

Contractually Speaking....

Towards better deals with CONNEX

Summer 2021

NRGI / CCSI / CONNEX MOOC hits the net

As part of its strong cooperation with partners active in resource governance, CONNEX financially supported the just released Massive Open Online Course (MOOC) entitled *Getting a Good Deal: Negotiating Extractive Industry Contracts*.

A joint project of the Columbia Center on Sustainable Investment (CCSI), the Natural Resource Governance Institute (NRGI) and the SDG Academy, the course provides a substantial, yet approachable, introduction to the complex



subject. It equally includes a distinguished group of individuals, among them:

- Zorigt Dashdorj, Former Minister of Mineral Resources and Energy, Mongolia
- Alberto Reyes, Former Vice-Minister of Hydrocarbons, Dominican Republic
- Tehtena Mebratu-Tsegaye, Senior Legal Researcher, CCSI.

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Peer Review Mechanism keeps CONNEX focused

How effective have we been? Where could we improve?

These were just two of the questions over a series of four online dialogues in March and April 2021 with CONNEX's stakeholders.

The Peer Review Mechanism brought together academics, institutes, experts, partners and partner countries to reflect on the past, share best practices and concentrate on how to become even more effective.

Head of Secretariat Brigitte Klein reflected, "The Peer Review Mechanism served as an informal, very practically-oriented feedback loop with our key constituents. We took particular notice of our experts that we deploy in countries and of course our partner countries."

The events, moderated by CONNEX's Advisory Committee members, offered a safe space to confront challenges around negotiation support and the practicalities of experts working in countries, but also to understand where the wind is blowing in the field.

Legal and financial expertise is what one traditionally thinks of with regards to contracts. However, key aspects such as mine closure and social performance/community development cannot be ignored. Indeed, they are growing in importance as non-technical risks are a major challenge for large-scale projects, particularly in the extractive sector. Once seen as peripheral, they are becoming management headaches and impacting bottom lines. CONNEX is now providing support to in social performance/community development in Colombia and a mine closure project in Argentina.

Diara Diallo, the CONNEX advisor who organised the dialogues, commented, "It was really somehow thrilling to have so many people in the room, from Vancouver to Manila, to discuss CONNEX and negotiation support more broadly. This is a growing field and covers all four corners of the globe."



Co-funded by the European Union



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CONNEX
Support Unit

Negotiation Support MOOC, con't.

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The three-week course focuses on the policy and legal context, the required preparation for negotiations and finally the actual negotiations and the aftermath. Course participants will be offered practical strategies to be used in negotiations.

NRGI's Margarita Batlle commented, "In the current context many of our stakeholders are juggling work and family commitments, so self-paced learning options bring an additional value. With the course, we can reach people across the globe, particularly those with limited access to learning opportunities as we continue to navigate the coronavirus pandemic."

CONNEX Advisor Sun-Min Kim added, "This MOOC is an excellent tool to help negotiation teams prepare well and define clear objectives based on the knowledge of diverse practitioners. It offers an excellent basis for governments to frame their negotiation process."

Right: CONNEX Advisory Council member Herbert M'cleod provides his deep insights to course participants.



Handing off the baton at CONNEX

Dr. Brigitte Klein recently took over from Juliane Weymann as Connex's Head of Secretariat.

Brigitte brings a substantial amount of experience with her. Most recently, she headed the Access to Insurance Initiative (A2ii) as well as led the development and institutionalization of several larger projects into sustainable initiatives. Brigitte has equally managed a rural finance programme in India for six years and has spent a great deal of time (including PhD research) in Latin America.

Brigitte added, "Juliane has left a full-standing operation and I am pleased to join the team. I look forward to helping CONNEX offer even more support to our partner countries, moving CONNEX towards a more diversified portfolio and achieving financial sustainability."

Juliane commented, "It was a privilege to engage so closely with partner country governments in designing and improving this innovative support mechanism. I am also grateful to our committed experts and for strong support from our Advisory Committee, the BMZ and GIZ."

Richard Dion also joined the team in early 2021 to take the lead on business development and fundraising. Originally from Los Angeles, Richard worked for 10 years at Royal Dutch/Shell plc, with previous positions at the UNDP and the EITI International Secretariat, as well as consulting for a range of clients.



Clockwise from above: Brigitte at a conference, Richard in the garden and Luca on the water.



Richard reflected, "CONNEX's support, deployed in weeks with a long-term value over 20-30 years, not only addresses the imbalance at the negotiating table, but also plays a role in ensuring sustainable investment. It achieves better deals, which to me, is the greatest gift that we can give to future generations of resource-rich countries."

Luca Bootsman recently joined CONNEX for six months to assist with a range of activities. No stranger to resource governance, Luca completed his studies at University of Bayreuth in the subject, worked in Benin for his civil service and has been involved in the Central African ecumenical network. Luca added, "I am looking forward to furthering my experience in the field and to helping CONNEX."

Q&A with Karl P. Sauvant

Karl P. Sauvant co-chairs CONNEX's Advisory Committee. He is Resident Senior Fellow at CCSI. In addition to his research at the Center, he also serves as a Lecturer-in-Law at Columbia Law School; Fellow at the Academy of International Business; and Honorary Fellow at the European International Business Academy.



Have you been surprised at the rise in demand for CONNEX's services since its inception?

It is encouraging to see that CONNEX has been able to assist several developing countries in negotiating large-scale investment contracts with foreign investors. After all, such contracts—especially in natural resources and infrastructure—determine the distribution of benefits between the two parties for years to come. Moreover, good contracts reduce the risks that the relationship between the parties is disrupted, with negative consequences for both sides. The need for negotiations support continues to be substantial. It took 19 years, from 1998 (when I organized the first workshop on the need for negotiations support) until early 2017 for CONNEX to be established. I am sure that, in a few more years, CONNEX will be well-known enough to be able to offer negotiations support to even more countries.

What were some of the initial discussions years ago when negotiation support was being considered?

The starting point was that negotiating mutually beneficial, highly complex contracts with well-organized and well-resourced foreign investors requires that host countries too have top-level expertise at their disposal. Such expertise goes far beyond the legal field.

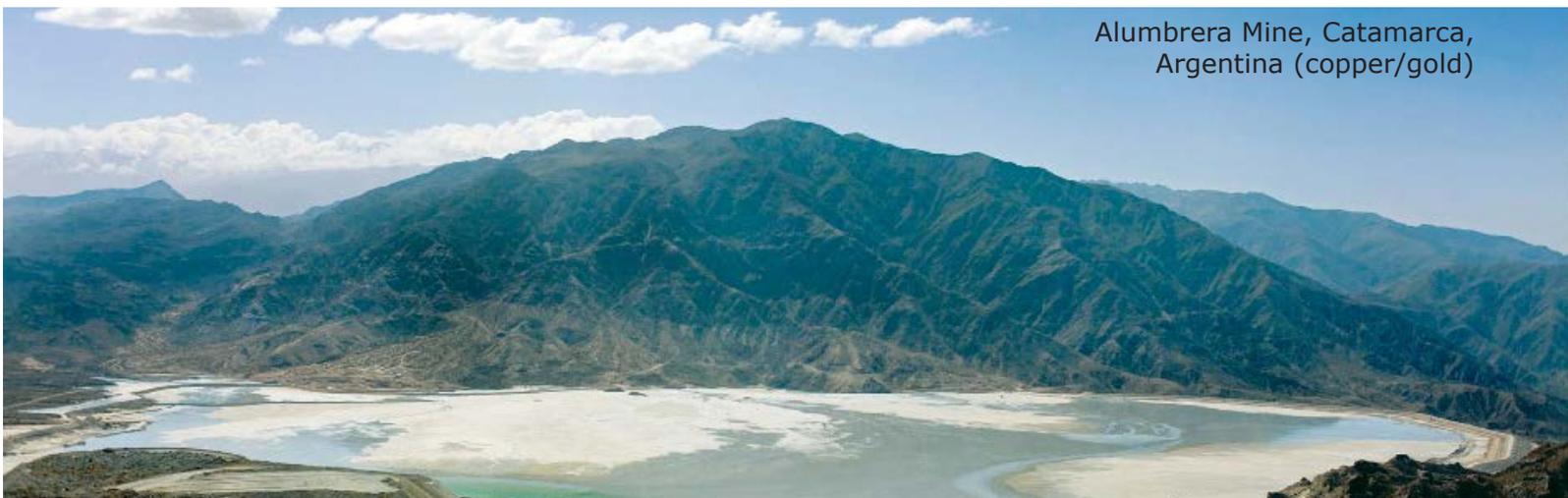
Have there been any new themes in contracts that you have noticed?

The themes have largely remained the same. What has changed are two things. First, the importance of good contracts as a critical source of domestic resource mobilization and hence a means to advance sustainable development has been recognized. Second—and my CONNEX Advisory Committee colleague Lou Wells and I have written about it—governments need to recognize that contracts no longer become obsolete. In the past, contracts could become obsolete once firms had invested in a country, as the sunk costs of their investments made them hostages of the country and, especially, when minerals prices rose. Today, if governments unilaterally change the terms of a contract, investors can initiate international investor-state dispute settlement (ISDS) proceedings, and tribunals will find in their favor if contracts were indeed violated—with potentially heavy damage awards and reputational risks for the governments involved.

Indeed, the number of ISDS cases, sometimes leading to billions of dollars in awards against governments, has risen substantially over the past few years: the International Centre for Settlement of Investment Disputes registered 11 cases in extractives and infrastructure disputes in 2000, a number that doubled to 22 in 2010 and reached 58 in 2020. The message is clear: governments must get their contracts right at the outset—despite their limited capabilities.

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Alumbrera Mine, Catamarca, Argentina (copper/gold)



Q&A with Karl, continued

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What do you see as some of the upcoming themes?

The basic problem will not change in the foreseeable future: under-resourced developing countries will need international support to arrive at the best possible contracts for them. More attention will need to be paid to the sustainable development impact of the activities covered in contracts, for example, backward linkages, climate neutrality and human rights impacts. And contracts need to contain provisions allowing for automatic change, or even renegotiations, if and when circumstances change, be it from the perspective of the government or the investor.

Short-term negotiation support vs. long-term capacity? What's the balance?

Building a world-class multi-disciplinary negotiations capacity equal to that of major investors is a daunting task for developing countries. Even if they were to succeed, chances are that experts would be hired away by international firms. Moreover, most countries do not negotiate large-scale investment contracts every year and, hence, need world-class multi-disciplinary expertise only

sporadically. Accordingly, it might not even be advisable for them to seek to build up domestic negotiations capacity—there are more likely more pressing and ongoing needs that need to be addressed. Outside experts can fill the gap. However, what may be advisable is to have the capacity to monitor contracts: after all, the best contract is worth little if it isn't implemented well.

Do you see any medium-term or long-term impacts that the pandemic will have on contract negotiations?

Governments will be desperate to restart their economies as soon as possible. They will, therefore, seek to mobilize as much capital as possible, as quickly as possible. This may tempt governments to conclude contracts with less-than-optimal provisions, simply to get funds flowing. Governments need to resist this temptation, as the resulting contracts will tie their hands for years to come. After all, governments also hold important cards in their hands: we may be at the beginning of a new commodity boom, and international investors too are seeking investment opportunities in their international competition with each other. Governments should go for the best possible contract terms they can get, if needed, with the assistance of CONNEX.

IGF / CONNEX webinar series examines new technology

CONNEX and the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) hosted a webinar in April for governments on technology's role in mining.

Technology has changed the world in just 15 months. Given that contracts govern the relations between investors and governments for upwards of 20 years, new technology will likely play a transformational role in mining. One change includes automation. How will driverless vehicles be introduced, which may reduce lost-time incidents, but will require fewer local employees? With drones playing a role in inspections, what is the legal mechanism which authorizes their use in a country's air space?

The panelists included IGF's Thomas Lassourd, Samantha Thompson and Dave Murray of Anglo American, Rosaline Carlos representing the Senegalese Mining Ministry and Hopewell Mauwa, an independent consultant. Isabelle Ramdoo, IGF'S Deputy, introduced the overriding themes of the New Tech, New Deal Report. The next webinar (23 June) will focus on the impact of technology on local communities, with Hervé Lado from the Natural Resource Governance Institute, IGF and Anglo-American participating. Registration is here:

<https://www.igfmining.org/event/webinar-technology-trends-implications-mining-community-relations/>

