaty on bribery,[3] a number of other home countries have been less eager enforcers of their laws. There is evidence that this has been changing, at least in Europe.

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3 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2009)

Are there specific provisions that governments should watch for?

There are many, of course. I'll focus on some to which too little attention is often paid.

I've referred earlier to pricing provisions: how to determine the price for royalty and corporate income tax purposes for, say, exported ore. Usually, discussions focus on the use of published prices and management of transfer prices, or even advanced pricing agreements. But subsequent disputes can be reduced by considering to whom and where the company is going to sell the output of the mine.

- If it sells to affiliates, most governments recognize the basic problem of the sale being booked at a non-market price. However, the issues are often made more difficult by the company's charges in marketing fees and other internal charges (ie: paid to the affiliates), even for sales to the parent. These need to be addressed.
- If the company sells to a distant market, deciding on proper bases for pricing can be difficult. Say ore is being mined in West Africa and sold abroad; he usual approach is to take some published price (if available) and subtract shipping costs to deliver the ore to market. But the impact on taxes and royalties differs sharply if, say, iron ore is going to Amsterdam or to Shanghai. The Amsterdam price, adjusted from shipping from West Africa, is likely to be higher than the Shanghai priced, adjusted for the long distance involved and competition from Australian iron ore. The choice of reference price and shipping needs be addressed in the agreement.

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"Working provisions" are also far too often overlooked in mining negotiations. Working provisions require production to begin by a certain date and to call for change, perhaps cancellation, if production falls below a specified level. These provisions serve to address two concerns: (1) a company may sit on the deposit, waiting for prices to increase or for a buyer who will actually proceed with the investment; (2) the investor will shut down the particular mine first if there is a market downturn, continuing to mine elsewhere if working provisions there demand it. The concern should be even greater if the prospective mine is not part of a vertically integrated value chain of a company.

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Any final advice for governments that we haven't discussed yet?

There is much more to be said about negotiations, of course. I've tried to address only a few of the points that I have seen ignored or misunderstood by government officials negotiating with foreign investors. We could talk about what I believe to be the most difficult part of negotiations with foreign investors: obtaining agreement *within* the host government concerning what the deal should be and how to

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approach the company. I've often said, the hardest negotiations are internal, involving all the interested agencies and ministries. Similarly, in the role of foreign advisors, technical knowledge is important, but real consulting skills are equally important. The advisor often must manage different opinions within the government for whom she or he is providing advice. To cover everything, the discussion could go on for hours!