



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

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HUMBOLDT-VIADRINA School of Governance
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PROGRAM

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About us:

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.

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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. www.norad.no

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Background

There is wide agreement that it is useful for all sides to strengthen the negotiation capacity of governments of developing countries when they negotiate large complex projects with foreign investors in the oil and gas, mining, infrastructure, and other sectors. Indeed, many 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 law, finance, geology, economic modeling, etc., while large investors typically do.

This situation is not conducive to efficient negotiations. In the absence of conditions for equitable negotiations, governments and citizens might conclude, either immediately or over time, that the resulting contracts are unfair – thus dooming them to be breached at some point. Conversely, the outcome of fair negotiations can be expected to be more balanced and more transparent and to provide a more stable legal framework that will be far more durable and profitable for governments, citizens and investors.

Despite this general consensus, the information and negotiation asymmetry remains and, thus far, outside assistance has failed to level the field. In part, this is because some actors resent outside participation. When outside expertise is brought in for such negotiations, it is often ad hoc and on a short-term consultancy basis, thereby resulting in assistance without the capacity effectively to implement the arrangements or build institutional memory.

This situation suggests the usefulness of evaluating the strengths and weaknesses of various initiatives to-date attempting to remedy this imbalance; understanding the current state of institutional memory and experience sharing; assessing how knowledge and experience can be further harnessed and institutionalized; and discussing the desirability and feasibility of how current initiatives, ad hoc efforts and negotiating teams (including the local experts in countries that are building their own legal teams) can be aligned, harmonized and supported.

Such a discussion should also consider the possibility of establishing an independent multi-stakeholder facility to coordinate these efforts as an entity or network, including, for example, by helping to select relevant expertise, developing appropriate terms of reference and providing assistance in the form of information, research, knowledge-sharing, and experience.

For further information, please contact Dr. Peter Eigen at peigen@transparency.org and Karl P. Sauvant, PhD, at ksauva@law.columbia.edu

Tuesday, 4 October 2011

09:00 – 09:15

Opening remarks

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

Karl P. Sauvant, PhD, Executive Director, Vale Columbia Center on Sustainable International Investment, Columbia University

09:15 – 13:00

Session I: What are the existing sources of negotiation support?

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

Several efforts to provide negotiation support do exist, most focused on the natural resource sector only. For example, the World Bank has created in early 2008 an integral approach to the whole value chain of extractive industries, including upstream and downstream from EITI's operation, with systematic efforts to optimize EI development for the benefit of the people; this includes the EI Technical Assistance Facility (EITAF) consisting of two parts, research and negotiations assistance.

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. In addition to negotiation assistance, it helps to protect governments against vulture fund litigation. It supports only African governments.

Among the bilateral sources of support, the Norwegian Oil for Development Initiative stands out; it provides regular support to host developing countries in oil and gas development, although actual involvement in negotiations remains restrained.

The Revenue Watch Institute has provided negotiation assistance in individual countries. Some of the work has been carried out in partnership with the African Center for Transformation (ACET) in Ghana. The International Senior Lawyers Project provides pro bono services of highly skilled and experienced lawyers. Ad hoc consultancies have been provided by IFC, the World Bank and the Commonwealth Secretariat.

To summarize, to date, negotiation assistance has been provided, but not in a globally coherent, systematic and coordinated way.

11:00 – 11:30

Keynote video address by Prof. Jeffrey D. Sachs, Director of The Earth Institute, Quetelet Professor of Sustainable Development, and Professor of Health Policy and Management at Columbia University.

13:00 – 14:00

Networking lunch

Welcome address by Prof. Dr. Gesine Schwan, President HUMBOLDT-VIADRINA School of Governance.

14:00 – 17:45

Session II: Do we need further negotiation support?

Moderator: *Karl P. Sauvant, PhD*, Executive Director, Vale Columbia Center on Sustainable International Investment.

Based on the discussion of the current landscape of negotiation assistance, this session will discuss the desirability and feasibility of further efforts to provide such assistance. This scoping discussion will cover concrete practical issues, including (but not limited to):

- Is there a gap in the current institutional landscape for negotiation assistance for large scale projects in various sectors?
- If so, what type of assistance would be desirable: A global network? A legal entity? An institute? Multi-stakeholder entity? If so, to what extent?
- The scope of an initiative: Only for extractive industries? All major negotiations? All legal issues relating to sustainable investment? Mediations and auctions? A phased approach?
- The substantive scope of an initiative: Any project? Public-private partnerships? Privatizations?
- The funding: Contributions from World Bank, AfDB, ADB, IADB? Bilateral donors? Investors? Foundations? All of the above? Cost recovery?
- Relationships to other actors in the field: e.g. World Bank EI TAF, AfDB, ALSF.
- Standards: Natural Resource Charter? IFC Performance Standards? New ones?
- Nature of operations: Selection, instruction, quality control, of lawyers and other specialists?
- Capacity building, training: how to achieve this within what system might be chosen?

17:45 – 18:00

Closing remarks

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

Karl P. Sauvant, PhD, Executive Director, Vale Columbia Center on Sustainable International Investment