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Second Workshop on Contract Negotiation Support for Developing Host Countries

18-19 July 2012

Columbia University, New York

BACKGROUND PAPER

Prepared by

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

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Support for Developing Country Governments in the Negotiation of Complex Contracts

Background Paper^{*}

INTRODUCTION

From time to time, all countries need to negotiate complex contracts with major private investors, suppliers and contractors. The most important and complex are often investment contracts related to natural resource and infrastructure projects. These investments can last for many decades and involve issues relating to sharing of economic rent between the investor and host government as well as significant environmental and social impacts. These contracts are, for many countries, an important means of generating funds to drive economic growth, development and prosperity. However, despite their critical importance, many developing country governments negotiate contracts that fail to maximize the benefits for their country.

The issue of support for developing country governments in complex contract negotiations was discussed at a workshop held in Berlin in October 2011, organized by the Humboldt-Viadrina School of Governance and the Vale Columbia Center on Sustainable International Investment. The 2011 workshop brought together a number of important actors involved in or with knowledge of developing country negotiations, including government officials, representatives of major investors, lawyers involved in contract negotiations, representatives of existing initiatives providing negotiation support, members of civil society and academics. There was consensus among participants at that workshop about the need for an expansion of support for developing countries in their contract negotiations, and that such support should include the involvement of lawyers, financial and fiscal analysts, environment/climate experts, geologists/mining experts, business strategists, and political risk experts.

A follow-up workshop is taking place on July 18 and 19, 2012, in New York. The purpose of this follow-up workshop is to assess the need and demand for negotiation assistance; to undertake a gap

^{*} This paper was prepared jointly by the Vale Columbia Center on Sustainable International Investment (VCC) and the Humboldt-Viadrina School of Governance (HVSG). The report was authored by James Bond (coordinator), Jacky Mandelbaum, and Antje Kunst, with help from Kari Lipschutz. Research was primarily carried out by Jacky Mandelbaum of VCC and Antje Kunst of HVSG. The paper was overseen by a Steering Committee composed of Joe Bell, Sven Biermann, James Bond, Natty Davis, Peter Eigen, Paul Jourdan, Antje Kunst, Jacky Mandelbaum, Barry Metzger, Akere Muna, Lisa Sachs, Karl P. Sauvant, Christopher Sheldon, Perrine Toledano, and Lou Wells.

analysis between such demand and existing sources of support and to assess a number of innovative alternative approaches (both existing and proposed). Based on these analyses, the participants at the workshop will explore, at a preliminary level, whether and if so what type of potential mechanisms, tools and innovative solutions can usefully be provided to make comprehensive support available to enable developing country governments to secure the best possible deals.

This background paper has been prepared for the follow-up workshop. It spells out, for the purpose of guiding discussions rather than as an exhaustive list, the nature and scope of developing countries' needs for support (Section I); the existing sources of support (Section II); the missing elements and challenges to address to fully meet these needs (Section III); and some possible options for delivering additional support (Section IV). While commercial contracts are often fraught with complexities for both the private contracting party and the government, the research underlying this paper focused mainly on contracts relating to investment projects.

Methodology

The material for this background paper was obtained based on the outcomes of the Berlin workshop (attended by 36 participants, representing home and host countries, multilateral and bilateral organizations, civil society, the private sector and academia), desk research and over 30 targeted telephone interviews with key stakeholders with experience in complex negotiations in Africa, Asia, Latin America, Europe, Australia and North America. Stakeholders included officials from developing country governments, representatives of the initiatives described in Section II, and other experts involved in a range of complex contract negotiations, particularly with developing countries.

I. DEVELOPING COUNTRY NEEDS FOR NEGOTIATION SUPPORT

This section will review the needs of developing countries for support in their contract negotiations and identify the types of support needed.

A. *Reasons for sub-optimal contracts*

Developing country governments face a number of challenges in negotiating complex deals across a range of sectors. It is important to understand these challenges and the exact problems faced in order to design appropriate solutions.

The chief cause of poorly negotiated deals is generally **resource constraints** – limited financial, technical and human resources - on the part of developing country governments. Government officials may lack **specialized know-how, technical expertise and experience in negotiating complex contracts**. This is compounded by problems of **high staff turnover** in key agencies and **difficulties attracting or retaining qualified and experienced staff** due to salary differentials vis-à-vis the private sector.¹ As a result government negotiators may have limited or no experience with negotiating similar deals and a limited understanding of the fiscal and other options available to them.

Other causes of poorly negotiated deals may include:

- asymmetry of information with respect to economic variables of the transaction and relevant fiscal and legal tools;
- time pressure from external donors and companies to conclude negotiations;
- weak governance;
- the desire, for political purposes, to manage transactions independently rather than seek external support;
- poor and incoherent legal and regulatory frameworks, e.g., lack of coherence in fiscal legislation such as mutually inconsistent tax laws;
- internal competition among different ministries to influence the outcome of the negotiation process²; and
- corruption on the part of government officials in charge of negotiating contracts - the secretive nature of many deals and the lack of transparency and public scrutiny provide opportunities for abuse and corruption.³

Large companies, on the other hand, will generally have superior means to carry out their side of the negotiation, both in terms of in-house resources and the ability to engage external firms as necessary. Companies also generally have a more coherent negotiation strategy and end goals. They may use loopholes in the legal and regulatory frameworks and information asymmetries to their short-term advantage, but at the cost of a less robust contractual relationship overall.⁴

B. *Impacts of sub-optimal contracts*

Poorly conceived and negotiated contracts not only prevent a country from enjoying the full long term benefits of its resources, but can entrench poverty, corruption and even conflicts, particularly when governance systems are inadequate. The impacts of sub-optimal investment contracts are far-reaching, especially if their duration extends over several decades, including: substantial loss of public revenue; natural resource degradation and depletion; loss of access to resources for local communities; and the non-achievement of larger development goals of a country (e.g. poverty reduction).⁵ Negative impacts may also include the temporary or permanent displacement of people without proper consultation and compensation and environmental damage or disturbance that can adversely impact food supply, water supplies, and livelihoods.⁶

It is highly likely that host countries will seek to renegotiate the terms of poor or unfavorable contracts, either because the conditions existing at the time the original terms are agreed have changed (as it is almost inevitable that these long-term deals will undergo “fundamental changes” at least once in the course of their existence⁷) and/or because it becomes clear to the host country government with time that the terms of the contract were not sufficiently beneficial (often after an outcry from host communities or civil society). Indeed, evidence points to a significantly greater frequency of renegotiations in cases where the initial contracts are unbalanced, poorly drafted, or inflexible to changing economic circumstances.⁸ In this respect, the number of renegotiations that have taken place with regard to infrastructure projects has been particularly high.⁹ Renegotiations are costly for host country governments. Even where the reason for renegotiating is an attempt to redress what was a manifestly inequitable deal, the host country’s reputation vis-à-vis investors will likely be tarnished as a result and it will have lost potential benefits over the initial period of the contract. Further, host country initiated renegotiations may trigger international arbitration which can be extremely costly for governments, not only in terms of the size of the potential awards but also in legal fees and reputational damage, regardless of the outcome of the case. Indeed, the number of international investment or commercial arbitration disputes before arbitration tribunals has increased substantially in recent years.¹⁰

It is therefore important for developing country governments to be in a position to negotiate strong deals at the outset, maximizing the impact of the investment for the benefit of the country as well as, if possible, providing flexibility to adapt to changing circumstances without the need to invoke contested renegotiations. Creating a strong deal at the outset, from the perspective of both the investor and the host country, may minimize the risk that the deal is revisited.

C. *Types of contracts*

Complex contracts can include natural resource contracts (e.g. mining, oil and gas, forestry concessions, commercial fishing rights, agriculture concessions), infrastructure contracts (construction, operation and/or management of large infrastructure) and other investment and commercial contracts (e.g., textile plants that import raw cotton and export textiles, or aluminum smelters that import bauxite and export aluminum). These contracts define the terms of an investment project, allocate risks between contracting parties, and determine profit sharing, as well as the scope of the costs and benefits for each party. In countries with weak legal systems, contracts can be very detailed, dealing with a broad range of issues in order to compensate for inadequate

and outdated legislative and regulatory frameworks. They can also constitute the key instrument for the governance of the investment over its lifetime. Complex contracts, within this wide landscape, vary widely in their structure, level of detail, linkages to existing legislation and economic parameters.

Contracting norms differ substantially across a range of regions, sectors and contracts. The process by which the government and private contracting party arrive at an agreement varies - by sector, by nature of the investment, and according to whether it is competitive or first-come first-served. Accordingly, the type of support required will differ from contract to contract. There may be significant differences in the potential source of funds for engaging assistance for various types of contracts; for example, with respect to infrastructure agreements, the presence of third party financing can provide an immediate source of funds which brings the possibility of paying counsel, with the cost of the government's legal counsel being wrapped into the project sponsor's costs (which are ultimately covered, in a certain proportion, by a financing entity). The presence of the financing entity creates certain restraints, some beneficial and some not so beneficial. Although third party financing may be involved in the case of natural resource concessions, it is not common at the stage of closing the deal and there are no contractual guarantees of cost recovery.

D. Different phases in preparing and negotiating contracts

A number of different steps are involved in preparing and negotiating an investment contract. As is evident from the discussion above, these vary from country to country, sector to sector, and in some cases investment to investment. Each of these steps may involve a wide range of skills, requiring different types of assistance. A description of the goals of each step and the types of support needed is elaborated in Annex I. Some of these skills are listed in Section I.E below.

For the purposes of this paper, these steps have been divided as follows:

Setting the Investment Environment:

(Non project-specific)

- Formulating government policies and strategies
- Reforming legislative and regulatory frameworks
- Conducting sector-wide analyses

Pre-negotiation phase:

(Project-specific)

- Conducting/reviewing project feasibility and other studies
- Conducting/reviewing environmental and social impact assessments
- Preparing tender documents (where the contract is granted through a competitive process)
- Preparing model contracts
- Managing the tendering process
- Preparing financial structure

Negotiation phase:

- Assembling a multi-disciplinary negotiation team
- Preparing the negotiation position

- Developing negotiation strategy
- Negotiating the contract
- Drafting and reviewing contractual provisions

Contract implementation phase:

- Monitoring to ensure contract compliance

E. Skills and the nature of external support

The range of skills sets needed to successfully conclude a complex negotiation includes, *inter alia*, the following:

- Project development
- Sector and project economics
- Legal (both sector-specific and broader financial, fiscal, commercial)
- Financial analysis and modeling
- Financial structuring
- Sector-specific expertise (e.g. geology, infrastructure, industry)
- Environment, social impacts and human rights
- Occupational health and work safety
- Governance (e.g. anti-corruption/stakeholder engagement)
- Fiscal and tax management
- Tendering and procurement
- Accounting and financial reporting
- Negotiation strategy

Some of these skills may be available within the administration, e.g. fiscal and tax management, tendering and procurement etc., while others may not.

Where skills are not available internally, the government can choose between acquisition and retention through **capacity building**, or to outsource as **technical assistance**. Retaining scarce skills within the administration has proven to be difficult in many countries including industrialized ones, either because of rapid skills obsolescence or through staff turnover as trained civil servants move to other departments or leave for the more attractive salaries in the private sector. In some cases, specialized government bodies have been created (e.g. the Norwegian Petroleum Directorate) which are able to pay private sector salaries outside the civil service pay scales, to favor retention. Moreover, an important question that governments need to consider is whether it is more effective to develop skills in-house, or to outsource them to some extent on the basis that these large scale, complex negotiations do not take place frequently so it may not be realistic or efficient to try to develop the skills in-house in every ministry that may need to negotiate such contracts.

- **Capacity building** is often a long-term, continuing process, building sustainable technical capacity and other skills of government officials to do the job themselves. Capacity building also involves the development of skills of government officials to identify needs

for external technical experts, procure their services (including conducting the consultant selection process), contract and manage outside experts, and monitor outcomes of their services.

- **Technical Assistance** involves in most cases the short term contracting of experts with relevant skills/knowledge to assist with specific functions in lieu of government officials.

F. Willingness of governments to seek support

The telephone interviews with government officials, advisers and international experts gauged the willingness of governments to accept external negotiation advice. These interviews revealed general willingness when such advice is really needed, e.g. for activities such as the preparation of feasibility studies during the period leading up to negotiations, to provide expert advice during the negotiations themselves, and to assist with drafting the contract. A reluctance to leave the monitoring of the contract to external advisers was observed. Reluctance to accept external support, at all stages, due to issues of national sovereignty, confidentiality and trust was also observed.

Need versus expressed demand. A number of interviewees raised the distinction between need and the actual demand expressed by governments. The question they raised was: how many governments that have a need for support are actually reaching out for it? And if they are not reaching out, why not?

As a partial and tentative response to these questions, a number of the interviewees raised the issue of tension and conflict among ministries. Some ministries may want ownership over particular deals, and may therefore be reluctant to coordinate and collaborate with other ministries. They may also be less inclined to reach out for external assistance. Indeed, interviewees commented that on occasion where external advisors are retained, their ability to provide advice can be subverted. This is especially the case where the advisors have been retained by a different ministry and there is the perception that that ministry is trying to control the process.

Alternatively the ministry that wishes to seek assistance may not have the authority or budget to engage support. In many cases, the authority within government or of a state resources company to manage the negotiations and to approve final terms is unclear. The range of issues that need to be addressed in the negotiations is broad (including, for example, taxes, customs duties on imported equipment, immigration clearance for foreign personnel, relocation of local residents, environmental issues). These often require coordination by “the lead ministry,” which is often difficult to achieve and can be significantly complicated by bureaucratic and political rivalries.

Sometimes a particular ministry already has its “trusted advisors” and prefers to keep the selection to these rather than seek new external assistance. Some countries have had long-term relationships with individual advisors, institutions or law firms. They may limit the selection of advisors to these pre-existing relationships or to advisors recommended through these relationships.

Other possible reasons include limited knowledge of what assistance is available (many providers of subsidized or non-fee based assistance have limited resources and as a result are reluctant to market their services broadly), or some countries may have had negative experiences with donor assistance in terms of delays, quality, etc., making them reluctant to call on outside help.

Finally, in cases of weak governance and corruption, government officials prefer to maintain full control over the process to ensure maximum discretionary authority in the decision-making process rather than to call on external advisors who might limit opportunities for pay-offs. This would also suggest that, if they do employ advisors, corrupt government officials would prefer partial targeted assistance rather than support over the entire process, which would make pay-offs more difficult.

The consideration of whether governments are willing to seek external advice raises a number of important questions. What makes those countries that have obtained good assistance different from others? What have they developed in the way of skills internally? How did they get their external advisors (and funding to pay for them)? Some have noted that successful deployment of external advice is often linked to cases where the government pays directly.

G. Key issues for discussion

- 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?

II. EXISTING SUPPORT AVAILABLE

This section reviews sources of advice and support currently available to developing countries. The descriptions of the initiatives contained in this Section II and in Annex 2 are based on the research carried out and are provided for the purpose of stimulating discussion at the July workshop, at which corrections and comments are welcome where necessary.

A. Overview

Governments can and do procure paid advisory or legal services to assist them in their negotiations with private parties. In addition, a large number of organizations provide some level of free or subsidized support to governments for negotiation of long-term investment contracts. This report provides an inventory, to the extent possible, of these organizations. Table 2 and the subsequent text provide details about ten prominent initiatives for investment contract negotiations;¹¹ Annex 2 lists other bodies active in this area.

A review of the support available to developing country governments shows that it ranges from assistance available in the investment environment and pre-negotiation phases (research, policy formulation, legislative and regulatory reform, preparation of bidding documents and term sheets, and evaluation of bidding proposals); to the contract negotiation phase itself. Capacity building is also provided in these phases, though predominantly through short-term training courses. Very few, if any, organizations provide support in the contract implementation phase of projects.

Where assistance is available, it may in fact be very limited. An important limitation of available assistance, for example, is that it is often not available at the negotiating table. While some initiatives do provide direct support for negotiations, often at no cost to the governments, these initiatives are limited in their funding. A number of donors, who provide funding to allow governments to retain advisors, will not provide funding for direct negotiations.

There appears to be a relatively large number of organizations providing short-term training courses to governments on areas related to long-term investment contracts. In addition, there are a number of sources of non-fee paying or subsidized legal advice, either through bilateral arrangements with private law firms or through facilities set up to coordinate the provision of legal advice. While the government may not be paying fees for the advice, an external entity may be paying the fee (as the advice itself is not provided *pro bono* by all of these facilities).

Expertise in financial and economic analysis is available, but less prevalent than legal assistance. Sector-specific and technical expertise appears to be the most difficult to find. In particular, a key concern for investment banks or industry experts may be the potential for conflicts-of-interest which would preclude future work, which may dissuade firms or individuals from providing support to developing country governments. Moreover, even when conflicts-of-interest are not an issue, the advice may be limited by the lack of demand or the availability of funding, as discussed above.

In addition to the organizations listed in table 2 below and Annex 2, a number of individuals (often academics and lawyers), retained as consultants, assist governments with tasks on an ad hoc basis (for example, drafting laws and regulations, preparing for negotiations, advising in negotiations).

This report does not list these individuals. A number of academics, academic centers and law firms also provide bilateral support to governments on an ad hoc basis, either on a paid basis, or externally subsidized and therefore free for the government. Such support is often through pre-existing relationships between the individual, center or firm and the particular government. These individual sources of support are not comprehensively identified in this report.

Finally, some governments of middle income and high income developing countries may go to the market to obtain support from private firms in a manner similar to industrialized countries. It appears that this is increasingly the case in South Asia and the Middle East.

Table 2: Prominent Initiatives for Negotiation Support

	Type	Classification	Countries	Type of Investment	Fee or Non-Fee Based?	Number of projects	Time-frame	In country /remote	Languages	Based
African Legal Support Facility (ALSF)	Pre-negotiation, Negotiation, Capacity-building (limited)	Legal	Exclusively African countries. ALSF is a public institution hosted by the AfDB, and its members are the countries in AfDB.	All types, but mostly related to project finance (natural resources, extractives, agriculture, transport, PPPs, debt management)	ALSF finances the fees of lawyers (either by grant or by loan); exploring alternative fee arrangements (e.g. investor to pay legal fees into an escrow account)	Projecting 10-12 contracts in 2012, 7 in 2011, 3 in 2010 (assisting 10 countries)	Short term as well as long term (1 to 1.5 years)	Generally remote, but ALSF encourages face to face contact. Local attorneys are face to face	Depends on need – lawyers with required language skills are engaged	Abidjan, Cote d'Ivoire (Temporarily relocated to Tunis, Tunisia)
African Center for Economic Transformation (ACET)	Capacity building, policy advice	Primarily policy, some legal	African countries	Extractive resources (through the Extractive Resource Services program)	ACET is funded by donors; Non-fee based	Limited number of workshops	Short term (workshops)	Workshops may be held in country, but a regional approach is taken.	English	Ghana
IMF	Capacity building, technical assistance	Financial	Worldwide	Dedicated fund for natural resources investments	Non-fee based		Short and long term	In country through regional centers	Depends on need	Washington DC and regional centers

International Development Law Organization (IDLO)	Capacity-building	Legal (including sector lawyers)	Worldwide	Initially treaty negotiation, but now includes support for investment contracts.	IDLO seeks funding from donors; Non-fee based		Mostly short term (e.g., training and workshops) – due to cost	90 % in country.	Depends on need	Rome
International Senior Lawyers Project (ISLP)	Negotiations; pre negotiation preparation; legislative and regulatory reform; onsite long-term capacity-building; post contract disputes, e.g., transfer pricing; supplemented with general policy advice, workshops, limited capacity development (some)	Legal (On occasion, external support, such as a financial or industry expert, has been arranged, generally through partnerships, e.g. with RWI.)	Primarily African countries. Country must have a government moving in a positive direction on transparency and human rights issues. Some funding is for support in particular countries.	Predominantly extractive industry investments (largely due to funding), but not restricted in principle to that.	Non-fee based; out of pocket costs paid for by donors or assisted governments	Around 10-15 projects per year, of which [5-10] are transactional projects (involving negotiations).	Short and long term (short-term trainings; longer-term onsite capacity-building; commitment of many months or years for contract negotiations); in some instances, e.g., Liberia, client relationship has continued over multiple projects and years. ISLP also sends	Both in-country and remote.	Depends on need. Work to date has included English, French, and Portuguese	New York (with affiliated offices in Paris and London); volunteers drawn from law firms principally in North America, Europe and South Africa

							senior lawyers to work onsite in Liberia with ministries for several weeks and multiple periods and is prepared to explore doing the same in other countries			
Norad - Oil for Development (OfD)	Capacity building, pre-negotiation phase assistance	Legal, financial	Core - Angola, Bolivia, Ghana, Mozambique, Sudan, South Sudan, Timor Leste, and Uganda. More limited relationships - Afghanistan, Bangladesh, Cuba, Iraq, Ivory Coast, Lebanon, Mauritania, Nicaragua, The Palestinian Territory, São	Oil sector	Non-fee based (grants)		Depends on project	In country	Depends on project	Norway

			Tomé and Príncipe and Tanzania.							
Pan African Lawyers Union (PALU)	Capacity building	Legal	African countries	N/A	PALU training funded by ALSF	4 workshops over 1 year	Short term	In-country support,	English, French	Arusha, Tanzania (base of secretariat)
Revenue Watch Institute (RWI)	Structuring of negotiation processes, development of negotiation strategy, support during negotiations (and renegotiation), capacity building, policy/legislative reform	Legal, financial advice, development	Predominantly African countries, also Mongolia and Latin America	Extractive industries	Non-fee based	Varies, but has been around 3 medium- to large-scale projects at any one time	Short and long term	In country support, with analysis sometimes done by remote experts.	Predominantly English and French, also Spanish	New York, satellite offices in Ghana, Peru, Azerbaijan, Lebanon, Indonesia and London

<p>UNDP – Regional Project for Capacity Development for Negotiation and Regulation of Investment Contracts</p> <p>[no longer operational]</p>	<p>Capacity building, pre-negotiation, negotiations, assistance with development of laws, regulations and policy</p>	<p>Legal, financial, development</p>	<p>African countries</p>	<p>Was focused on, but not limited to, natural resources</p>	<p>Non-fee based</p>	<p>Expanded from 5 to 11 per year (defined by number of countries being assisted), 5 to 6 additional countries wanting to receive support</p>	<p>Short and long term</p>	<p>In-country support, coordinated from Senegal</p>	<p>English, French, Portuguese (depends on project)</p>	<p>UNDP/UNOPS Regional Service Center in Senegal</p>
<p>World Bank – Extractive Industries Technical Advisory Facility (EI-TAF)</p>	<p>Capacity building, pre-negotiation phase</p>	<p>Multi-disciplinary (legal, financial, sector experts, commercial commodity specialists, environment/social experts, infrastructure specialists)</p>	<p>Worldwide</p>	<p>Extractive industries</p>	<p>Trust Fund established by Bank members; Non-fee based (grants)</p>	<p>In 2009-10 – 3 active, 8 commencing, 7 potential requests</p>	<p>Depends on project</p>	<p>In country</p>	<p>Depends on project</p>	<p>Washington DC</p>

B. Prominent initiatives¹²

1. African Legal Support Facility (ALSF)

ALSF was established in 2009 as an independent institution housed in the African Development Bank (AfDB), in response to a call by finance ministers both in Africa and internationally to provide assistance to member countries struggling with vulture fund litigation. It has also provided support for complex negotiations.

ALSF acts in response to requests for assistance from governments. Because of its affiliation with the AfDB, ALSF's point of entry is generally with ministries of finance. However, once engaged, ALSF seeks involvement by ministries of justice/attorney generals' offices on the team, as well as sector specific ministries if the project requires it. On every project, ALSF asks for a "point person" to be nominated, preferably a lawyer and usually a tenured civil servant, in the relevant government agency and seeks to require that relevant ministries work together on projects.

ALSF provides funds for governments to retain lawyers, and manages the procurement process which is essentially similar to AfDB's procurement guidelines. ALSF maintains a database of international lawyers with relevant expertise, who bid competitively for projects. ALSF shortlists the respondents and assists the government with its selection. ALSF requires that local lawyers be retained by the international lawyers on every project and usefully engaged (i.e. at the table, rather than acting as "drop boxes"), in order to build capacity of local lawyers. International law firms are selected on the basis of their skills and fee package offered, as well as their commitment to capacity building during the project. ALSF's preferred scenario is that the international lawyers act as support to the local lawyers. In addition, ALSF requires that international lawyers run training sessions for government lawyers and local lawyers, when they are in the country.

ALSF usually obtains a discount on market rates (around 20% on hourly fees) and preferably seeks a fixed fee arrangement. All fee payments are made directly by ALSF to the retained lawyers.

ALSF seeks to monitor the provision of advice, but its ability depends on the particular engagement and the government's willingness to disclose information. ALSF requires monthly written reports from outside counsel, and calls or writes to the government representative monthly.

ALSF has encountered a positive response from governments requesting assistance, which it attributes in many respects to the fact that governments perceive that they have a stake in the ALSF, given its relationship to the African Development Bank, and it is therefore not perceived as an external body providing advice.

ALSF has also run four formal capacity-building sessions for African lawyers, which included complex commercial transaction in partnership with PALU and PPIAF (Public-Private Infrastructure Advisory Facility) at the World Bank. ALSF is looking for other ways to provide capacity building facilities for African government and private lawyers.

ALSF's staff includes a director, five attorneys, a finance expert, and a three-person administrative staff. With this staff, ALSF sometimes handles legal projects in-house, typically on shorter, straightforward, deals, but generally acts as the liaison between the country and the retained

counsel. ALSF's profile is higher in countries where it has a field office. ALSF is funded by the AfDB, bilateral sources and regional development banks.

Limitations: ALSF's procurement process can lead to delays in making support available. The Facility currently lacks the mandate to expand – e.g. ALSF has received requests to assist in broader areas such as law and policy drafting, but has declined. ALSF is trying to develop “best practices” for projects, but this is difficult, particularly given the variety of sectors and common vs. civil law systems. Financial, economic, and technical advice are not provided under the ALSF's mandate. No requests so far for assistance in deals with China. No policy yet on assisting with renegotiations.

2. African Center for Economic Transformation (ACET)

ACET is an economic policy institute supporting the long-term growth *with* transformation of African economies. It conducts research and analysis of economic policies and works for their implementation through direct advice to governments, advocacy, and knowledge-sharing among decision makers. ACET helps African countries use their natural resources to drive economic transformation through policy-oriented research, advice to governments, and capacity-building programs. To date, ACET has partnered on capacity-building with the Norwegian Agency for Development Cooperation (NORAD), Petrad, Revenue Watch Institute (RWI), and the World Bank. With a core staff of twenty from eight African countries based in Accra, ACET brings an authentic African perspective, augmented by a vast network of leading thinkers throughout the world.

Limitations: Work is primarily focused on policy-oriented research although some capacity building is undertaken. ACET has limited staff at present.

3. International Monetary Fund (IMF)

The IMF provides technical assistance in its areas of core expertise: macroeconomic policy, tax policy and revenue administration, expenditure management, monetary policy, the exchange rate system, financial sector stability, financial sector legislative frameworks, and macroeconomic and financial statistics. The IMF has increasingly adopted a regional approach to the delivery of technical assistance and training. It operates eight regional technical assistance centers: in the Pacific; the Caribbean; East, West, Central, and Southern Africa; the Middle East; and Central America. The IMF is planning to open a second regional center in West Africa for non-francophone countries in the region. In addition to the regional centers the IMF provides technical assistance from headquarters financed internally, through multi-donor topical trust funds, and under schemes with bilateral donors. The IMF established a topical trust fund for managing natural resource wealth that started operations in 2011. It aims to help resource-rich countries with their specific needs with respect to fiscal regimes and related contracts, revenue administration (incl. commitments under the Extractive Industries Transparency Initiative), macroeconomic management, transparency arrangements, public financial management, asset and liability management, and statistics. The objective is to maximize the development benefits of natural resource wealth. The volume of IMF technical assistance in extractive industry issues has substantially expanded in recent years.

Limitations: Assistance is limited to IMF core areas of expertise. The IMF is unwilling to provide assistance in actual negotiations.

4. International Development Law Organization (IDLO)

IDLO provides both training and technical assistance in relation to investment contracts, i.e. working with the beneficiary to prepare them for the negotiation. Six years ago, IDLO also began assisting with institutional reform. Because of IDLO's policy of strict neutrality, IDLO experts have never participated in an actual negotiation with the investor. Rather, they seek to enhance the capacity of beneficiaries to carry out negotiations themselves.

In-house staff or external experts hired by IDLO travel to the country to conduct training workshops upon a specific request from a government, organization or donor. IDLO generally sends in-house staff to run workshops, but if it does not have the required expertise it engages an external expert and designs the workshop or training course with that expert. IDLO maintains a database of external experts it can draw upon when needed. IDLO interviews proposed experts to ensure that they have the right experience and language skills; experts must have at least 10 years practical experience and regional expertise. It then negotiates with the expert an arrangement making sure that the expert uses IDLO's Training Methodology, Needs Assessment and Performance Objectives.

IDLO exercises quality control on training events ensuring that IDLO's training methodology is rigorously applied by IDLO managers, facilitators and consultants.

The following are examples of relevant support (regarding investment contracts) IDLO has provided:

- Workshops and training courses for relevant stakeholders within the government in Mozambique (Ministry for Mineral Resources, Ministry of Environment and Ministry of Finance) on oil, gas, natural resources, minerals law. IDLO organized training on negotiation skills and Alternative Dispute Resolution (ADR) as well as on the drafting of bilateral investment treaties and concession agreements.
- Courses aimed at strengthening the capacity of lawyers negotiating investment contracts (this course ran for 24 years and was discontinued in 2010 due to lack of donor funding).
- Courses to local enterprises and investment lawyers on how to attract FDI and how to draft investment contracts including PPP infrastructure agreements (courses ran for many years and were also discontinued in 2010 due to lack of donor funding).
- Courses on the negotiation of technology transfer agreements.

Limitations: IDLO does not provide technical expert advice on a specific negotiation of a contract with an investor and is limited in funding for its capacity building programs.

5. International Senior Lawyers Project (ISLP)

ISLP provides training, onsite capacity-building, legislative and regulatory reform assistance and contract negotiation assistance to governments. In all cases, ISLP operates by providing highly experienced senior lawyers, on a pro bono basis, to serve as counsel and advisors to governments. ISLP currently has two paid staff members dedicated exclusively to its economic development

program. They work with clients and volunteers to develop the terms of reference of an advisory project and ensure that the project is effectively implemented, secure funding for the program, and manage the logistical and administrative aspects of each volunteer assignment. ISLP is currently seeking to fill a new staff or consultancy position that will focus exclusively on economic development work in Africa.

Typically, governments or third parties make a request to ISLP when a need is identified. Governments that approach ISLP are generally those with which there is an established relationship, or where external contacts (e.g. the IMF, a counterpart in another country) have recommended ISLP. ISLP maintains a network of global law firms and senior lawyers, and requires that lead lawyers on projects must be partner level. ISLP connects the government with one or more lawyers selected by ISLP for their specific expertise in the area of need. If the parties decide to go forward, ISLP signs an engagement letter along with the volunteer (individual or firm) and the government in question.

ISLP monitors the engagement on an ongoing basis, with both the government and the volunteer (through ongoing and end-of-activity reports) and provides logistical support to the volunteer for arranging travel and meetings.

In addition to support for actual negotiations or contract disputes, ISLP provides training and capacity development support. Examples include:

- High-level capacity building: practical workshops of 3.5 to 5 days duration, in Liberia, Tanzania and Mozambique, on topics including “an overview of international practices in negotiating and contracting,” “drafting investment contracts,” “fiscal and financial provisions,” “best practices for administration and management of mining contracts,” “how to manage uranium mining contracts,” and “legislative drafting.”
- Some work on building capacity to monitor extractive-industry investment projects on an ongoing basis, including in the area of verifying the accuracy of tax receipts.
- Assistance with the drafting of rules, regulations, and codes related to extractive sectors (in Liberia, Sierra Leone, Mozambique).
- Ongoing assistance and advice to the Ministry of Finance in Liberia regarding the development of transfer pricing regulations and their application in particular matters and general international tax matters including treaties and information exchanges.

Limitations: Although ISLP volunteers have spent significant periods in certain client countries and have ongoing and continuing relationships with ministries, it does not have any permanent presence in any recipient country. This deficiency may be addressed in the next several months, when ISLP retains a full-time staff or consultant to focus exclusively on its economic development work in Africa. To date ISLP has been able to identify sufficient high quality volunteers to service the projects it accepts, but the number of projects it can evaluate and take on is limited by staff and funding for out-of-pocket and administrative expenses. ISLP limits this aspect of its programs to very low income countries, e.g., Liberia, Sierra Leone and Malawi. ISLP does not take on projects where governments can reasonably and timely secure paid counsel. Subject to funding, ISLP could envisage expanding its support to other regions and sectors, although availability of qualified lawyers willing to do the work on a volunteer basis could become a constraint. ISLP is active in other sectors with

civil society and governments on economic development issues, human rights, and rule of law; in some cases these other activities may raise conflicts.

6. Norad - Oil for Development (OfD)

Oil for Development was launched in 2005 in order to focus Norway's petroleum-related assistance on work that helps to improve revenue and environmental management in the oil sectors of resource-dependent developing countries. OfD describes their assistance as "demand driven." Requests for assistance, as well as funding to the OfD country programs, are usually channeled through the embassies.

Oil for Development has arranged workshops preparing cooperating countries for negotiation with oil companies with regard to block allocations. However, OfD's assistance stops just before the negotiating table. For political reasons, they decline to take active part in negotiations. OfD also collaborates with the World Bank Group on the Extractive Industries – Technical Advisory Facility (EI-TAF) (which is described below).

Limitations: OfD is able only to provide support in the oil and gas sector, and does not provide direct assistance for actual negotiations. Experience on the ground has shown limited coordination in collaborating with other bodies providing assistance in the oil and gas sector, and a propensity to apply the Norwegian model over alternatives.

7. Pan African Lawyers Union (PALU)

PALU acts as an overarching association for regional and national lawyers' associations in Africa. PALU's mission statement includes legal capacity building, regional integration, and the bolstering of development initiatives geared toward socio-economic development and the rule of law. PALU's work is complemented by its relationships with the African Union and the African Development Bank.

In 2010, AfDB's African Legal Support Facility (ALSF) approved a \$900,000 grant to PALU. This partnership aims to increase the capacity of African lawyers to better engage in complex international commercial transactions and litigation, bringing together the private legal bar and governments (through an intergovernmental organization). The joint capacity building project will train over 150 lawyers from across Africa. Regional training seminars have been held for the Eastern, Southern, Northern and Western African regions in Kigali (February 2011), Cape Town (May 2011), Tunis (January 2012) and Yaoundé (March 2012).

The broad objectives of the project are: to take stock of the "state of play" in complex international commercial negotiations and dispute resolution across Africa; build a database of lawyers knowledgeable, skilled and experienced in complex international commercial negotiations and dispute resolution in Africa; facilitate increased and improved financing of infrastructure projects; sharpen international arbitration skills; develop the capacity of African lawyers to tackle vulture funds and better manage public debt; promote the activities of the African Legal Support Facility; and market PALU and motivate lawyers to join as fee-paying members.

Limitations: Workshops are short term so capacity building is not sustained. The initiative is not targeted to governments and does not provide direct assistance for negotiations.

8. Revenue Watch Institute (RWI)

RWI is primarily involved in providing assistance to governments in their review of existing extractive industry contracts, planning for and assisting in the renegotiation of those contracts, and assessing the renegotiation process. Infrequently, RWI has assisted with new investment contracts (including pre-negotiation preparation and negotiation itself). RWI's core expertise is in providing a development perspective, as well as advice on fiscal policy, economic modeling and analysis and good governance. RWI advises oil- and mineral-rich governments on legislative and policy reform, and seeks to help governments link contract negotiations to these broader sectoral policy reforms. RWI's team includes lawyers, economists and governance specialists.

In their contributions to negotiation processes, RWI experts typically serve as members of a team of advisors, frequently involving sector experts (for example, in diamonds or in iron ore) and other lawyers from ISLP or retained by governments by other means. RWI has worked closely with UNDP in Sierra Leone and has had discussions about collaboration with lawyers arranged through the World Bank EI-TAF or through ALSF. RWI has also worked closely with OfD and ACET in Sierra Leone and Liberia, providing assistance on the legal framework for petroleum and organizing capacity-building workshops covering negotiation strategy, among other subjects. On some occasions, RWI assists the government to assemble its team for a particular project and on others RWI has been approached by another organization to join an established team.

Maintaining regional offices in Ghana, Peru, Azerbaijan, Lebanon and Indonesia as well as staff on the ground in other countries in which RWI is active, assists in delivery of support. For example, there is a readily available point of contact for government counterparts, communication is easier and there is the ability to respond quickly to new demands. It is felt that this builds more trust into the relationship.

Support is generally initiated by request from contacts in government in countries where RWI has a presence or as a result of RWI's profile in these issues. Alternatively, contact has been made through donors or staff on the ground.

Beyond its support to governments, RWI provides extensive capacity building support to civil society groups, parliaments and other oversight actors throughout the world, including on the analysis and monitoring of extractive-industry contracts.

Limitations: RWI does not, on its own, enter into traditional attorney-client relationships with government partners for negotiations; instead, it typically works as part of a team with private-sector lawyers supporting the government, or provides over-arching advice to governments on contract strategy. RWI's ability to support negotiations in multiple countries is constrained as a function of available financial resources.

9. UNDP – Regional Project for Capacity Development for Negotiation and Regulation of Investment Contracts

The UNDP Regional Project for Capacity Development is no longer operational. The initiative provided support in a number of areas, with a mission to strengthen governance and transparency related to large-scale investment contracts, and a core focus on capacity building.

The Project provided and coordinated external expert support to African government officials in a number of disciplines, including financial, technical, industry specific, investment bankers and lawyers. The Project benefited from active guidance from recognized academic experts and partnered with ISLP, RWI and Advocates for International Development. Although external experts were engaged to provide technical assistance, the Project staff also provided technical assistance and actively managed the high level government relationships necessary for successful Project implementation. The Project was managed through the regional UNDP/UNOPS offices in Dakar, Senegal. In addition to leading international lawyers and other experts, project assistance to countries was also carried out with support from African lawyers in the region. Its key focus was the following:

- Assistance with development and reform of policies, laws and regulations
- Assistance with capacity building in evaluation of a country's assets, setting up bids, understanding necessary documentation required to qualify bidders, evaluating bids
- Training on drafting laws and regulation, and negotiations, including substantive issues largely related to the negotiation of large-scale mineral, oil and gas agreements
- Briefing and preparing for negotiations
- Assistance in negotiations

Key strengths of this Project were its presence on the ground through the UNDP regional offices, balanced technical competence of its staff, and the staff's ability to function at the highest levels in both English and French. These attributes allowed Project staff to interact face to face and manage issues directly with high-level government officials, other stakeholders in-country and recipients of support. This enabled the Project to develop relationships with government and relevant stakeholders, which strengthened the ability to deliver support by being perceived as trusted advisors. As a result, within 12 months of being fully staffed, the Project grew from 5 Project beneficiary countries to 11 Project beneficiary countries at the specific and high-level request of the relevant African States.

Limitations: Hosting an initiative like this within a multilateral institution has limitations, for example, perceived political risks to the organization and shifting organizational priorities on "special" projects with leadership changes. Additionally, the bureaucratic structure, rules and regulations of a multilateral institution are not optimal for a Project designed to provide significant technical expertise from the private sector and support negotiations with the private sector. The Project was ultimately closed because of funding limitations and cuts.

10. World Bank – Extractive Industries Technical Advisory Facility (EI-TAF)

The EI-TAF is a multi-donor trust fund managed by the Oil, Gas and Mining Policy and Operations Division of the World Bank. The EI-TAF aims to facilitate rapid response advisory services to developing country governments for capacity building and to prepare governments for extractive industry projects, including contract negotiations and associated policy reforms and frameworks. Services are demand-driven and there has recently been a trend towards requests for assistance in relation to evaluations of the interface between mining and infrastructure proposals.

The EI-TAF provides funds to governments – generally an award of around \$500,000 – and government carries out the procurement to assemble the required team of experts. The World Bank maintains a list of consultants with particular expertise. The procurement process is monitored by the World Bank under its procurement rules, including the provision of a report detailing the reasons for selection of each expert. Where the country does not have the capacity to undertake the procurement process, the World Bank will carry it out on the country's behalf. Generally a multi-disciplinary team of 5-7 experts is assembled, which includes legal, financial, sector, commodity, environmental and social expertise. Increasingly, there is also a physical infrastructure specialist (e.g. roads, rail, and port as relevant). Ministries are required to nominate counterpart specialists, who will work with the experts in order to develop capacity.

Experts are engaged at market rates and the funding generally lasts around 8-10 months. The general turn-around time from request to engagement is around 2-3 months.

According to its 2010 Progress Report, EI-TAF is able to respond to country needs for advisory assistance on a much faster basis than traditional World Bank lending and technical assistance instruments. EI-TAF works on a first-come / first-served basis and the projects are reviewed and decided in a single meeting.

A meeting is convened with donors to the EI-TAF trust twice a year to go through the countries to which assistance has been provided. The World Bank is currently working on developing new measures for success of projects.

Limitations: Governments have commented that provision of assistance on occasion is not fast enough. Procurement and financial management issues were slow when the grants were recipient-executed (managed by the government). However, since April 2012 the donors and EI-TAF program management have switched to largely World Bank-executed implementation arrangements. Assistance is not provided for negotiations themselves. The position of EI-TAF is that governments themselves should be driving the negotiations, although there may also be concerns which stem from key World Bank shareholders or trust fund donors.

In addition to these ten key initiatives, an inventory of other mechanisms of support is provided in Annex 2. This list is not intended to be exhaustive and comments are invited during the workshop.

C. Key issues for discussion

- 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?

III WHAT IS MISSING

This section of the report reviews the gaps that have been identified in the current range of sources of assistance for negotiation support.

1. Expertise other than legal

The review in the previous section shows that there are organizations providing legal support in all phases of negotiations, albeit the support is limited for specific negotiations (see below) and for monitoring and implementation. In addition, there are a number of programs that provide capacity building on legal issues. Non-legal experts are less readily available – for example, financial/economic experts, financial modelers, sector experts, investment bankers for financial structuring, and development specialists.

The weakest area in terms of availability of support relates to assistance targeted to **industry-specific technical expertise**. A knowledge gap usually exists between the government and the investor (e.g. geological data and its interpretation, global sector trends, technology developments, sustainable development challenges, environmental management). Governments often do not possess industry-specific commercial skills or access to critical information (global commodity market trends, commodity pricing trends and systems, consumer trends). The presence of an industry specialist on the team can help build the government's credibility and confidence when dealing with the company's negotiating team.

A number of respondents commented that it can be a challenge, in particular, to find strong industry experts, due to conflict-of-interest issues. Industry experts often work for investors and may therefore display reluctance to work for governments. It was also noted by several respondents that governments can show a reluctance to bring in external experts associated with industry for fear of breaches of confidentiality. Governments may also not have the ability to pay the fees charged by these experts or may not even be aware of the need for this expertise.

In addition, governments may need assistance in the management aspects relating to **assembling a negotiating team** to prepare for and carry out a negotiation, including but not limited to identifying experts that are required in addition to lawyers. An external advisor can also be helpful in managing internal government negotiations.

2. Limitations of existing legal assistance

a) Limitations of non-fee paying legal assistance

A number of initiatives exist to provide non-fee based or subsidized legal advice to governments. However, these initiatives are often **limited in their funding** and therefore the amount of support they are able to provide. Moreover, as mentioned previously, a number of donors that provide funding to allow governments to retain advisors **will not provide that funding for direct negotiations**.

b) Limitations of specialty, timeframe and scope of existing legal assistance

It was noted that legal experts retained may not have **specialist experience** in the relevant sector (e.g. extractive industries), or in working with and serving **the needs of government**. For example, transactional lawyers may tend to focus on “getting the deal done,” which may not include a long term view of the terms of the deal for the country or revenue management issues. Moreover, the assistance may be **limited in timeframe or scope** according to the resources and mandate of the external initiative rather than by the needs of the government. **Strong monitoring standards** should be implemented to ensure that the advice provided is real, tangible and practical. It is preferable for lawyers to be involved over a long term, in order to develop relationships with government clients.

c) Limitations of experience and relationships with the government

Without experience working with governments, the experts may not have the incentive (or the experience) to create ownership within the broader confines of government, for example, working slowly in order to obtain buy-in from competing government groups for the negotiation strategy. This may therefore ultimately not translate into good outcomes for the country. Indeed, one respondent commented that key success factors for the provision of support are: (a) providers of support should have the **confidence and trust** of governments; (b) there has to be **buy-in and political will at the top**; (c) the approach must be **conciliatory rather than antagonistic** (if advisors create a rift between governments and investors, the resulting acrimony will be prejudicial); (d) the support must **enable governments to articulate their own visions**; and (e) the support must provide the government with the **capacity to achieve the vision and promote governance** in addition to carrying out a short term transaction. **Experience working with governments**, as well as long term involvement as discussed below, is important in order to understand and be able to address these issues.

d) Limitations imposed by government procurement processes and funding

A government’s ability to engage effective legal advice may be affected by its **procurement processes**. These processes may require that legal services are engaged by tender, with the contract generally being awarded to the lowest bid. In some cases, this may mean that the government does not receive the highest quality advice. For example, in order to “get a foot in the door,” firms may bid low prices and then provide more junior (and less experienced) lawyers to work on the project. In some cases, the fee arrangement may also be subsequently renegotiated (and increased) over the course of the engagement, if the fees were unrealistic at the outset.

On other occasions, governments may wish to retain experienced counsel, but are impeded by **lack of available funding sources**, meaning that it may be impossible, or a long process, to engage their desired counsel.

3. Timing of support

Governments often do not seek help with negotiations at an **early stage**, putting them at a disadvantage in the negotiations from the outset. On occasion, negotiations have already commenced (sometimes even after the term sheet has been agreed) before external assistance is sought. This may mean, for example, that certain options have not been considered, leading to a

less advantageous contract. **Late requests for assistance** might be due to political sensitivities, to inexperience, to lack of funding and to the desire to maintain control over the negotiation.

Respondents underlined that for the best negotiating outcomes it was important for the government to put together the negotiating team, including both officials and external advisors, at the very start of the process rather than bring in experts part way through, and to the extent possible, to maintain the same negotiating team throughout the negotiation. Providing resources, tools and assistance even before the negotiating process starts—for instance, with drafting model contracts, policy reviews and formation, and industry research—can also be instrumental in shaping successful negotiations.

4. Support following conclusion of a contract – implementation phase

There is a significant gap in the availability of support to governments following the conclusion of a contract. The governments' tasks here are to **ensure contract compliance** (both in terms of financial and fiscal elements, and for environmental and social performance), and to **plan for end-of-life** activities such as environmental cleanup, labor creation for affected communities, etc.

Other than limited capacity-building workshops, there does not appear to be support dedicated to the **implementation, enforcement and monitoring of the contracts** or to strengthening governments' capacity to do so.

5. Long-term assistance

Many of the initiatives provide **assistance for particular projects** and for **limited phases** of those projects only. The assistance is not provided over the long term, to build up a particular ministry, agency or national resource company. Respondents commented that an external advisor “parachuting” in and out does not serve the capacity building needs of governments. Rather, it is important to become a “trusted advisor” in order to provide capacity building, and this needs to be built up over a period of time. Short-term training sessions are also of limited benefit.

While model contracts may be available, host-country negotiators may not understand where they can deviate from the terms, or the company may try to refuse to negotiate from the model. In addition, model contracts need to be used carefully, understanding that each project should be independently evaluated and may require different terms. In addition, without significant experience gained through practice in negotiations, in the face of company's negotiating teams and political pressure, it can be difficult to maintain a strong position or to know which way to go on particular issues. This sort of experience cannot be taught in short term training sessions.

An example was provided of long term assistance provided to the Indonesian government by advisors from Harvard University who were involved in Indonesia for about 20 years. Expatriate advisors, experts in economics, planning and law, were based in two critical ministries with long-term commitments (of around 2 years or longer). Over that time, the resident advisors brought in short-term experts from abroad as needed, but the residents themselves remained on the ground to help officials implement the advice, or to help modify it as problems arose.

One respondent commented that it is important for governments to determine what kind of expertise to develop internally, which would be addressed by long term capacity building, and what should be outsourced.

6. Knowledge management and knowledge sharing

There is generally a **lack of availability of documentation**. For example, there are few documents describing “**best practices**” in terms of policy frameworks, legal and fiscal terms, contract provisions, etc., as applicable to common law and civil law countries. In addition, **accessing past or existing contracts** as precedents, models or for comparison can be difficult. There is **limited knowledge sharing** between countries and regions of concluded contracts and related documents and there can also be a **lack of co-ordination between different teams** (e.g., across different sectors) within one country. Countries also **lack contract management systems** to enable monitoring and enforcement of contractual terms over the long term of the project. In contrast, in the private sector, companies or firms are able to access many other industry contracts, either through the firm’s own precedent system or through specialized subscription databases. Here, better knowledge sharing mechanisms and resources would be useful for building in-country knowledge and precedents.

Ideally governments would use model contracts and associated standard documentation in the key sectors: mining, oil and gas, forestry, toll roads, water and sanitation plants, independent power plants, etc., with clear guidance on the fact that they must be adapted to the context of the particular deal. However, these specialized resources are not readily available.

Finally, there is **limited opportunity** for local experts to get **exposure to similar transformative, large-scale transactions**. Unlike experts of industrialized countries who have more international flexibility to develop their practice on a wider geographical scope, local experts have limited occasions to develop experience in negotiations in house.

The **lack of institutional knowledge** is exacerbated within governments by high staff turnover in government agencies, which means that the skills and ability to build institutional knowledge are lost. More formalized knowledge-sharing mechanisms could be useful in this respect.

7. Sector focus of available support

Most of the existing initiatives provide support for negotiations of oil, mining and gas contracts but now there is an emerging focus on other major investment contracts, such as for land or infrastructure projects.

One respondent commented that it would be helpful to understand the evolving needs of government in new areas where support is required. For example, in South Asia and the Middle East where governments and local firms have developed capacity for negotiations of natural resource contracts, they are now increasingly negotiating agreements relating to pipelines and transportation where their knowledge is less extensive. Assistance in building up capacity, and the ability to share knowledge between countries and develop “best practices” in those areas is needed.

A. Key issues for discussion

- Does the above review accurately represent the gaps between the identified needs of governments and the available support?
- Specifically, where are there gaps in terms of type of expertise? Geographic focus? Type of contract? Stage in the contracting process? Direct participation in the negotiating process?

IV HOW TO ENSURE EFFECTIVE SUPPORT

This paper posits that in order to achieve more robust and balanced contracts governing major investments, it would be useful for developing country governments to be able to call on world class legal, technical and financial skills that they do not possess, as well as to increase their own capacity in those fields (Section I). In the prior review of existing support, it should be noted that while a large number of support initiatives exist (Section II), there remain significant gaps (Section III). This section poses a number of key questions as to whether and how existing sources of support could usefully be complemented to ensure comprehensive support. It is designed to foster discussion concerning various possible options.

A. Objectives

Clear objectives must be set in the context of criteria to be considered in evaluating the sufficiency of existing mechanisms and/or the need for any new mechanisms, as well as to determine the appropriate mechanism going forwards (if any). As has been discussed in the sections above, some of the important criteria to consider include (but are not limited to) the following.

- Advice is needed in integrated specializations, including but not limited to, legal support, financial and business expertise, geological and technical expertise, environmental expertise, and other areas of knowledge, outlined in section I and Annex 1 of this report.
- Advice and assistance is needed at all stages of the contracting process, from the pre-contracting phases (of designing model contracts and drafting legislation) through implementation, as outlined in detail in section I and Annex 1. Different skills would be required in each of these phases.
- Technical support needs to be high quality, based on extensive field experience.
- Relationships with the government are important, and long-term, resident relationships can be helpful in that respect.
- Tools and resources that provide increased access to information (including contracts, other legal frameworks, etc...) can help to level the field in terms of access to precedents and information.
- Capacity building needs to be structured, long term and often resident where possible.
- Funding mechanisms are important to consider, as they may impact aspects of the advice, such as the buy-in of the government and sufficiency of resources for the provision of assistance, among other things.

B. Consideration of mechanisms to provide support

There are a number of options that could be considered as mechanisms to address the gaps. For instance, one or a combination of the following options may be explored.

- Working with some of the existing initiatives to expand their support to sectors and regions currently not covered. This may include expanding technical and financial support as well as making available precedent documents, knowledge management systems and other tools and resources.
- Creating a mechanism to coordinate existing sources of support, drawing on the strengths of each.
- Creating a new initiative, either targeted at the gaps identified or comprehensive in design. A new initiative could deliver support in a number of ways, for example, it may be directed at providing the tools, resources and/or innovative approaches described below, it may address the gaps in existing support, coordinate existing support, it could provide comprehensive support, or a combination of these options.
- Designing improved tools and resources (as discussed in part C below), as well as new creative ways to support governments (e.g., through the use of the media and social networking to enable widespread sharing and comparison of information and pricing information, contract norms and outcomes, problem-solving frameworks¹³ to assist governments with developing plans and negotiation strategy). These could be delivered through any mechanism which is taken forward.

It could be argued that support to the government at every phase of an investment project – from the pre-negotiation phase, to the negotiation phase and contract implementation phase – by one organization would be the ideal option, because of the overall consistency and seamlessness that this would present in terms of advice. The question must however be asked whether this approach is indeed feasible or practical given the scale that such support would require and given the number of initiatives already successfully providing certain types of support. In this regard, a new initiative may better be targeted at coordinating this existing support and filling any gaps, in both resources and tools available.

It should be determined whether it is indeed feasible or desirable to combine all required skills within one initiative, and if it is what the pros and cons are of such an approach. (Were a new initiative to be considered, Annex 3 provides some options for its institutional structure.)

Finally, if it is not necessary or possible for support to be provided effectively at all stages of the process and for all relevant skills within one initiative, consideration must be given to where the addition of more limited support should be concentrated, or which areas or activities should initially be given priority.

C. The need for tools, resources and long-term capacity building

A first (or ongoing) step that may be taken, whichever of the options is pursued, is to create useful tools and resources to be made available to developing country governments to expand on the few tools already available (for example, the Extractive Industries Source Book, the Model Mineral Development Agreement, and the Natural Resource Charter, all listed in Annex 2). Tools and resources could be provided through whichever type mechanism is adopted (e.g., through a coordinating mechanism or a new initiative).

These may include databases of contracts (perhaps coordinated with the World Bank Institute initiative listed in Annex 2) together with appropriate guidance as to the need to ensure that each contract must be specific to the deal at hand, websites providing comparisons of countries' legal and fiscal regimes and infrastructure arrangements, fiscal and economic analysis tools (such as that being developed by SNR Denton and ACT Financial Consulting, listed in Annex 2), geological databases and expert databases. A toolkit that was commissioned by the Walter and Duncan Gordon Foundation (based in Canada) as a resource for First Nation, Inuit and Métis communities in Canada considering impact and benefit agreements (such as those with mining companies) may serve as a useful example.¹⁴ While the toolkit focuses on the mining industry, many of the issues and processes addressed in the toolkit are relevant in other sectors and contexts. The toolkit is being rolled out with training sessions in Aboriginal communities and is being taken up by Aboriginal communities as well as their advisers. Many of the issues faced by Aboriginal communities in negotiations of impact and benefit agreements with investors parallel those faced by developing country governments.

D. Key issues for discussion

- How can existing initiatives be supported or expanded? 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?

Annex I: Analysis of needs to support developing countries in their contract negotiations

(Based on outcomes of the Berlin 2011 workshop, desk research, and interviews with international experts and government officials)

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
SETTING THE INVESTMENT ENVIRONMENT		
Formulate government policies and strategies	<ul style="list-style-type: none"> ➤ Sound policies providing guidance/information relevant for the negotiation of a complex contract. (e.g., FDI and fiscal policies, national development strategy, sector strategies). 	<p><i>2011 Action Plan of the "Africa Mining Vision"¹</i>: There is need to build capacity and enhance skills of government officials in formulating policies, laws and regulations.</p> <p><i>International Expert</i>: Assistance is needed for the development of a national vision. This is crucial for a successful outcome of the negotiations in providing direction and guiding principles to the negotiation team. Capacity development is needed with respect to policy formulation, statutory and technical issues.</p> <p><i>Berlin Workshop 2011 Report</i>: Improved assistance involves building long-term relationships with governments to develop and improve the broader legal framework.</p>
Reform legislative/regulatory framework	<ul style="list-style-type: none"> ➤ Unambiguous comprehensive legislation and regulations. ➤ Model contracts (according to best practices) to minimize discretion in the contract negotiating process, with guidance as to which provisions may be altered in the course of negotiation. 	

¹ African Union Commission, African Development Bank, United Nations Economic Commission for Africa. (2011). "Building a sustainable future for Africa's extractive industry: From vision to action. Action Plan for implementing the African Mining Vision." Addis Ababa.

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
Conduct sector-wide analyses and strategies	<ul style="list-style-type: none"> ➤ Good understanding of resource or infrastructure potential, providing guidance/information relevant for the negotiation of a complex contract (e.g., oil and gas reserve estimates, infrastructure needs). 	
PRE-NEGOTIATION PHASE		
Conduct/review feasibility and other studies	<ul style="list-style-type: none"> ➤ Obtain crucial information that defines the framework of the contract through feasibility studies, geological or micro-economic studies etc. 	<p><i>Berlin Workshop 2011 Report:</i> Assistance is needed early in the process, e.g., before the exploration phase (important when the license is bundled to the exploration license) or before a privatization.</p>
Conduct/review environmental/social impact assessments	<ul style="list-style-type: none"> ➤ Obtain crucial information on adverse impacts of a project through environmental, social and safety impact assessments to be considered in the contract. ➤ Prevention, mitigation or rehabilitation of potentially adverse impacts on environment, human health and social aspects (e.g. Environmental Management Plan). 	<p><i>Governmental Official:</i> Support is needed to obtain sound geological information which is crucial for extractive industries projects. Geological expertise is most needed.</p> <p><i>International Expert:</i> Capacity development is needed to bridge the knowledge gap between the government and the investor: development of industry specific technical expertise (e.g., geological data, global sector trends, sustainable development challenges, environmental management) and development of industry specific commercial skills (e.g., global commodity market trends, global commodity pricing systems, consumer trends). The parties should go into the negotiation as equal partners with the same technical information.</p>
Prepare the tendering documents (incl. draft contract)/ term sheet	<ul style="list-style-type: none"> ➤ Well-drafted and comprehensive tendering documents/term sheet. Preparation of/input to the draft contract/term sheet by legal counsel with sector expertise, sector experts. 	<p><i>Berlin Workshop 2011 Report:</i> Assistance is needed in setting competitive bidding processes.</p> <p><i>Government officials/International experts:</i> Legal Assistance is needed for contract</p>

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
Manage the tendering process	<ul style="list-style-type: none"> ➤ Identify the “best” contracting party through a sound, competitive (if possible and suitable in the circumstances), inclusive and transparent tender process. 	<p>formulation (see also the Negotiation Phase).</p> <p><i>Government Official:</i> In view of the highly complex nature of the activities involved in the tendering process, outside expertise is needed.</p>
Prepare the financial structure, as applicable	<ul style="list-style-type: none"> ➤ An appropriate and sound financial structure. 	<p><i>Several government officials/international experts:</i> There is a need for financial analysts and investment bankers. Some added that those are needed only on a short-term basis for the specific transaction. One government adviser mentioned that countries in Africa most needed financial analysts, and capacity-building is required in particular in the financial area.</p>
NEGOTIATION PHASE		
Prepare the negotiation	<ul style="list-style-type: none"> ➤ Determination of a national position taking into account the positions of all relevant stakeholders. Determination of areas of higher and lesser priority in which concessions to the other party can be made. ➤ Preparation of all documents & research of issues in consultation with other experts, as necessary, to bolster the Government’s negotiation position. 	<p><i>Berlin Workshop Report/Government Officials/International Experts:</i> Support is needed to strengthen the negotiation capacity of governments when they negotiate complex contracts. Improved assistance through “training that is long enough to cover the full process, including building negotiation skills and not only technical skills.”</p> <p><i>International Expert:</i> There is a need for a high level (national) position on the key issues reached by a government before the negotiation team enters the negotiation room (so that the team has sufficient directions on which issues it may negotiate).</p>
Develop negotiation	<ul style="list-style-type: none"> ➤ A clear and effective negotiation strategy 	<p><i>Lessons Learned from the External Assistance provided for the Liberia Renegotiations²:</i> A clear and effective negotiation strategy is needed as it can make a significant difference to the outcome of the negotiations. Training programs are needed which should</p>

² Raja Kaul, Antoine Heuty and Alvina Norman. 2009. *Getting a better deal from the Extractive Sector. Concession Negotiation in Liberia 2006-2008*. Revenue Watch Institute. Washington.

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
strategy		<p>include leadership and teamwork, concession negotiation management and strategy, negotiator training for complex negotiations.</p> <p><i>Research of the World Economic Forum's Responsible Mineral Development Initiative interviewing stakeholders of 13 countries in three regions: capacity building needs include preparation of negotiation strategies, negotiation and drafting of contracts.</i>³</p>
Assemble (multi-disciplinary) negotiation team	<p>➤ An effective multi-disciplinary negotiation team which is composed in a professionally balanced manner (i.e., all relevant ministries) and comprises all relevant disciplines.</p>	<p><i>Lessons Learned from the External Assistance provided for the Liberia Renegotiations: A multi-disciplinary negotiation team comprising individuals with different backgrounds, skills and experience (e.g., with significant mining, environmental, investment banking, finance, legal, and management experience) is needed in order to have a successful outcome of renegotiations.</i></p> <p><i>International Expert: Governments need assistance in assembling a negotiating team.</i></p> <p><i>Berlin Report/Several Government Officials and International Experts: Legal, financial (modeling), geological, environment experts are needed for the negotiation of the contract.</i></p> <p><i>Governmental official: Capacity building is needed for these disciplines.</i></p>

³ World Economic Forum. (2011). *Research Report. Stakeholders Perceptions and Suggestions. Responsible Mineral Development Initiative 2010*. Geneva.

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
<p>Negotiate the contract/draft and review contractual provisions</p>	<ul style="list-style-type: none"> ➤ An effective and smooth negotiation where both parties are on an equal playing field (with the same information, expertise and understanding of the available options). ➤ A contract which is well-drafted, responsive to changing circumstances and fair to both parties. 	<p><i>Literature:</i> Expert negotiators are needed as a means for a developing country to successfully and profitably exploit its natural resources for national advancement and at relatively low cost.⁴</p> <p><i>Several Government Officials:</i> They need short-term outside experts for the support of negotiations of bigger transactions.</p> <p><i>Lessons Learned from the External Assistance provided for the Liberia Renegotiations:</i> Support (i.e. legal support complemented by industry-specific, financial and other support) is needed for the negotiation of the contract: preparing proposals and counter-proposals on specific provisions; drafting language for resolving conflicts, modeling financial projections of the impact to changes in government's positions; helping finding viable compromises to apparent “deadlock” situations, advising on the implications and ramifications of proposed positions. External advisors should <i>advise</i> the government negotiators, but not be at the negotiating table themselves.</p>
CONTRACT IMPLEMENTATION PHASE		
<p>Monitor/ ensure contract compliance</p>	<ul style="list-style-type: none"> ➤ Contract compliance is monitored/ ensured (e.g., with respect to operational, fiscal, financial, environmental and social obligations) and plan for end-of-life activities (environmental clean-up, labor creation for affected communities). ➤ Institutions/mechanisms are built for contract monitoring (specialized 	<p><i>Draft Revisions to the Natural Resource Charter</i>⁵: The fundamental issue is not so much the design of environmental and social legislation and regulations, but rather the capacity of government agencies at national, and importantly, at local levels to monitor and enforce environmental and social laws and regulations.</p> <p><i>Several Government Officials:</i> Countries need capacity building of government officials for the monitoring of the contract.</p> <p><i>Government Adviser/Official:</i> Governments prefer to have the monitoring of the contract done by their own people. Capacity-building is needed to understand the</p>

⁴ Radon, Jenik (2007). Chapter 4: How to negotiate an Oil Agreement. Columbia University, New York.

⁵ Draft revisions to the Natural Resource Charter, December 2011: <http://www.naturalresources.org>

Typical Activity	Goals with Respect to the Activity	Needs of Support with Respect to the Activity
	<p>monitoring agencies as a large taxpayer unit).</p>	<p>specific field relevant for monitoring the contract implementation (e.g., finances, exports, internal pricing).</p> <p><i>Berlin Workshop Report/Government Adviser:</i> Improved assistance should involve building long-term relationships with governments to develop and improve enforcement capacity.</p> <p><i>Literature:</i> Capacity-building is needed with respect to the calculation and collection of revenues from projects (e.g., taxes).⁶</p> <p>State agencies should be equipped with knowledge and training to be able to credibly monitor contract compliance. The State must ensure that it has the capacity to effectively review, evaluate and to take appropriate and timely action on environmental and social impact assessments.⁷</p>

⁶ Bryan Land (2009). Capturing a fair share of fiscal benefits in the extractive industry. *Transnational Corporations*, Vol. 18, No. 1; UNCTAD, Geneva and New York, p. 170

⁷ John Ruggie.(2011). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. General Assembly Resolution of 25 May 2011. A/HRC/17/31/Add.3. United Nations. New York, paragraph 30, p.12

Annex 2: Other Organizations Providing Support to Developing Countries for Contract Negotiations⁸

<p>Adam Smith International (ASI) Legal, financial, policy, capacity building</p>	<p>ASI is an international advisory firm with an extractive industries practice that provides consulting services to both international investors and host governments. Key services include political and risk analysis, assistance with legal, fiscal and legislative reform (including issuance of mineral rights and the licensing regime associated with exploration and mining) as well as institutional reform meant to strengthen the capacity of government ministries to better manage the energy sector. ASI is particularly active in the mining arena. In working with governments, ASI develops regulations that enable licensing, monitoring and safe and responsible business practices. ASI has also launched a training course on extractive industries governance.</p>
<p>ABA Rule of Law Initiative <i>Legal, capacity building</i></p>	<p>Develops and supports legal education, governance and anti-corruption programs throughout the world.</p>
<p>Advocates for International Development (A4ID) <i>Legal</i></p>	<p>A4ID has three broad areas of assistance – non-fee based legal advice, awareness raising (through a resource center containing reports and legal guides prepared by legal partners) and an events and training program (for both legal partners and development partners).</p> <p>Legal advice is provided to those who qualify as “development partners”, which can include developing country governments, charities, NGOs, inter-governmental organizations, social enterprises, bar associations and law societies. The criteria to qualify include that the development partner must “abide by strong and transparent systems of governance and</p>

⁸ This list is not intended to be exhaustive, but is an indication of sources of support available. Comments are invited during the workshop on additional sources of support not identified in Annex 2.

	<p>accountability” and if it is an organization, it cannot make its assistance contingent on religious or political affiliation. A4ID also maintains a network of legal partners. Development partners submit a request for legal assistance and A4ID matches them with a legal partner.</p> <p>Support has been provided in Africa, Asia and Central and South America.</p>
<p>African Mineral Development Center (AMDC)</p>	<p>The AMDC will be established to strategically coordinate the implementation of the African Mining Vision (AMV). The AMDC will coordinate activities including the provision of technical support for the implementation of the AMV, identifying gaps and areas of need potential expertise to address those needs, undertake and coordinate policy research, undertake advocacy and information dissemination, monitor and evaluate activities relating to the implementation of the AMV and provide a think tank capacity for the AMV and the activities around it.</p>
<p>Ausaid – Mining for Development program <i>Capacity building</i></p>	<p>Launched in October 2011. Provides assistance through scholarships, study programs and research assistance, in Africa and Asia-Pacific, particularly focused on improving governance.</p> <p>Also, through this Mining for Development program, the International Mining for Development Center (IM4DC) was established, which will provide access to education and training, as well as technical and other advice, including through short courses in Australia and overseas, fellowships in Australia, mentoring and capacity building of local institutions, publishing guides and tools and conference and alumni events and support. IM4DC is targeting capacity in three areas - governance and regulation, community and environmental sustainability and operational effectiveness and safety. IM4DC does not have any courses planned at present that offer coaching on negotiations directly, although as its activities are aimed at building capacity in mining governance it is intended that will enhance negotiating capacity. Country needs assessments and scoping studies may well identify need for direct capacity building in negotiations in certain jurisdictions, although this would be generic rather than aimed at any particular project.</p>

<p>Brookings Institution <i>Policy</i></p>	<p>Provides substantial research and policy recommendations through its "Africa Growth Initiative", which focuses on 5 areas - macroeconomic management and the political economy, industrial policy, modernizing agriculture, managing natural resource exploitation and poverty alleviation and social protection.</p>
<p>Centre for Energy, Petroleum, and Mineral Law and Policy (CEPMLP) <i>Legal expertise, capacity building</i></p>	<p>CEPMLP is the lead Consultant for the Extractive Industries Source Book project. It is the largest graduate school in the world for the study of law, policy, economics, and management of the international petroleum, mining, and energy sectors. CEPMLP provides consultancy services to government.</p>
<p>CEPIL (Centre for Public Interest Law) <i>Legal expertise</i></p>	<p>CEPIL is a Ghana-based non-profit organization providing research and guidance to promote public interest law, particularly in the area of extractive rights. CEPIL helped implement the IIED-led "Legal tools" training program in Ghana.</p>
<p>Commonwealth Secretariat <i>Technical Expertise</i></p>	<p>The Commonwealth Secretariat's Strategic Plan has two "goals" (peace and democracy and pro-poor growth and sustainable development), through which it has built programs to assist Commonwealth countries to achieve the Millennium Development Goals.</p> <p>Until around 10 years ago, the Commonwealth Secretariat had an active technical cooperation program which provided support to governments in relation to negotiations for investment contracts, particularly related to natural resources. The in-house team was led by a number of experts in the field, which had the ability to assemble teams with the necessary expertise for particular transactions (including lawyers, financial experts and industry experts). However, the technical cooperation program ceased to be funded, the in-house experts who founded the program ended their terms, and the program has not been maintained.</p>
<p>Extractive Industries Source Book</p>	<p>The EI Source Book is a free online, interactive resource that provides a narrative analysis of the sector, supplemented by downloads and other web resources, including specially commissioned</p>

	<p>reports, summaries and briefs. The EI Source Book is principally intended for use by senior government officials and decision makers and by supporting domestic and international technical specialists. It focuses on sector policy, legal and regulatory development and administration, fiscal issues, and their linkages to broader impacts across the economy.</p> <p>The EI Source Book is a partnership between the World Bank Group, a global consortium of universities led by the University of Dundee, and non-governmental organizations.</p>
<p>Foundation for International Environmental Law and Development (FIELD) <i>Legal expertise</i></p>	<p>FIELD is a wholly independent organization working with IIED to provide legal services to disadvantaged countries, communities and campaigners negotiating for fairer international environmental laws. FIELD's three principal thematic areas are multilateral environmental treaties, accountability and good governance, and energy and investment. Work in the energy and investment theme appears to involve research and policy related publications, to date a publication on 'Opening Up Oil and Gas Policy in Kazakhstan'.</p>
<p>International Bar Association (IBA) <i>Legal expertise, capacity building</i></p>	<p>The IBA is an international association of lawyers and lawyers' associations whose purpose is to influence the development of international law reform and positively shape the future of the legal profession worldwide. IBA's Oil and Gas Law Committee and Mining Law Committee have been particularly active in developing frameworks that balance the needs and rights of both host countries and international investors.</p> <p>Most significantly, IBA's Model Mining Development Agreement (MMDA) brings together "international best practice principles" into a negotiation template for investor-state agreements in the mining sector in developing countries. The MMDA is intended to be used as a non-prescriptive negotiation tool for mining development agreements where either 'mature' mining codes are not in place or a mining code requires supplementation by private contract.</p>
<p>International Institute for Environment and Development (IIED)</p>	<p>IIED covers five central research themes: natural resources, climate change, human settlements, sustainable markets and governance. In partnership with similar organizations throughout Africa,</p>

Legal

Asia and Latin America IIED projects serve to strengthen capacity and governance mechanisms at the local, national and global levels. IIED has developed a Legal Tools program which also provides resources for host countries by developing, testing and implementing replicable capacity-building tools and methods to help local groups, national civil society and governments make use of available legal options. Though still in its infancy, Legal Tools has already provided legal literacy training in Ghana, Mali and Senegal - to inform and empower local communities and civil society, but which have been conducted further upstream to government officials. These trainings focus on land rights, decentralization, benefit-sharing opportunities and negotiation skills. IIED also provides a host of free training manuals and legal tools that instruct governments on how to structure investment contracts for natural resource projects that maximize the investment's contribution to sustainable development.

The Legal Tools program has been delivered together with the following partners:

- In Ghana, national and local-level trainings have been led by the Centre for Public Interest Law (CEPIL).
- In Mali, activities have been led by **Le Groupe d'Etude et de Recherche en Sociologie et Droit Appliqué (GERSDA)**, an action-research oriented center that brings together legal expertise, grounded legal empowerment experience, and partnerships with producer organizations.
- In Mozambique, in-country work has been led by **Centro Terra Viva (CTV)**, a public interest environmental law organization. CTV's objectives are to promote participatory environmental governance rooted in science, justice and law.
- In Senegal, activities were coordinated by **IED Afrique: Innovations Environnement Développement**. IED Afrique works to strengthen the capacity of vulnerable groups, documenting local practices and information policies.

The Legal Tools program has received funding from the following bodies: Irish Aid (Ireland), Danida (Denmark), DFID (UK), DGIS (the Netherlands), Norad (Norway), SDC (Switzerland), and

	Sida (Sweden).
International Institute for Sustainable Development (IISD) <i>Legal expertise</i>	<p>IISD's support ranges from in-depth research on investment law and investment dispute settlement to capacity building programs and forums meant to assist developing countries in forging sound investment contracts and treaties. Through its stable of international lawyers, IISD's Investment Program advises governments on negotiation and implementation of international investment treaties and contracts. IISD services and publications include the following:</p> <ul style="list-style-type: none"> • Advice on drafting, negotiating and implementing international investment treaties and host government contracts, as well as investment disputes at the pre-claim stage; • Preparation of legal opinions on international investment law; • Training for negotiators and government officials at the country-specific and regional levels; • Easy-to-use "Best Practices Bulletins" to fill gaps in existing literature and better inform government officials; • Model Agreement on Investment, which provides insight into the creation of international investment agreements, paying special attention to the rights and obligations of both the investor and the host state.
International Lawyers for Africa (ILFA) <i>Legal expertise</i>	<p>ILFA is a program run by international law firms based in the United Kingdom which aims to assist in the development of legal skills and expertise of African lawyers. ILFA provides, on a non-fee based basis, a 3 month program (running from September to November each year), which combines work experience through secondment to UK international law firms (20 firms are involved to date), with training sessions in international law and key legal practice skills. The aim is to build the capacity of African lawyers in the areas of public international law, corporate law and international dispute resolution, to promote rule of law, create legal networks across African countries and to keep legal work in Africa.</p>

	<p>Since its launch in 2006, 64 African lawyers have participated in the program, with lawyers from 17 countries in Africa competing for places - Botswana, Cameroon, Ghana, Kenya, Nigeria, Namibia, Malawi, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe. The program has been supported by Diageo, Associated British Foods PLC, H.J Heinz, Hewlett Packard and the Commercial Bar Association.</p>
<p>Natural Resource Charter <i>Capacity building</i></p>	<p>The Natural Resource Charter provides a set of principles intended to aid policy makers in their use of natural resources in order to promote optimal returns for citizens from the resources.</p>
<p>Oxford Policy Management(OPM) <i>Policy, financial expertise</i></p>	<p>OPM is an international development consultancy that enables strategic decision makers to identify and implement sustainable solutions for reducing social and economic disadvantage. For the extractive industries specifically, OPM conducts social and economic impact assessments and advises donors and host country governments on revenue management and transparency, local economic development, and development partnerships, among other related areas. Specifically, the Facility for Oil Sector Transparency and Reform (FOSTER), a five year program of support for oil and gas sector reforms in Nigeria, funded by DFID is implemented by OPM In partnership with Revenue Watch Institute and the Centre for the Study of Economies of Africa (CSEA). FOSTER is currently providing support in a number of areas in the development of a new, revised legislative framework that will govern the fiscal regime for future oil and gas production. This includes providing technical and analytical support to help achieve consensus on a common approach by working with the Ministry of Finance, key legislative committees in the upper and lower legislatures, the main upstream and downstream regulatory agencies, the key petroleum unions, and relevant civil society organizations and media institutions.</p>
<p>Pact Capacity building</p>	<p>Pact has a natural resource management program through which it provides capacity building to governments in relation to natural resource management, mostly in relation to planning and frameworks.</p>

<p>Public-Private Infrastructure Advisory Facility (PPIAF) <i>Infrastructure development, capacity building, policy</i></p>	<p>PPIAF is a multi-donor trust fund (financed by 17 multilateral and bilateral donors) that provides grants to governments in developing countries to allow them to obtain technical assistance directed to the development of policy frameworks that facilitate private investment in infrastructure, including with respect to policies, laws, regulations, institutions, and government capacity. It also supports governments to develop specific infrastructure projects with private sector participation.</p> <p>PPIAF has a work program structured around three strategic pillars (universal access, climate change, and urbanization) and four cross-cutting themes (sub-national technical assistance, fragile states, regional integration, and capacity building).</p> <p>Two-thirds of PPIAF's support goes to low-income countries (that receive special consideration) and half of PPIAF support goes to Africa. Eligible sectors include water and sanitation, solid waste management, telecommunications, transport, energy, and irrigation.</p>
<p>Private Infrastructure Development Group (PIDG) <i>Infrastructure development</i></p>	<p>PIDG works in partnership with other donors, local operators and government bodies to mobilize private sector investment, build infrastructure and increase funds for development.</p>
<p>SNR Denton LLP and ACT Financial Consulting LLC <i>Economic analysis</i></p>	<p>SNR Denton LLP and ACT Financial Consulting LLP are collaborating to develop a cloud-based economic model for analyzing upstream petroleum project economics. The model will be made available at no cost (a free user license) to emerging petroleum resource countries. The model will incorporate many educational features that can be readily incorporated in cloud-based platforms.</p>
<p>Sustainable Development Strategies Group (SDSG) <i>Capacity building, policy</i></p>	<p>SDSG is a group of researchers and consultants, based in Colorado, US. SDSG works with governments, companies, communities and others to develop solutions and build capacity for wise use and conservation of natural resources, for example, running capacity building workshops for governments and communities and review of countries' mining legislation, SDSG was involved in the development of the Model Mine Development Agreement (with the IBA) and has more</p>

	recently released a library of Community Development Agreements.
UNCTAD <i>Investment advice</i>	Through its Division on Investment and Enterprise (DIAE), promotes understanding of, and helps build consensus on matters related to foreign direct investment (FDI), transfer of technology and development. DITE also helps developing countries attract and benefit from FDI and to build their productive capacities and international competitiveness. Its Special Programme for Least Developed, Landlocked and Island Developing Countries coordinates UNCTAD's work in these categories of countries, providing analyses of the broad development challenges facing these countries and delivers technical assistance.
Vale Columbia Center on Sustainable International Investment (VCC) <i>Policy, capacity building, contract review</i>	A joint center of Columbia Law School and the Earth Institute at Columbia University, the VCC undertakes applied research to inform policy formulation, particularly with respect to legal and fiscal frameworks. The VCC has also been involved in review of a country's model production sharing contract and targeted capacity building workshops for government officials involved in countries' minerals sector.
World Bank Institute (WBI) – contracts database <i>Legal</i>	Through its Governance Practice, the WBI is working with a number of partners to design and develop an online, searchable database of extractive industries contracts, starting with sub-Saharan Africa. The project is collecting publicly available contracts and basic metadata on them in order to categorize the content of a subset of these contracts in a standardized way, provide an online interface for searching this collection, and serve as a central node to access and download complete texts of contracts.

Annex 3: Options for Structure and Governance, Financing Considerations

A. Structure and Governance

If a new initiative is to be created, whether as a coordinating mechanism, a complement to existing initiatives, a new comprehensive negotiation support facility or a mechanism through which to design and disseminate useful tools and resource to governments, there are a number of options to be considered with respect to its structure and governance. These options will be explored in more detail at a subsequent workshop, if it is determined that a new mechanism is desirable and feasible. For the purpose of guiding an exploratory discussion at this workshop, a number of possible structure and governance options are described in the section below. Existing arrangements are illustrated to provide guidance on possible options for proceeding.

Select Options for Institutional Setup and Governance					
	A. Multi-stakeholder initiative, e.g. EITI	B. International Organization, e.g. ALSF	C. Coordinating Mechanism, e.g. ISLP	D. Public Interest Firm	E. Information sharing Forum, e.g. IGF
Organization Form	Non Profit Association	International Organization Treaty body	Non Profit Association	Either General partnership or Limited liability company	Inter-governmental forum. Non-incorporated
Constituting Document	Articles of Association	Agreement on the Establishment of the Institution	Articles of Association	Partnership/ Limited Liability Company Agreement	Terms of Reference (non-binding)
Institution Membership	Personal Representatives appointed by constituency	States and International institutions	Members of the Association	Partners or shareholders of public Interest firm	Various – from States to firms and NGOs
Liability	Institution: Yes Members of Decision-Making Bodies: Limited Liability	Institution: No Members of Decision-making bodies: No	Generally liability of the members of a non-profit association	<u>General partnership</u> : Shared liability of owners <u>Limited liability company</u> : No direct liability of shareholders	Institution and Members: No.
Governance/ Decision-making bodies	Members' Meeting (Multi-stakeholder) Multi-stakeholder board If this were to be an incorporated entity, representatives of governments, industry and civil society could be invited into the membership of the association and vote on a weighted basis for the members of a Board that would take the major policy decisions.	Governing Council. Management Board	Board of Directors	Depends on incorporating structure: Partners or Board of Directors	Consultative Group Executive Board
Management/ Administration	Head of Secretariat	Director (Chief Executive Officer)	Executive Director	Managing Partner or CEO	Head of Secretariat
Key strength.	A multi-stakeholder structure can foster collaboration. All relevant stakeholders play a role in determining the governance of the initiative and strategic priorities,	Regional structure which has the potential to deliver a whole range of support (legal and technical) also on a global scale	A lean organization which coordinates effectively. Able to draw upon highly experienced technical advisors as need arises.	In-house professionals are able to deliver fast and high quality advisory services to governments	A very light structure appropriate for information sharing

	<p>which confers buy-in and legitimacy.⁹</p> <p>Multi-stakeholder governance may create the necessary “space” for donors to allow its trust funds to be used in actual negotiation support.</p> <p>In contrast, limited stakeholder governance, which essentially includes only the government (with perhaps limited consultation of industry or civil society) has the advantage of easier and faster decision-making and more efficient working procedures.</p>		Simpler to establish.		
Key weakness	<p>Unless host countries consider they have sufficient influence in the multi-stakeholder structure, it may lack acceptance. Also, each stakeholder group may have to accommodate different views in its own constituency and reach agreement before it can take those views forward in discussion with others.¹⁰</p> <p>The disadvantages of limited stakeholder governance are that if the initiative becomes dominated by one player only, it has less legitimacy and buy-in from the other players, and may therefore be less transparent in its support overall.</p>	<p>Being subject to treaty law the structure can be unwieldy (e.g., accession to a treaty of new members necessary). For example, the founding of ALSF took years, even with the support of the professional resources of the AfDB Legal department.</p>	<p>A lower level of transparency as compared to the first two options may impede fund raising. There is little or no legal protection of directors.</p>	<p>It may be more difficult for a public interest firm to deliver a whole range of support (including technical) across many countries</p>	<p>An inter-governmental forum such as IGF cannot deliver entire range of required support.</p>

⁹ See <http://www.eiti.org>

¹⁰ See Mariëtte van Huijstee. (2012). Multi-Stakeholder Initiatives. A strategic guide for civil society organizations. Centre for Research on Multinational Corporations. The Netherlands

B. Financial aspects

Any approach going forwards will require financing. The nature and structure of the approach will influence the nature of the funding that is sought and available. There are many funding options that can be considered, a number of which are described below. Any mechanism or combination of mechanisms will require funding from one or a number of these (or additional) options, described below for the purpose of the exploratory discussions. Any real decision on financing to be sought will be discussed at a later workshop, depending on the outcome of the discussions at this workshop.

Donor support The key issue is whether funds for negotiation support can be raised directly from donors, perhaps in the form of a revolving fund.

Cost recovery Cost recovery from host countries after successful negotiations (at least part of the total cost) would be very desirable, not only for the financial sustainability of the initiative but also to ensure quality of service and appreciation of value by recipients. In this regard, the experience of the ALSF will be interesting.

Cost recovery from investors There are a number of models that may be used which require the investor to cover the government's costs in retaining experts. Recovering costs from investors requires careful consideration of an institutional model to ensure transparency in the selection and terms of retention of advisers. One option is for the costs paid for by the investor to be considered as a part of the recoverable costs of the investor in determining the "split" of contract economics between the investor and the state. Another model could require (as a contractual term and a precondition to the government entering into negotiations) that the investor agrees to an annual payment from project revenues towards the cost of the government retaining advisers. In terms of institutional models to deal with the receipt of investor funding for payment of advisers, one example may be a "clearing house" organization to administer the process, ensuring transparent selection of advisers and to serve as the "pay master" for disbursements to such advisers to ensure they remain effectively insulated from investor pressure which could give rise to conflicts of interest. Another example could be a facility that covers the costs of retaining lawyers and other professional advisers to represent the government, administering the selection of advisers with the host government, and receives an annual payment from the investor's project revenues to the facility. The facility would recover costs but would not be tied to costs – the annual payment would ultimately contribute to resources (in effect by way of endowment). Both of these options would initially require donor assistance for their establishment and initial engagements but the funding option would aim over time to eliminate the need for donor support

Direct fund raising A further option might be to help governments to raise funds themselves. Offering a plausible system of selecting, instructing and supervising experts for funding by bilateral or multilateral funding agencies might be a practical way to proceed in this regard. In the case of EITI, a combination of donor support and direct funding has been successful.

Endnotes

¹ Lorenzo Cotula. (2010). Investment Contracts and Sustainable Development: How to make contracts for fairer and more sustainable natural resource investments. Natural Resource Issues No.20. International Institute for Environment and Development (IIED). London, p.5

² World Economic Forum (2011). Research Report. Stakeholders Perceptions and Suggestions. Responsible Mineral Development Initiative 2010. Geneva p.11

³ U4 Expert Answer. (2007). Corruption and the renegotiation of mining contracts. Anti-Corruption Resource Centre, Transparency International. Bergen and Berlin., p.1

⁴ World Economic Forum. (2011). Research Report. Stakeholders Perceptions and Suggestions. Responsible Mineral Development Initiative 2010. Geneva. p. 13

⁵ United Nations Development Programme (UNDP) –United Nations Environment Programme (UNEP) Poverty-Environment Initiative. (2011). Managing Private Investment in Natural Resources. UNDP/UNEP. Nairobi, Chapter 1.

⁶ See John Ruggie.(2011). Report of the Special Representative of the Secretary-General of the United Nations (SRS) on the issue of human rights and transnational corporations and other business enterprises. Principles of responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators. General Assembly Resolution of 25 May 2011. A/HRC/17/31/Add.3. United Nations. New York. paragraph 9. p.5.

⁷ George Kahale, III, “The uproar surrounding petroleum contract renegotiations,” 82 Oxford Energy Forum (August 2010), p. 5, available at: <http://www.curtis.com/siteFiles/Publications/Oxford%20Energy%20Forum.pdf>

⁸ See John Ruggie. (2011). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Principles of responsible contracts: Integrating the management of human rights risks into State-investor contract negotiations: Guidance for negotiators. General Assembly Resolution of 25 May 2011. A/HRC/17/31/Add.3. United Nations.

⁹ According to a 2004 estimate, based on data from more than 1,000 concessions in infrastructure in Latin America and the Caribbean granted during 1985–2000 more than 40 % of the contracts for private infrastructure projects, excluding telecommunications, were re-negotiated See J. Luis Guasch. (2004). Granting and Renegotiating Infrastructure Concessions. Doing it right. The World Bank. Washington DC.

¹⁰ There were few international arbitration cases regarding investment disputes during the 1980s and 1990s. By the end of 2011, however, ICSID had registered 369 cases. In 20% of those cases, an investment contract was invoked to establish ICSID’s jurisdiction. (ICSID Caseload Statistics. (2012). Issue 2012-1. Washington. DC. This may be due to the proliferation of BITs in that timeframe, all with provisions for arbitration.

¹¹ Those initiatives described as “prominent” were selected on the basis of the outcomes of the discussions at the Berlin workshop, as well as the telephone interviews conducted.

¹² Key characteristics for these initiatives are listed in Table 2 - activities supported, type of support, countries supported, type of investment supported, non-fee based or paying, number of projects, timeframe of support, in-country or remote, languages and country in which the initiative is based.

¹³ Futureye (<http://www.futureeye.com/>) has designed problem solving framework which it currently uses successfully primarily with companies in relation to their engagement with communities.

¹⁴ The toolkit is found at: <http://www.ibacommunitytoolkit.ca/index.html>

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